



A NEW OPPORTUNITY TO BUILD A 21ST-CENTURY IMMIGRATION COURT SYSTEM

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Acknowledgements

Dedicated with love to my parents, Enrique and Martha Mendoza, who immigrated to the U.S. and fulfilled the American dream through their children Elizabeth, Patricia, and Victoria.

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"A New Opportunity to Build a 21st-Century Immigration Court System"

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Introduction

This policy analysis examines the current state of the Executive Office for Immigration Review (EOIR)—the country’s immigration court system—and lays out a path to modernization under the administration of President Joe Biden. Rarely has a new U.S. administration had such an immediate need and opportunity to profoundly change the immigration courts—to implement reforms that will better serve America’s interests now and in the coming decades.

What Is the EOIR?

The EOIR is an agency within the U.S. Department of Justice (DOJ). It is a system of courts throughout the U.S. that decide immigration cases in civil proceedings for undocumented persons (UPs) and lawful permanent residents facing removal. The Department of Homeland Security (DHS) is represented in court by attorneys who work for Immigration and Customs Enforcement (ICE). These attorneys prosecute cases on behalf of different immigration agencies that send cases into the court system. The EOIR was created in January 1983 and currently manages 69 courts with 460 immigration judges.²

An oddity of the EOIR is that it is housed in a law enforcement agency, yet its judges, who are appointed by the attorney general, can grant immigration benefits such as asylum. Because the EOIR is not an independent Article I court,³ but rather is an office within an executive branch prosecutorial agency, it has been vulnerable to the political influence of successive presidential administrations. This vulnerability should be remedied in order for the EOIR to secure the public’s trust and impartially administer the country’s immigration laws.

The EOIR’s Vulnerabilities

The EOIR has historically been vulnerable to the political goals and policy responses of presidential administrations of both political parties. Under the administration of President George W. Bush, for instance, immigration judges with no experience in immigration law were appointed to the bench in a controversy that led to a DOJ investigation in 2008. This investigation uncovered improper political vetting of judicial candidates.⁴ Immigration law is

¹ The author has practiced immigration law in Houston, Texas, since 1993, with half of her practice dedicated to removal defense. As such she has witnessed the ebb and flow of statutory and regulatory policy and political changes that have impacted the Executive Office for Immigration Review (EOIR) system over the course of four presidential administrations. Additionally, the author has volunteered since 2018 as the liaison to the Houston EOIR on behalf of the American Immigration Lawyers Association (AILA) and as such has witnessed up close the direct impact of policy changes made during the last four years on the EOIR.

² “Office of the Chief Immigration Judge,” EOIR, United States Department of Justice (DOJ), <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge>.

³ Article I courts are created through the first article of the U.S. constitution to review federal agency decisions. Judges in an Article I court are not employees of the DOJ.

⁴ Office of the Inspector General, *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General*, July 1, 2008,

infamous for its complexity, and the functioning of the EOIR is damaged by having judges on the bench who face a steep learning curve due to their inexperience in this area of the law.⁵ In 2014, when thousands of Central American families and unaccompanied children fleeing persecution and poverty entered the U.S. seeking asylum, the Obama administration faced an outcry when immigration law enforcement agencies were unable to handle the surge of border crossings. One measure the administration implemented in response was a “rocket docket” to fast-track the processing of cases for new arrivals. However, this forced the EOIR to reset tens of thousands of already-pending cases five years into the future to accommodate the recent arrivals, further adding to the agency’s backlog.⁶

Currently, the EOIR has over 1 million cases on its docket.⁷ Houston’s immigration courts, with one of the largest dockets in the country, have close to 70,000 pending cases. In some immigration courts, it is common for a case to be on the docket for three years or more. This is not surprising. Historically, the EOIR has been underfunded and understaffed. Figure 1 illustrates the stark difference between the EOIR’s budget in comparison to other immigration enforcement agencies. The Customs and Border Protection (CBP) and ICE budgets have soared since 2003, while the EOIR’s has remained significantly behind.

However, the last four years have pushed immigration to the center of the American news cycle. The Trump administration implemented policy and priority changes in immigration enforcement that dramatically impacted the EOIR by rapidly increasing immigration cases. Because funding for the EOIR has not kept pace with funding for the agencies that funnel cases into the EOIR, the system is faced with a huge backlog that could take, in some cities, over a decade to clear. While the Trump administration appointed over 100 judges to the immigration bench, it simply is not enough to tackle the agency’s backlog.⁸

<https://oig.justice.gov/reports/investigation-allegations-politicized-hiring-monica-goodling-and-other-staff-office>.

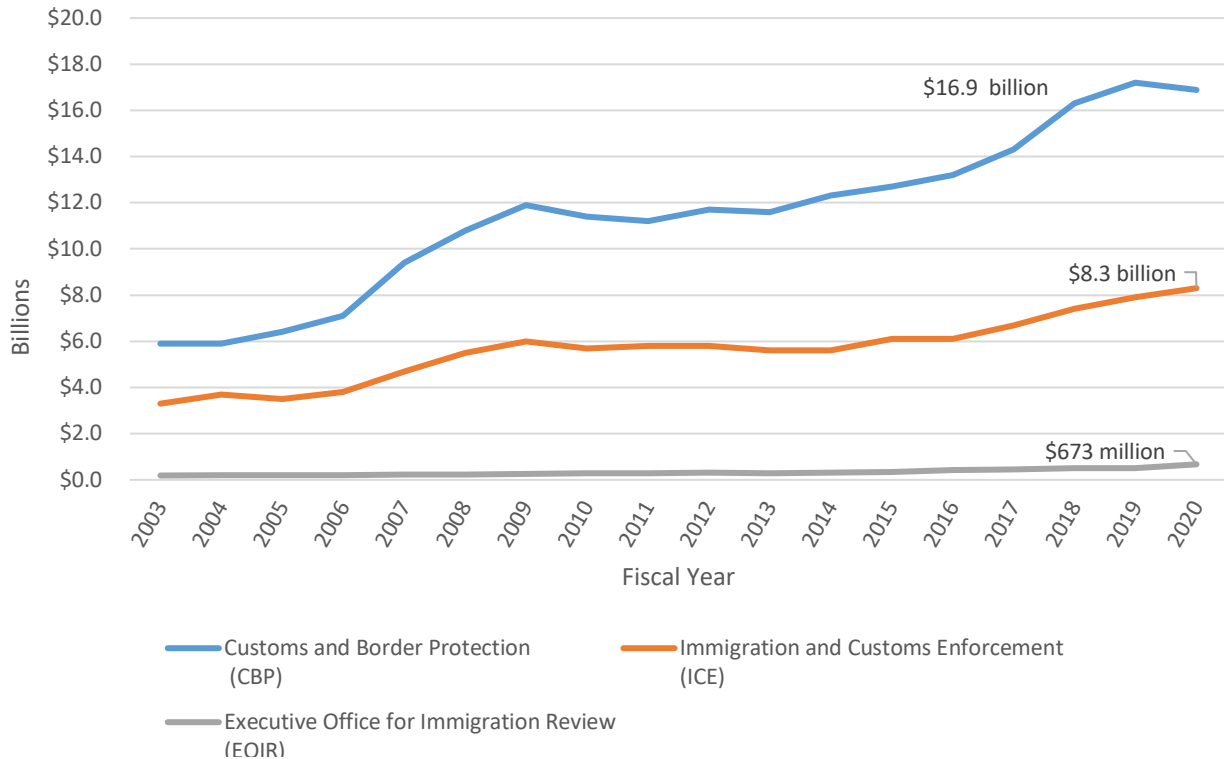
⁵ Michelle Kim, “The Complexity of Immigration Law,” *ILW.com*, quoting *Alanis-Bustamante v. Reno*, 201 F.3d 1303, (11th Cir. 2000). “It would seem that should be a simple issue with a clear answer, but this is immigration law where the issues are seldom simple and the answers are far from clear.”

⁶ Office of the Press Secretary, White House, “Letter from the President -- Efforts to Address the Humanitarian Situation in the Rio Grande Valley Area of Our Nation’s Southwest Border,” June 30, 2014, <https://obamawhitehouse.archives.gov/the-press-office/2014/06/30/letter-president-efforts-address-humanitarian-situation-rio-grande-valle>.

⁷ “Immigration Court Backlog Tool,” TRACImmigration, https://trac.syr.edu/phptools/immigration/court_backlog.

⁸ Amy Taxin, “Trump puts his stamp on nation’s immigration courts,” *Associated Press*, July 23, 2019, <https://apnews.com/article/50e97a112fb142f2abffa061ed5737d6>.

Figure 1. Immigration Enforcement Agencies’ Annual Budgets, FY 2003–2020



Source: EOIR budget data for FY 2003–2020 from “Budget and Performance Summary,” U.S. Department of Justice, <https://www.justice.gov/doj/budget-and-performance>; CBP and ICE data for FY 2003–2020 from “Budget-in-Brief,” U.S. Department of Homeland Security, <https://www.dhs.gov/dhs-budget>.

Apart from historic funding issues and docket backlogs, the EOIR’s judges operate in a world in which their jobs are tied to performance metrics⁹ and their decisions are subject to change by the attorney general.¹⁰ Immigration judges are expected to complete 700 cases per fiscal year. If they do not meet this performance metric, they risk being disciplined, or, for judges on a probationary period, being let go. At first glance, it may seem to be a common-sense policy to demand that judges complete a certain number of cases a year given the size of the EOIR’s docket, but many of the cases pending in immigration courts are asylum cases. Asylum law is an exceedingly complex area of immigration law. Asylum cases deal with people fearing or suffering persecution in their home country, and due process requires judges to give each case the time necessary to weigh testimony and evidence to make a fair, informed decision. Circumstances frequently call for a continuance for an asylum seeker, perhaps to obtain important evidence from the home

⁹ “Immigration Judge Performance Metrics,” EOIR, March 30, 2018, <https://www.justice.gov/eoir>.

¹⁰ Alison Frankel, “Jeff Sessions’ ‘unprecedented’ legacy in immigration court,” *Reuters*, November 8, 2018, <https://www.reuters.com/article/us-otc-sessions/jeff-sessions-unprecedented-legacy-in-immigration-court-idUSKCN1ND35C>.

country—but the asylum seeker’s need for time will conflict with the judge’s need to meet performance metrics. Additionally, the immigration judge knows that any decision that is issued, while always subject to appeal by the UP or the DHS, can be “certified” by the attorney general, who can overturn the decision for whatever reason within the bounds of law. That means an immigration judge can grant asylum and the DHS can agree to it, but the attorney general can certify the case to herself or himself and overrule the judge’s ruling. In the Trump era, this happened at a rate that outpaced all prior administrations during a first term.¹¹

This lack of judicial independence, along with heavy dockets and the vulnerability of the EOIR to the political influence of the administration in power, has created the crisis we have today. It also presents the Biden-Harris administration with the opportunity to course-correct and put the EOIR on a path to effectively, nimbly, and fairly navigate the 21st century and beyond. The U.S. Citizenship Act of 2021 presents one such path forward. Introduced on February 18, 2021, the proposal calls for a systemic reform of the U.S. immigration ecosystem. Included in the proposed legislation is an increase in training for immigration judges, an increase in the use of technology in courtrooms, and government-paid legal representation for vulnerable populations such as minors, the mentally incompetent, and pregnant women. However, given the current political party breakdown in the Senate, the fate of this proposed legislation is uncertain, which increases the pressure on the Biden-Harris administration to address the immigration court system challenges as quickly as possible through executive authority.

The next section discusses some practical solutions that can help achieve this goal.

Judicial Independence and Administrative Closure

Immigration judges need to be able to manage their dockets. A practical tool to help them do so is the use of administrative closure. This tool allows judges to “freeze” cases, or make them inactive, at their discretion or when requested to do so by the UP or the Department of Homeland Security. The case remains in the court system under the control of the immigration judge, but it is not on an active docket requiring hearings in court. This tool is commonly used when the UP has a petition pending with another agency, usually Citizenship and Immigration Services (CIS), that if approved would allow the UP to apply for permanent residency in court or with CIS. Through administrative closure, the judge can put the UP’s case on inactive status, allowing the UP to process the petition with another agency. This allows the judge to free up docket slots for other cases and thereby process more cases that do not have collateral relief or are higher priority.

In 2018, this important tool to manage dockets and protect judicial independence was eliminated when Attorney General Jeff Sessions issued a decision taking away judges’ authority to administratively close cases except in extremely limited circumstances that do

¹¹ Kim Bellware, “On Immigration, Attorney General Barr is his own Supreme Court, Judges and lawyers say that’s a problem,” *Washington Post*, March 5, 2020.

not apply to most UPs in immigration court. *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018) stated that an immigration judge could no longer administratively close a case even if the Department of Homeland Security agreed to such closure. Sessions decided that the regulations allowing judges to make decisions appropriate and necessary for the disposition of a case did not encompass administratively closing a case. But administrative closure allows the EOIR to be nimble in a world where national security risks are imperative. Consider the following fact pattern example:¹²

Maria came to the U.S. illegally in 1990. She fled the civil war in her home country of El Salvador. She had a brother in the U.S. who was a U.S. citizen who helped her settle, and a few years later he filed a petition to sponsor her for permanent residency. They were told the petition would take over 10 years to process because of the way the family immigration system is organized. Maria married, had kids, worked for herself cleaning houses, paid her taxes, bought a home, stayed out of trouble with the police, and built a life in the U.S. but without any legal status. When Maria's oldest child who was a U.S. citizen turned 21, he filed a petition to sponsor her for residency as well. The family hoped that Maria would become a resident sooner through her son than through her brother's petition, which had been pending for many years. Because of the date Maria's brother filed his petition for her, she was eligible to become a resident in the U.S. through her son's petition without having to go to El Salvador for her residency interview. One day when Maria was returning from work, she was pulled over by the police for a broken taillight. She was unable to show a valid driver's license to the officer because she did not have one, since undocumented persons are unable to obtain a driver's license in the state that she lives in. The officer arrested Maria and took her to jail. At the jail, ICE was notified of Maria's detention. ICE arrived and interviewed Maria, and based on her lack of a criminal record, her ties to the U.S., and her lack of threat factors to national security, they decided not to detain her. They gave her documents instructing her to go to immigration court and speak with an immigration judge. Maria's family hired an attorney and Maria attended her court hearing. Maria's attorney explained to the judge that Maria had a petition pending through her son, a U.S. citizen, with CIS and that if it was approved, she would become a permanent resident. The attorney asked the judge to administratively close Maria's case to allow her time to finish processing the petition her son filed for her. The DHS attorney in court reviewed Maria's background checks and saw she had no criminal record in the U.S. or any factors that threatened national security. As such, the DHS attorney agreed that administrative closure would be appropriate. Accordingly, the judge administratively closed Maria's case and asked her attorney to notify the court of the result of the son's petition for Maria.

¹² Fact patterns presented in this paper are based on the author's experience practicing immigration law.

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As a result of administratively closing Maria's case, the immigration judge was able to use future docket time for Maria's hearings for other cases. The time needed by the judge, by court support staff, and by the DHS attorney to address Maria's case was diverted to other cases that did not have the factors Maria's case had.

Consider another fact pattern:

Tom is 18 years old. He was brought to the U.S. when he was a baby by his parents. The family entered with visas for a visit but decided to remain in the U.S. Tom's father had been a political opposition leader in their home country. During their visit to the U.S., they learned the government was searching for Tom's dad to arrest him, and the family decided to stay in the U.S. Tom grew up in the U.S. and knows no other country. He is registered in the DACA program, which provides protection from deportation for young people brought to the U.S. before age 16 who have no legal status. Unbeknownst to Tom, his family had applied for asylum and included him in the case. The case is pending in immigration court. Tom's family hired an attorney who asked the immigration judge to administratively close Tom's case since he is registered in the DACA program and cannot be deported while he is in the program as long as he complies with its requirements. The DHS attorney reviewed Tom's background checks and saw that Tom had no criminal record nor any factors that threatened national security. As such, the DHS attorney agreed it would be appropriate to administratively close Tom's case. Accordingly, the immigration judge administratively closed Tom's case and asked his attorney to notify him if there were any changes in Tom's status in the DACA program.

And one more fact pattern:

Fahim entered the U.S. years ago on a student visa. He attended school for a semester and dropped out. He went to work with a friend in his pharmacy as an assistant. Fahim married a U.S. citizen who petitioned for him. Fahim had multiple shoplifting convictions and eventually was arrested for controlled substance violations, was convicted, and served two years in jail. Upon release the police turned him over to ICE, who initiated removal proceedings against him in immigration court. Fahim hired an attorney who asked the immigration judge to administratively close his case due to the family petition pending for him. The judge and the DHS attorney reviewed Fahim's criminal records and the judge declined to administratively close Fahim's case, citing the poor chance Fahim had of prevailing in a residency case due to his criminal record.

In each fact pattern, the immigration judge had the freedom to control his docket. He had the freedom to direct extremely limited court resources to cases with more problematic factors to review. He had the freedom to promote judicial efficiency.

Administrative closure is a tool based on the immigration judge's authority to make decisions that are "appropriate and necessary for the disposition of [the] case."¹³ For years the judge's authority to administratively close a case was hemmed in by the need to have the DHS attorney agree to closure.¹⁴ However, in 2012, this dependency on DHS agreement for administrative closure was overturned by the attorney general, who cited the inherent authority judges have to make appropriate decisions in their cases.¹⁵ As a result, immigration judges—employees of the DOJ—can make closure decisions independently of the DHS's posture in a case. With this unshackled authority, EOIR judges are able to close thousands of cases for people like Maria and Tom and instead focus extremely limited resources on cases like Fahim's.

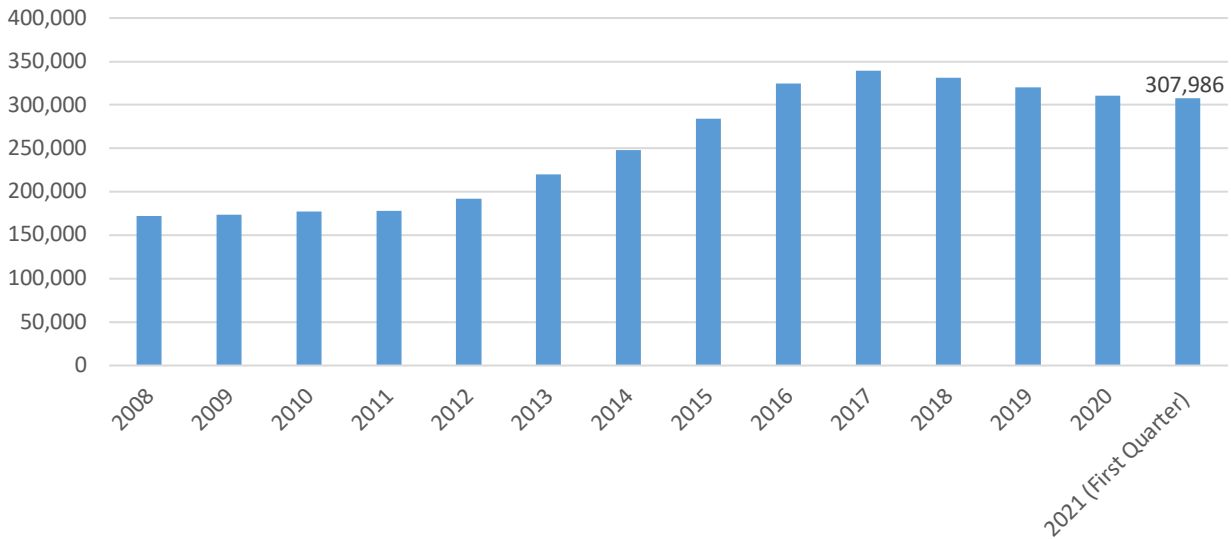
It is important to note that administrative closure is *not* a "get-out-of-jail-free" card. Maria and Tom are in the court system. They are under the jurisdiction of the judge. The DHS has asked the judge to order them removed, and they must report to the judge the status of their collateral cases. If their collateral cases are denied, the DHS will ask the immigration judge to re-docket their cases, and Maria and Tom will have to return to court and possibly face removal to their home countries. As of October 13, 2020, the EOIR has administratively closed over 300,000 cases, as shown in Figure 2 below.

¹³ 8 C.F.R. § 1240.1(a)(1).

¹⁴ *Matter of Gutierrez*, 21 I&N Dec. 479 (BIA 1996).

¹⁵ *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012).

Figure 2. Administratively Closed Cases



Source: “Workload and Adjudication Statistics,” Executive Office for Immigration Review, data generated January 7, 2021, <https://www.justice.gov/eoir/workload-and-adjudication-statistics>.

As a result of Sessions’ decision on immigration judges in 2018, judges have been forced to keep cases on dockets that were previously amenable to administrative closure, and to dedicate extremely limited resources to them even as the EOIR’s docket numbers continue to climb. Some UPs were suddenly faced with having their cases, which had been administratively closed for years, reactivated at the same time that the EOIR’s dockets were exploding.¹⁶

In 2020, the DHS rescheduled thousands of cases during the COVID-19 pandemic, when many immigration courts were closed for hearings. In March 2020, the EOIR postponed certain non-detained court hearings around the country due to the COVID-19 pandemic. In 2021, some immigration courts have resumed non-detained hearings, but those without an announced date are postponed through June 11, 2021.¹⁷

The Biden-Harris administration should return the essential tool of administrative closure to immigration judges. It is simple, practical, and promotes the government’s mission to fairly and efficiently manage dockets while protecting the nation by promptly processing the cases of bad actors who pose a threat to local communities.

¹⁶ Mazin Sidahmed, “Thousands of New Yorkers Could be Headed Back to Immigration Court,” *Documented*, August 31, 2018, <https://documentedny.com/2018/08/31/thousands-of-new-yorkers-could-be-headed-back-to-immigration-court/>.

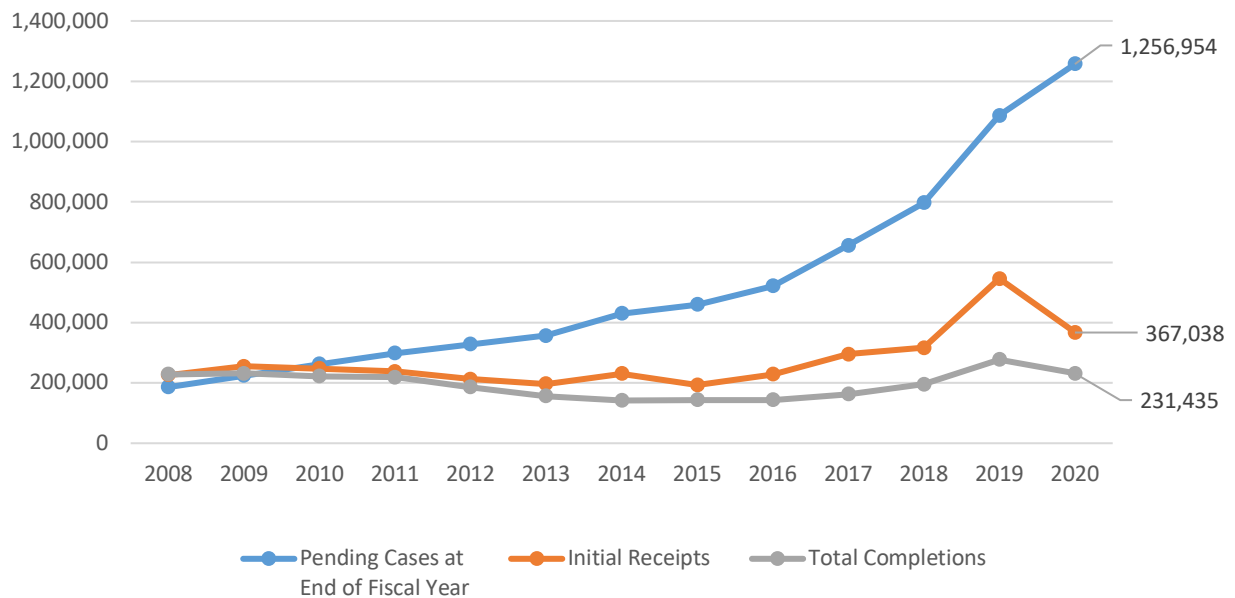
¹⁷ “EOIR Operational Status,” EOIR, <https://www.justice.gov/eoir-operational-status>.

Judicial Independence and Case Completion Quotas

Immigration judges must meet case completion quotas or face disciplinary action. As noted above, this may seem like a common-sense metric for a system burdened with over 1 million cases, but it is important to consider the nature of the cases heard by the EOIR; in doing so, one may appreciate that a “crunch-the-numbers” approach falls woefully short of providing the time and due process the system is statutorily mandated to provide to each case heard by an immigration judge.

The DOJ introduced EOIR quotas as the number of new cases skyrocketed. Figure 3 shows the increase in pending cases versus total completions.

Figure 3. EOIR Pending Cases, New Cases, and Total Completions



Source: EOIR, Workload and Adjudication Statistics, data generated January 7, 2021, <https://www.justice.gov/eoir/workload-and-adjudication-statistics>.

The types of cases a UP may present in immigration court are limited. There are basically six types of relief one can request in immigration court: asylum, cancellation of removal, Temporary Protected Status (TPS), permanent residency through the Nicaraguan Adjustment and Central American Relief Act (NACARA),¹⁸ waivers, and adjustment of status. Many of the cases heard in immigration court involve requests for asylum and, as noted earlier, asylum law is exceedingly complex. While many asylum seekers suffer from

¹⁸ NACARA provides permanent residency to certain Salvadorans, Guatemalans, and Nicaraguans, as well as citizens of certain former Soviet republics.

trauma, they must meet a high burden to prove their claims are credible; to present corroborating evidence, if available; to present information about conditions in the country they are fleeing from; and to convince the immigration judge their situation deserves a remedy.¹⁹

In this context, it is imperative that asylum seekers prepare for their cases. Problems arise when immigration judges balance efforts to meet their quota against the UP's need for preparation time. "The government has now tied our financial interest in keeping a job with the outcome of our decision," explains Judge Amiena Khan, a federal immigration judge, adding that "right there the integrity of the process as a whole" has been "put into question."²⁰

Thus, judges must weigh their job security against the due process considerations of the UP. This is a balancing test inappropriate for the EOIR. Immigration judges should never have to pick between their job security and what is fair and reasonable for the UP. Yet this is exactly the balancing test that hundreds of immigration judges around the country perform every day in a system that has been molded into a number-crunching paradigm instead of a court system that exercises judicial independence.

The Biden-Harris administration should consider recalibrating what performance metrics, if any, are reasonable while protecting judicial independence and the due process rights of persons in immigration court, and think outside the box in considering what performance metrics matter in the context of the EOIR.

For instance, the EOIR could seek anonymous input from attorneys and private and nongovernmental organizations on judges' performance, and the DOJ could consider a judge's performance on the bench as a metric and give it the weight it deserves. For example, was the judge punctual, impartial, professional, patient, and fair? Was the judge knowledgeable of law, policy, and procedure? Immigration court can be a very emotional setting. Judges hear testimony that may be clearly frivolous or lacking in candor. Judges interact with persons of all educational levels, from all types of socioeconomic backgrounds, from all over the world. They must treat all impartially and fairly, and yet the reality is that a great many judges are hearing cases of people who are marginalized, low-income, undereducated, and completely unaware of how a court operates. It is not uncommon for immigration courts to look like a child day care because so many persons have children included in their court case. In other cases, UPs lack child care and must bring their children or risk removal due to a failure to appear. Immigration judges hear testimony from trauma survivors, sometimes children, who may publicly recount their story for the first time—and at a court proceeding they may not understand even if they are represented by counsel. Immigration judges hear testimony as well from persons who have committed violent and non-violent acts that clearly pose a threat to the community.

¹⁹ 8 U.S.C. § 1158 – Asylum.

²⁰ Eric Katz, "Conveyor Belt' Justice: An Inside Look at Immigration Courts," *Government Executive*, <https://www.govexec.com/feature/inside-conveyor-belt-behind-curtain-doj-immigration-courts/>.

It is against this backdrop that the EOIR currently uses quotas. The quota metric imposed by the last presidential administration does little to promote a fair, nimble, effective court system. It is a policy that should be rescinded as soon as possible.

Judicial Independence and Case Certification

As we analyze the challenges that face the Biden-Harris administration if it is to transform the EOIR into a 21st-century court system, it is key to consider the quirks of case certification. An attorney general who disagrees with an immigration judge's or appellate court's decision can change it under case certification.²¹ This regulatory oddity allows the attorney general, who is the country's top law enforcement official, to adjudicate cases that confer or deny benefits. This paradigm does not exist in other court systems. If one goes to tax court, the treasury secretary cannot overturn the judge's adjudication. If one is prosecuted in a district court and is found guilty, the district attorney cannot overturn the judge's or jury's decision. And yet this is permissible in the EOIR because of the broad powers granted to the attorney general by the Immigration and Nationality Act and the regulations that implement it.

Consider the inefficiency of processing a case in immigration court that requires a judge, court support staff, a DHS attorney, the UP and perhaps a personal attorney if there is one, hearings, courtroom space, witnesses, and transcripts in the event of an appeal; that results in an adjudication being made by the immigration judge or perhaps by the appellate court if an appeal was filed; that is then, without notice, changed by the attorney general.

This was done at an accelerated rate by the attorneys general under the prior administration. In the span of eight months, Attorney General Sessions certified eight cases to himself in which he overturned a judge's or the appellate court's decision.²² The most consequential example of this regulatory power was *Matter of A-B*, 27 I&N Dec. 316 (A.G. 2018). In *A-B*, Sessions certified to himself an asylum case that had been adjudicated by an immigration judge and was on appeal. The immigration judge denied the petitioner asylum, but the appellate court overturned the immigration judge's denial and granted asylum. Sessions certified the case to himself and reversed the appellate court's decision. He also used *A-B* to overturn a long-standing precedent that women who have been victims of domestic violence per se qualify for asylum by asserting that most of those cases do not fall within the parameters of asylum law.

Consider the following example, a common case example in the immigration court system, of how case certification translates into real-world consequences:

²¹ 8 C.F.R. § 1003.1 (h)(1)(i).

²² Melissa Heelan Stanzione, "ABA to Weigh Proposal on AG Powers Over Immigration Appeals," *Bloomberg Law*, August 5, 2019, <https://news.bloomberglaw.com/business-and-practice/aba-to-weigh-proposal-on-ag-powers-over-immigration-appeals>.

Reyna fled Guatemala in 2005. Her then-husband was a police officer who beat her. Because of his job, Reyna was unable to find any local police officer who would help her file a complaint against her husband. After a beating that forced Reyna to seek medical attention, she fled and came to the U.S. illegally where an aunt received her. Reyna's aunt helped her find an attorney at a local nonprofit and Reyna applied for asylum. Reyna's immigration judge decided that the case fell within the parameters of asylum law and granted her case. The DHS agreed, and Reyna's grant was final. A few years later Reyna became a permanent resident, and a few years after that a U.S. citizen based on that grant of asylum years before. In 2015, Reyna's niece, also a victim of severe domestic violence, fled Guatemala. She entered the U.S. illegally, and Reyna took her to the same nonprofit organization that helped her years before. Reyna's niece applied for asylum and was granted it, but in her case the DHS appealed the grant. While on appeal, *Matter of A-B* was certified by Sessions. The appeals court in Reyna's case cited *A-B* and ruled that her being a victim of domestic violence was no longer a basis for asylum, reversed the judge's grant of asylum, and denied her case.

Certifying cases without transparency or regard to the reality of the immigration situation at our borders, in our communities, and in the EOIR system itself does not engender confidence that the EOIR is independent. Indeed, case certification is the antithesis of an immigration judge's judicial independence. And, while an administration may be tempted to use the certification tool to achieve its political and policy goals, it is not appropriate within the judicial context unless it is used to undo precedents clearly at odds with statutes, regulations, or congressional intent.

Judicial Independence and Continuances

Because it is commonplace for UPs to not have an attorney, usually because the UP does not have the financial means to hire an attorney or has been unable to obtain free legal services from a nonprofit organization, the UP frequently needs the court to provide him or her time to obtain legal representation. The use of continuances as a docketing tool was commonplace until 2018, when Attorney General Sessions certified a case to himself and changed the factors immigration judges are to consider when deciding whether to continue a case. *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G.2018) tightened these factors, again prioritizing speed of case processing over all other metrics in the EOIR ecosystem.

Here is another common fact pattern illustrating how case certification translates into real-world consequences in relation to continuances:

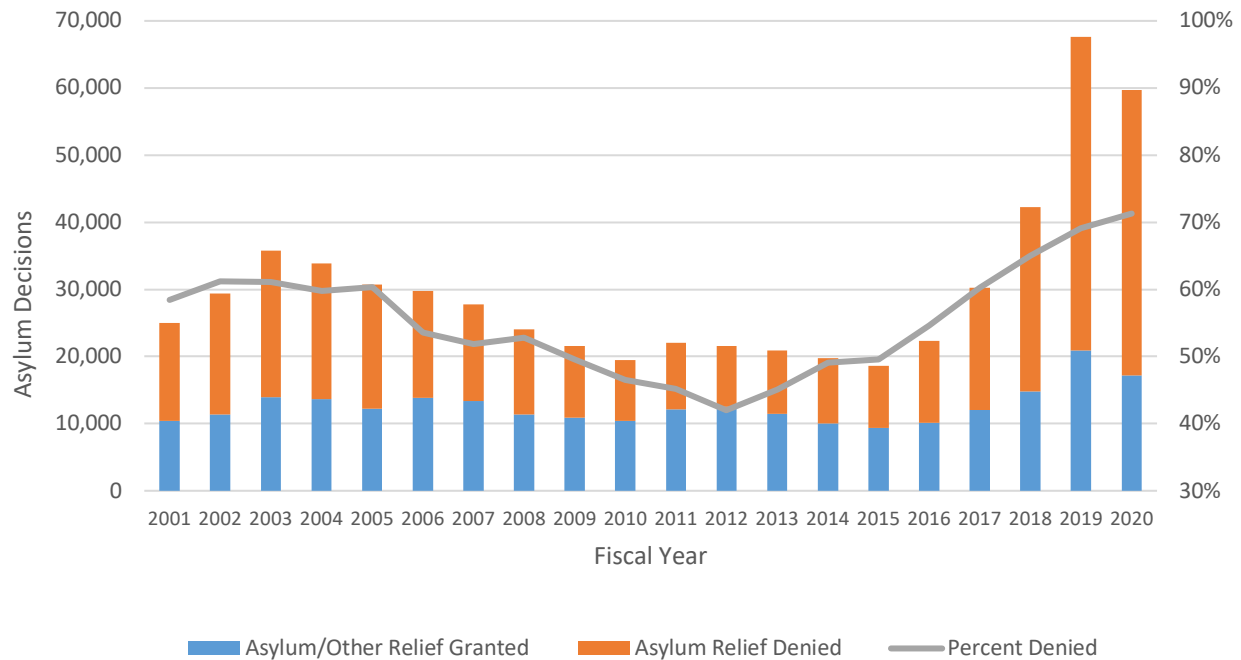
Fadila entered the U.S. with a work visa. She is from a Middle Eastern country with an unstable government. She worked for a few years for her employer but was laid off during an economic downturn. Fadila didn't have the funds to hire an attorney to pursue other legal options, and she wound up staying in the U.S. without legal status. Fadila later married a permanent resident. They went to a notary to file a

residency case for Fadila. The notary did a poor job with the application, and the case was denied. As a result, Fadila's case was sent to immigration court. By this time, Fadila's spouse had applied for U.S. citizenship and his case was pending. Fadila was able to hire an attorney to represent her in court. The attorney asked the immigration judge to administratively close the case, but the judge denied that request because he no longer had the authority to do so. The attorney asked for a continuance, explaining that in a short period of time Fadila's spouse would become a U.S. citizen and Fadila would then be able to apply for residency in court based on her marriage to a U.S. citizen. The judge denied the request, stating that since Fadila's spouse did not have his citizenship already, the court could not wait for him to become a citizen, even if it were a matter that would be concluded within a year at the most. The only option left for Fadila is to apply for asylum, given the change of events in her home country, but she is in a city with a very low grant rate for asylum cases. Fadila and her spouse must decide what path to pursue.

For the EOIR to be efficient, nimble, and independent, it must have the tools to deal with scenarios like the fact pattern described above. On one hand is the prior administration's policy goal of putting case processing numbers above all else. In that context, Fadila's judge must consider how his quota metric will be affected if he grants her a continuance. He cannot close her case and give her time slot to another case that may have far more problematic factors like, for example, a serious criminal record. He cannot continue her case, because even though her husband will soon become a U.S. citizen, which will afford Fadila the immediate opportunity to apply for residency, he must focus on the case Fadila is presenting to him now. If Fadila applies for asylum, then all of the court's resources will be focused on that case, even though it will take far more resources and far more time to process. On the other hand is an opportunity for a system that gives the immigration judge the tools to continue Fadila's case for enough time to ready her collateral case.

Considering how low the grant rates are for asylum, as shown in Figure 4, in most cities in the U.S. it is imperative for the EOIR to liberally use whatever tools it has to allow the UPs before it to pursue other relief and keep EOIR resources focused on processing the most problematic cases.

Figure 4. Immigration Court Asylum Decisions



Source: Transactional Records Access Clearinghouse (TRAC), Syracuse University, 2001–2020, <https://trac.syr.edu/phptools/immigration/asylum/>. Note: Nine thousand seventy-seven asylum applications disappeared from EOIR data during FY 2019–2021; see <https://trac.syr.edu/immigration/reports/624/>.

Returning to Fadila, consider the following:

Fadila will probably apply for asylum, given that she has no other immediate form of relief for which she can apply and even though she knows that the probability of winning asylum is very low. If the judge denies her asylum case, Fadila will appeal. The judge denies her asylum, and Fadila’s husband becomes a U.S. citizen during the appeal court process. Fadila will ask the appeals court to return her case to the same judge who denied her asylum. Once her case is before the judge again, she will present the residency case based on her marriage. The time that will have elapsed between Fadila’s hearing with the judge when he denied her asylum and her return to his court to present her new marriage case is about a year and a half. Because the immigration judge could not close or continue Fadila’s case, scarce resources were spent on her asylum case instead of utilizing reasonable docketing tools to free up the resources from her case to invest in another one.

With over 1 million cases pending in its system, the EOIR cannot continue down this path. It should institute reasonable, practical, real-world solutions to manage its docket and afford due process and fairness to those who come before it presenting their cases for relief.

Creative Solutions for the EOIR Ecosystem

If the Biden-Harris administration is to reshape the EOIR into an agency for the 21st century, it must think outside the box, look to its sister court systems around the country for inspiration, and listen to its stakeholders—such as nonprofit organizations that provide direct legal services to UPs, the American Immigration Lawyers Association, community organizations that lobby for immigration reforms, and law enforcement entities that work with DHS—something that the prior administration failed to do but which will hopefully be resumed quickly.

1. The administration should ask the attorney general to clarify that immigration regulations do allow for administrative closure for the reasons cited above. This will immediately free up considerable docket space so that immigration judges can quickly schedule hearings for cases that have no collateral relief or have sensitive factors that need prompt attention, such as cases involving serious criminal histories or national security implications.
2. The EOIR should liberally use status dockets to keep cases on the active dockets but avoid hearings. Parties can submit in writing case statuses, thereby letting immigration judges determine which cases are ripe for a final hearing and which are not. This frees up scarce docketing resources for cases that need prompt attention. While similar to administrative closure, the use of status dockets differs in that the case remains active on the docket. A practical example: The UP has an asylum case pending in court and is set for a final hearing in a few months. The UP is awaiting important evidence from home to present to the judge but is sure it will not arrive by the final hearing. The UP's attorney asks for the case to be placed on the status docket instead of asking for a continuance. The judge agrees and orders the UP to inform the court if and when the evidence from home arrives. The judge asks for a status update within six months. A month later, the UP receives the evidence, the attorney notifies the court, and the judge sets a date for a final hearing. No docket hearing slots were wasted in this scenario. Fairness was afforded to the UP, and the originally scheduled final hearing date for the UP was given to another case ripe to be heard.
3. The EOIR and DHS should sign a memorandum of understanding stating that they will work together to achieve the administration's goal of building a 21st-century immigration court system. This is reasonable, because it is the DHS that sends all cases to the EOIR. In practical terms, this suggestion means that all DHS attorneys and their management staff as well as all EOIR judges would be on the same page regarding future policies toward that end. A practical example: if the administration reauthorized administrative closure and a UP's case clearly fell within the

parameters of a case acceptable for closure, then the judge would close the case and the DHS would not attempt to obstruct the decision. The “lottery system” of similar cases receiving radically different treatment depending on the judge or DHS attorney involved must end where it is a matter of whether clearly stated policies are being complied with.

4. The EOIR should institute a “clean case” docket. Judges, DHS attorneys, and private bar know which cases are clearly eligible for relief and will not take long to present in court. The EOIR can create docket space to allow judges to hear clean cases on a certain day of the week to quickly process cases that are “ready to go” and will take less than an hour to present.
5. The EOIR should consider allowing UPs to present their cases based on the written record without the need for testimony on matters where the UP and the DHS have conferred and agreed to a grant of relief.
6. The EOIR should strongly encourage the DHS to use status conferences with the private bar to free up docket space. Imagine a judge being able to clear the docket of 50-plus cases in a week upon receiving joint notice from the DHS and private counsel that those cases are amenable to administrative closure, to a continuance, to being placed on a status docket, or to being placed on the “clean case” docket. Every court should have a standing order mandating that counsel and the DHS confer about cases.
7. The EOIR should strongly consider instituting a vulnerable population docket. Many UPs in court are children. Many are victims of domestic violence whose abusers are U.S. citizens or permanent residents who live in the community. Many are intellectually incompetent or suffer from mental illness that makes them incompetent. The EOIR should create dockets that separate these vulnerable populations from *en masse* dockets, should provide special training to judges who are assigned to these dockets, and should provide the necessary safeguards for these populations such as appointment of pro bono counsel to afford them the full measure of due process.
8. The EOIR should institute an anonymous performance review portal for counsel and DHS attorneys to submit their observations about judges. The EOIR can in turn use the feedback in its performance reviews. The EOIR suffers from a lack of transparency when it comes to why some judges remain on the bench despite repeated disciplinary issues. A judge’s ability to be impartial is in question amid valid complaints of misconduct.²³ Many attorneys, including the author, have had to navigate the “fall on the sword” moment in immigration court. When faced with bad behavior, the attorney must decide whether addressing the behavior will prejudice the judge against the client

²³ Tal Kopan, “Bad conduct, leering ‘jokes’ — immigration judges stay on bench,” *San Francisco Chronicle*, January 22, 2021, <https://www.sfchronicle.com/politics/article/Sexually-inappropriate-behavior-rife-in-15889003.php>.

and all future clients the attorney may represent. In other court systems, judges may be accountable to the electorate or to a judicial body, but in the EOIR, judges are accountable to the attorney general. Providing feedback to the EOIR about a judge's performance is one valuable tool to gauge whether the judge is supporting the mission to reshape the EOIR for the 21st century.

9. The EOIR should take full advantage of technology. One notable improvement by the prior administration was the move to electronic filing. Attorneys in other court systems note that the EOIR is still not using electronic filings in all of its courts, but the work to meet this goal has begun and is scheduled to be completed in 2021 or 2022. Because the country is still in the midst of the COVID-19 pandemic and may face other outbreaks in the future, it is imperative that EOIR be adaptive. Judges must be able to effectively use video platforms that allow for remote hearings when appropriate. This means the EOIR should invest in resources to ensure that telephonic and video hearings are glitch-free, given that the system has over 1 million cases to process. A hearing should not have to be reset because video equipment is not properly working.
10. The EOIR should enter into the necessary agreements and invest in necessary infrastructure to allow UPs to pay filing fees at court. If a UP is applying for residency based on marriage and must pay a fee for the forms in that case, the UP should be able to pay those fees at the court where the case is pending and have the court issue a receipt and tender the money to CIS.
11. The EOIR should engage in robust, frequent contact with its stakeholders. The prior administration curtailed engagement system-wide, but outlier pockets of constructive agency communication remained in certain cities. This should change in order for the Biden-Harris administration to reshape the EOIR for the 21st century. A government must speak to and with its people.

Conclusion

The EOIR must be effective, nimble, and fair. The Biden-Harris administration has all the tools at its disposal to recreate an EOIR that embodies these traits. It will require a thoughtful approach, competent management, consistent policy deployment, and transparency to achieve these goals. The last four years saw numerous policy and regulatory changes to the EOIR that fundamentally changed the focus of the immigration court system into what could be considered a “deportation machine.” As noted earlier, the EOIR is a civil court system housed inside a law enforcement agency. It is not an independent court. Its judges are employees of the DOJ. Presidential priorities dictate how resources are allocated in the court system and which policies control court operations. Congress should act to make the EOIR an independent entity, free of presidential interference, so that it can fairly and effectively implement and enforce U.S. immigration laws. By doing so, the EOIR can become an integral component of U.S. national security

A New Opportunity to Build a 21st-Century Immigration Court System

strategy and help fulfill America's promise that those who meet the legal requirements created by Congress will merit relief in court.

The U.S. Citizenship Act of 2021 and the Dream and Promise Act of 2021, still pending in the House of Representatives, face an uncertain political future. Stakeholders should consider lobbying Congress for stand-alone legislation that would create an independent EOIR, codify judicial independence, and codify the authority judges have to manage their dockets free from interference by the executive branch or the DHS.

The onslaught of policy changes to the EOIR and DHS immigration agencies in the last four years has created challenges that may take years to repair, but the tools to do so exist if we have the political will to use them. The people who appear before the EOIR deserve a well-functioning court system. Our communities deserve a court system that promptly adjudicates the cases of bad actors so they can be quickly removed. And our nation deserves an EOIR that reflects the best of American principles—that all people are equal under the law.