

Built to Fail

Deception and Disorder in America's Immigration Courts

By Mark H. Metcalf

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About the Center

The Center for Immigration Studies, founded in 1985, is a non-profit, non-partisan research organization in Washington, D.C., that examines and critiques the impact of immigration on the United States. It provides a variety of services for policymakers, journalists, and academics, including an e-mail news service, a *Backgrounder* series, and other publications, congressional testimony, and public briefings.

About the Author

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These essays are dedicated to Circuit Judge James S. Chenault of Kentucky, whose patient teaching taught me to be a patient judge; to Judge Kevin Bradley, of the Miami Immigration Court, the finest of men and the finest of judges; and my parents, Robert C. Metcalf and Donna C. Metcalf, whose firmness, gentleness, and humor made five children into five adults who honor their lives and treasure their company.

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Executive Summary

American immigration courts are the heart of a system that nurtures scandal. Their work touches nearly every aspect of America's immigration system. These courts are essential to recruit the bright and talented to American shores, to alleviate persecution, and to secure this nation's borders and neighborhoods. But they cannot perform their critical work. Deception and disorder rule. These courts have become — in the words of frustrated judges — “play courts.” In reality, they are courts that are built to fail.

Weakness is supreme and its impact is pervasive:

- Very few aliens who file lawsuits to remain in the United States are deported, even though immigration courts — after years of litigation — order them removed.
- Deportation orders are rarely enforced, even against aliens who skip court or ignore orders to leave the United States.
- Aliens evade immigration courts more often than accused felons evade state courts. Unlike accused felons, aliens who skip court are rarely caught.
- From 1996 through 2009, the United States allowed 1.9 million aliens to remain free before trial and 770,000 of them — 40 percent of the total — vanished. Nearly one million deportation orders were issued to this group — 78 percent of these orders were handed down for court evasion.
- From 2002 through 2006 — in the shadow of 9/11 — 50 percent of all aliens free pending trial disappeared. Court numbers show 360,199 aliens out of 713,974 dodged court.
- For years, the Department of Justice (DoJ) has grossly understated the number of aliens who evade court. In 2005 and 2006, DoJ said 39 percent of aliens missed court. Actually, 59 percent of aliens — aliens remaining free before trial — never showed.
- Since 1996, failures of aliens to appear in court have never dipped below 30 percent.
- Immigration judges cannot enforce their own orders. Department of Homeland Security (DHS) officials may order alien offenders arrested and deported. Immigration judges — the system's sole judicial officers — have no such authority. Judges seldom know if their orders are enforced.
- No single federal agency is exclusively tasked with enforcement of removal orders. Immigration and Customs Enforcement (ICE) executes removal orders only when its enforcement strategy says so, not — as it should — in obedience to court orders. ICE's enforcement strategy does not mention immigration courts or deportation orders.
- Enforcement of deportation orders is now nearly non-existent. Removal orders are not enforced unless aliens have committed serious crimes.

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- Unexecuted removal orders are growing. As of 2002, 602,000 deportation orders had not been enforced. Since then, another 507,551 have been added to the rolls. Today, unexecuted removal orders number approximately 1,109,551 — an 84 percent increase since 2002.
- U.S. immigration courts rule in favor of aliens 60 percent of the time. DoJ suggests aliens win 20 percent of the time.
- The Department of Justice tells Congress that aliens appeal deportation orders only 8 percent of the time. In fact, over the last 10 years aliens appealed deportation orders 98 percent of the time.
- Since 1990, immigration court budgets have increased 823 percent with taxpayers footing the entire bill. Aliens pay no more to file their cases today than they did in 1990.
- From 2000 through 2007, tax dollars — slightly more than \$30 million — paid aliens' court costs. Taxpayers underwrote the appeals of aliens ordered removed for criminal convictions and fraudulent marriages.
- U.S. immigration judges carry huge caseloads. In 2006 — the courts' busiest year ever — 233 judges completed 407,487 matters. All work of DoJ's trial and appellate lawyers combined equaled only 289,316. By comparison, federal district and circuit courts, with 1,271 judges, completed 414,375 matters.
- Aliens face the real prospect of not receiving a fair trial. DoJ's attorney discipline scheme — a scheme applicable only to the alien's lawyer — denies aliens the right to effective assistance of counsel and fair trial.
- The only possible way the Justice Department's misrepresentations will be corrected is for the Government Accountability Office (GAO) to audit America's immigration courts.
- An Article I court — a court created through Congress's constitutional authority over immigration — is the surest solution for those fleeing persecution, while balancing America's fundamental interest in secure borders and an effective immigration system.

America's immigration courts are built to fail. Their authority is weak and their accountability weaker. Their annual reports to Congress — reports offered as a candid summary of court business — are simply dishonest. Bland language and twisted numbers — “government speak” — substitute for unblinking candor and reliable statistics. Court records are reported so badly as to mislead or, worse yet, not reported at all. As a result, America is penalized — and so are the millions of immigrants whose fates have rested with government officials who refuse to tell America the straight story about these very American courts and their very American business. America is shortchanged

by the one institution of the federal government charged with telling the truth about these courts — the U.S. Department of Justice. America is more than shortchanged. It is, in fact, cheated.

Immigration is vital to America and its immigration courts express fundamental confidence in those who embrace our shores and a steadfast faith in our democratic traditions. It is a confidence that pluralism, free enterprise, and rule of law are redemptive.¹ They are redemptive because they bestow the most priceless gift a nation can confer upon its people — in a word, self-determination.² Self-determination tempered by order and liberty defines the American experience.³ America's immi-

gration courts are essential to this experience. They bring to a single point the vaulting ideals and hard-boiled pragmatism that lie — and should lie — at the core of America’s immigration system.⁴ Their story, though, is untold. Deception and disorder reign.

Deception is found in numbers that distort more than just yearly reports to Congress. Phony numbers cloak the courts’ absent authority — and absent authority, more than anything else, defines these tribunals. Absent authority is the common thread running through every piece of the courts’ work. Absent authority equals enfeebled judges, no-show litigants, unenforced orders, errant removals, listless caseloads, tardy relief, at-risk American neighborhoods, and compromised national security.

Absent judicial authority means disorder and this disorder encourages the illegal immigration to America that overshadows the singular, positive role immigration has played and still plays in this nation that accepts more legal immigrants to its shores each year than all nations of the world combined.⁵ Immigration — one of America’s most powerful dynamics — is unmatched by courts of equal strength. Weakness is supreme and its impact is pervasive. Put simply, feeble courts cannot enforce their own judgments.⁶ Deportation orders are ignored and few aliens — aliens ordered removed after years of litigation — are ever deported.⁷ And

what follows from this feebleness is nothing less than predictable.

Courts unable to execute deportation orders are incapable of speeding relief to the worthy when bureaucrats falter. Courts without resources — chiefly agencies that will execute their orders⁸ — cannot pursue rule of law. Courts, in effect, are not courts at all. They can neither impose order nor protect liberty. Absent authority signals frailty and frailty invites calculation.

The man who skips court or disobeys an order to leave the United States does so knowing that the court that can order him removed⁹ cannot enforce its judgment.¹⁰ A 1989 GAO report found “[a]liens have nothing to lose by failing to appear for hearings and, in effect, ignoring the deportation process.”¹¹ Disregard for the courts, the study concluded, stemmed from a “lack of repercussions” — in other words, no consequences — because few aliens are actually deported.¹² In 2003, DoJ’s Inspector General reached the same conclusion. He found no more than 3 percent of asylum seekers ordered deported were actually removed.¹³ Even after federal circuit courts of appeal yearly affirm deportation verdicts by the thousands, the same aliens remain in the United States because DHS is no better at enforcing the orders of federal appellate courts than it is of immigration trial courts.¹⁴ But time also plays a major role.

Frequently Used Acronyms

ATD	Alternatives to Detention
CBP	Customs and Border Protection
CRS	Congressional Research Service
DHS	Department of Homeland Security
DoJ	Department of Justice
DRO	Office of Detention and Removal (an ICE agency)
EOIR	Executive Office of Immigration Review
FY	Fiscal Year
FOTs	Fugitive Operation Teams
GAO	Government Accountability Office (was the General Accounting Office)
ICE	Immigration and Customs Enforcement
INA	Immigration and Nationality Act
INS	Immigration and Naturalization Service (merged into DHS)
OIG	Office of Inspector General
OMB	Office of Management and Budget (a White House office)
USCIS	United States Citizenship and Immigration Services

The man who overstays a visa can predict his lawsuit to stay in the United States — a lawsuit called an application for relief — will take years to finish, even though his trial took less than three hours.¹⁵ The 1989 GAO report found that by avoiding deportation, aliens “prolong their stay in the United States” and “establish roots” that may prove beneficial.¹⁶ “Roots” like marriages started during deportation proceedings or children conceived after illegal entry — children sometimes called “anchor babies” — are just two examples.

Even if their bids to remain in America fail, both men know that removal seldom occurs,¹⁷ and, in the end, neither is removed. One lies low, the other waits on the courts, and both avoid enforcement — enforcement that in all likelihood will never arrive anyway. If there is one truism that directs those who enter the United States illegally, it is this: *find a way in*. Thousands of deaths along America’s borders and beaches are tragic evidence of this maxim. This maxim has a corollary and it is this: *once in, find a way to stay*. Court evasion and marriage fraud¹⁸ are ready proof of this imperative and the risks it creates for American security. Headlines tell the story.

The Times Square Bomber, Faisal Shahzad, came to the United States as a student.¹⁹ He obtained his “green card”²⁰ and citizenship through marriage to a U.S. citizen — while at the same time federal law enforcement suspected he was a security risk.²¹ At sentencing, he cursed his adopted country²² and admitted his citizenship application was perjured.²³ Ingmar Guandique, an *illegado*²⁴ from El Salvador and the murderer of Chandra Levy, belonged to MS-13, a Central American crime gang.²⁵ Jose Reyes Alfaro, a Salvadoran ordered deported in 2002 and, though later twice arrested, unsurprisingly remained in America another nine years — long enough to murder three people in Manassas, Va., on February 10, 201.²⁶ Then there’s Nada Nadim Prouty. An immigrant from Lebanon, she used marriage fraud to become a citizen and later became an agent for the FBI and CIA. Using her access to sensitive government files, she passed along top secret intelligence to her brother-in-law, a suspected major fundraiser for the terrorist group Hezbollah.²⁷ Shahzad, Guandique, Alfaro, and Prouty are by far

more the exception than the rule. Overwhelmingly, illegal aliens are economic migrants denied gainful employment, honest government, crime-free streets, and education in their home countries.²⁸ Their hardscrabble lives propel them to a nation lush with everything their own nations lack. Still, they share the same avenues of entry²⁹ and avoidance with terrorists and criminals.³⁰

More precisely, those who violate America’s immigration laws do so deliberately. Just over 1.1 million deportation orders — orders issued against those who evaded court or disobeyed orders to leave — remain unenforced.³¹ Nearly half the illegal alien population in the United States — out of some 12 million persons — overstayed their visas.³² And because these “overstayers” cannot be located, rarely are they brought to court.³³ Even when they are, few are deported.³⁴ In the end, more is gained from violation of law than obedience to court orders, international borders, or visas. “[A]s long as the benefits of illegally immigrating outweigh the costs,” Temple Law School’s Jan Ting, observes, “the influx will continue.”³⁵ All these problems are rooted in a Justice Department that cannot square with the American public about these courts and the chaos left in their wake. From beginning to end this enormous problem is created, aided, and abetted by the Justice Department.

The Department of Justice manages America’s immigration courts. Judges work for the Attorney General.³⁶ Through the Executive Office for Immigration Review — better known as EOIR, the DoJ agency responsible for the courts — Congress is supposed to learn how these tribunals perform. But EOIR reveals little and what it reveals is largely inaccurate. Agency reports mock transparency. The full picture of large and complex caseloads goes undeveloped. Candor that yields understanding fails. Practical reforms go unproposed because critical statistics are falsely stated, skewed, or omitted. Making matters worse, judges seldom know if any orders they issue — orders granting relief to aliens or those ordering removal — are ever enforced.³⁷ From its beginning in 1983 through today, EOIR has adopted no mechanisms to match its courts’ removal orders with actual deportations.³⁸ The seamless relationship that should characterize the courts’

relationship with immigration enforcement agencies is totally nonexistent.

The courts' yearly accounting is a farce. Numbers are absent for all cases filed, adjudicated, appealed, granted, denied, transferred, and withdrawn. Only reports on asylum cases come close to transparency and even these lack completeness. As to most cases the courts hear, DoJ reveals only one thing: grants of relief — judgments favoring aliens. Nearly everything else is hidden, muted, or left out. What EOIR offers in its annual reports are at best shallow audits of court business and this shallowness — the hallmark of mendacity — adds up in big ways. It is not benign.

Shallow audits deceive. They deny to Congress information essential to understanding courts that demand more in tax dollars each year, yet refuse a truthful accounting of their record. Their reports lull lawmakers and the public alike into believing the courts are effective when the opposite is true. This shallowness is not limited to caseloads, though. It extends to the most aggravating problem that judges confront on a daily basis — failures to appear in court.

Failure of aliens to appear in court — DoJ's label for court evasions — is the largest problem of all. The problem is two-fold. First is the *fact* of evasion — a scandal by itself. Second is the way EOIR

reports it — an even worse scandal. EOIR masks the problem and reports numbers unsupported by even the most generous scrutiny. When Mark Twain wrote “[T]here are three kinds of lies: lies, damned lies, and statistics,” he was kidding — but he also knew something of statistics or at least those who author them.³⁹ The way EOIR reports court evasions only proves Twain's adage — and worsens the problem.

Contrary to Justice Department reports, aliens routinely evade court and in great numbers.⁴⁰ Nearly 800,000 aliens fled court between 1996 and 2009.⁴¹ They failed to appear in court after receiving their summons⁴² or, after answering charges, simply vanished. Others received removal orders — orders they said they would appeal — and walked from courtrooms never to be seen again. Then there are those who have fully litigated their cases through trial and appeal, have been ordered removed, and continue living here disobedient to the same laws they claimed they would obey. All are proof that weak courts and weaker accounting corrode a system intended to dignify litigants and give confidence to an increasingly skeptical public. The present system fails both and hides these failures behind numbers and phrases that disclose little and stifle inquiry even more. Deception and disorder rule along with their co-equal partner: unaccountability.

In 2005 and 2006, for example, EOIR told Congress the “overall failure” of aliens to appear in court was 39 percent, surely a bad number in any court system. Scrutiny reveals 59 percent — nearly three-fifths of all aliens free pending trial in those years — evaded court.⁴³ Since 1996, failure-to-appear rates have never dipped below 30 percent of those free pending trial. (See table next page.)⁴⁴ No other group disobeyed orders to appear in court because no other group could. The only other group was in detention — and its members made their court dates. The term historically used by DoJ — “overall failure to appear” — mischaracterizes litigants, aliens all, as court-dodgers, when, in fact, only one part of one group evaded court — *those who were free before trial*. It is this group that EOIR obscures from critical examination. Instead of transparency, EOIR games the numbers and ac-

Table 1. Failure to Appear Rates, 1996 to 2009

	Reported Rate	Actual Rate
1996	21 %	38 %
1997	21 %	35 %
1998	25 %	34 %
1999	24 %	34 %
2000	21 %	31 %
2001	20 %	30 %
2002	25 %	45 %
2003	22 %	37 %
2004	25 %	42 %
2005	39 %	59 %
2006	39 %	59 %
2007	19 %	38 %
2008	16 %	37 %
2009	11 %	32 %

countability becomes as much a casualty as candor and order.

To get the lower figure, EOIR lumped together two very different groups — another way of saying it mixed apples with oranges. EOIR combined aliens free pending trial with those detained pending trial — and, in turn, dramatically reduced failure to appear rates. Because detained aliens, essentially aliens in jail, always attended court and outnumbered aliens who failed to appear, evasion rates *seemed* much lower. This practice — the practice of merging different groups and reporting numbers that *looked* better — was not a one-time thing. The same practice has distorted the court's work across everything it does. Distortion, in fact, is not exceptional with these courts. It is routine. It began in 1996 and continues today.

From 1996 through 2009, the United States permitted 1.9 million aliens to remain free pending trial.⁴⁵ Forty percent of this group never showed for court.⁴⁶ From this same group nearly one million aliens were ordered deported — and 78 percent of these orders were against those who evaded court.⁴⁷ Absent numbers and misleading numbers — numbers from an agency claiming an important role for the courts in national security⁴⁸ — hid from Congress the disorder befalling America's immigration courts at a time in American history when the need for accurate reporting could not have been greater. EOIR's own words admit the urgency that existed then and still exists — an urgency its executives set aside in favor of statistics that buried disturbing figures beneath soft graphs and friendly numbers. Official-looking government reports belied the hard reality of a court system in disarray with its senior leadership in denial.

“The fight against terrorism,” EOIR said in 2008, “is the first and overriding priority of the Department of Justice The application and enforcement of our immigration laws remain a critical element of this national effort” and “EOIR remains an important function [with regard to] ... enforcement.”⁴⁹ From 2005 through 2009, EOIR — using the same language — justified itself and the courts' budget to lawmakers.⁵⁰ Surely national security, if not counter-terrorism, requires the same vigilance,⁵¹ but as annual reports show, EOIR's actions never

matched its words. It said one thing and did another — all the while telling Congress that immigration courts are the “frontline presence” in immigration enforcement.⁵² Year after year, court records show EOIR filed false reports and failed the high calling of federal service.

In the five years following 9/11, obedience to court orders plummeted; 50.4 percent of all non-detained aliens — people the United States permitted to remain free pending trial — never showed for court.⁵³ Over the last 14 years, 770,000 aliens free pending trial did the same.⁵⁴ From these failures to appear — and EOIR's failure to credibly report them — came the 558,000 alien fugitives that DHS reported in 2008⁵⁵ and the 1.1 million removal orders that still remain unenforced.⁵⁶

The linkage between aliens who flee court and unenforced removal orders is clear — and clearly unreported by the Justice Department. In fact, DoJ's own regulations — regulations driving a wedge between the courts and law enforcement — aggravate the problem. “Once an alien has been ordered removed,” EOIR states, “DHS is charged with executing removal.”⁵⁷ By regulation — not by statute — DoJ refuses to monitor its judges' orders, still claiming a contradictory “frontline presence” in enforcement and shifting any perceived failure in enforcement over to DHS. DoJ does other things, too, that cannot be reconciled with vigilant courts and alert enforcement.

Never has the Justice Department admitted that aliens failed to appear in court more than 39 percent of the time.⁵⁸ From 1996 through 2009, the courts issued 2.3 million removal orders. Of these, 1.1 million orders — nearly 48 percent — remain unenforced today and the vast majority of them are against aliens allowed to remain free during and after trial.⁵⁹ At no time did DoJ or EOIR sound alarm at these evasions. Never did DoJ or EOIR ask Congress for more authority to control alien conduct. Never did DoJ or EOIR offer specifics.

How many of these orders, for instance, involved aliens whose criminal convictions brought on deportation rulings? How many concerned those who entered fraudulent marriages? How many orders are against those who skipped court? How many are orders against those who overstayed their

visas? How many were issued against those whose urgent pleas for sanctuary placed them in expedited asylum proceedings? On all these questions, court reports are silent. This pattern of non-disclosure — through even greater distortion — continues to this day. The courts' 2009 report is proof.

For 2009, EOIR told Congress that failures to appear in court dropped to historically low levels⁶⁰ — that only 11 percent of alien litigants failed to keep their court dates.⁶¹ In fact, 32 percent of aliens free pending court evaded their hearings.⁶² EOIR reported a figure nearly three-times lower than the actual number. To obtain this number, EOIR *excluded* a whole category of cases — cases it had disclosed for the last 13 years — and again *included* the two different groups of aliens its accounting had mixed together for 13 years.

Throwing together aliens held in detention who came to court with aliens outside detention who often skipped court and dropping from calculations those aliens whose court misses resulted in their cases being administratively closed⁶³ caused 2009 court evasions to “decline.” Without this numerical sleight of hand, failures to appear in court would not have decreased. They would have remained right where they were prior to 9/11 — when 30 percent to 38 percent of aliens evaded their court dates.⁶⁴ They would also have remained consistent with evasion rates in 2007 and 2008, when as many as 38 percent of aliens free pending court ignored orders to appear before a judge. By fudging its numbers, EOIR has for years claimed evasion rates that honest accounting does not support. Never in any year did EOIR do the right thing and compare only those aliens who were free pending trial and tell Congress how many out of this group disobeyed orders to appear in court. Instead, it whitewashed these numbers — along with others that it omitted. And what it omits, it leaves to guess work.

EOIR routinely reports how many applications or lawsuits aliens file each year in order to defend against deportation. In 2009, EOIR said the courts completed 69,442 applications.⁶⁵ Nowhere in its 2009 report — or any other year — did EOIR account for all these applications. Asylum applications totaled 39,279, and the courts actually completed 5,551 more asylum cases than were filed

by finishing some from prior years,⁶⁶ for a total of 44,830 asylum claims actually decided one way or another.⁶⁷ But EOIR says nothing about the 24,612 cases that made up the balance of the 69,442 lawsuits that were completed.⁶⁸ EOIR never mentions this total or what became of the cases that compose it. This is the way this agency has reported the courts' business since 1996. Rather than a full accounting, EOIR yearly defaults to numbers which “improve” only by manipulation, not by better performance or superior processes.

To put it mildly, EOIR's bookkeeping is more than substandard — and dishonest may not be too strong a word. Guidance authored by the National Research Council⁶⁹ shows just how shabby this bookkeeping really is and how badly EOIR fails the objective standards that federal agencies that report statistics are expected to uphold:

“Statistics that are publicly available from government agencies are essential for a nation to advance the economic well-being and quality of life of its people. Its public policy makers are best served by statistics that are accurate, timely, relevant for policy decisions, and credible . . . [T]he operation of a democratic system of government depends on the unhindered flow of statistical information that citizens can use to assess government actions.”⁷⁰

In short, EOIR's yearly reports are a sham — a pretense of candid audit. Accuracy, credibility, relevance, and timeliness elude this agency and the flow of believable statistics to the public — a flow EOIR not only controls, but authors — is more than hindered. Its reports fail the narrow purpose of describing the courts to lawmakers and the broader one of informing the public. The story of America's immigration courts is hidden beneath details that blur a compelling story of national purpose and the disappointing one that demands change — the kind of change found only in a democracy.

It is change that honors litigants with a court that delivers on its promise of justice.⁷¹ For even those immigrants who play by the rules — and observe in trusting silence as others break them —

find these rules at odds with reason and fairness.⁷² “All you ever hear about,” declares one observer, “is the issue of amnesty for illegal aliens. Meanwhile, the legal aliens in the queue — those who dot all the I’s and cross all the T’s — are lost in the shuffle.”⁷³ It is also change that assures the American public that its institutions of justice work and that their work is faithfully reported. Finally, it is change that tackles problems known for years that have been just as knowingly neglected by those in charge.

Laws written decades ago have little relevance to present caseloads.⁷⁴ Aliens convicted of minor offenses in the past are called to court years after leading productive lives without blemish.⁷⁵ Harmless scuffles and non-violent offenses — matters disposed with little difficulty decades before in state and municipal courts — place otherwise solid residents, young and old, in deportation proceedings.⁷⁶ Other flaws are equally corrosive.

Under present law, courts have only two alternatives to address *any* case: relief — a decision favoring an alien — or removal — an order directing an alien to leave the United States. Courts are overcome by caseloads demanding more powerful and sentient tools the Immigration and Nationality Act (INA) presently denies them. Remedies that allow courts to suspend the harshness — and in some cases the laxity — of the INA are absent. Remedies proportionate to the seriousness of offenses are needed. Sanctions that remove offenders and under the right facts offer redemptive solutions are the answer to the blunt alternates of relief and removal.⁷⁷ Vesting judges with this authority has other benefits as well.

Empowered courts balance the relationship with DHS. Immigration courts are less than weak compared to this powerful police agency. No clearer example of this is found than in the inability of judges to enforce removal orders against those who skipped court or ignored deportation rulings. These orders are rarely enforced.⁷⁸ Instead, they are executed at the discretion of DHS. Put differently, non-judicial officials determine whether judicial orders are enforced — not the judges who issue them.⁷⁹ This practice turns the courts and enforcement upside down, making judges secondary to a police agency and barely a footnote to their own judgments. This

topsy-turvy failure shows that aliens who disobey court orders are treated remarkably better than the general public in other courts across the United States. In any other court, disobedience to court orders results in arrest, contempt, and incarceration. Not so in immigration courts. Rarely, if at all, are aliens held accountable for the same conduct that would place a citizen in jail. In immigration courts, upside down is routine — as routine as annual reports that masquerade as truth.

Immigration trial courts are popularized as stingy, denying relief to aliens as a product poor scholarship, intemperate demeanor, and bigotry.⁸⁰ Both DoJ — through Attorney General statements calling judges “abusive” — and EOIR — through skewed numbers — have encouraged this perception.⁸¹ EOIR reports deportation verdicts make up 80 percent⁸² of trial court decisions and that aliens receive favorable judgments around 20 percent of the time.⁸³ Accuracy reveals aliens receive favorable judgments three times more often — in fact, 60 percent of the time.⁸⁴ From 2000 through 2009 — 10 fiscal years — trial courts decided 486,032 cases in which aliens filed applications or lawsuits to defeat deportation efforts. The courts gave favorable verdicts to aliens in 295,617 cases.⁸⁵

That the courts have been typecast as openly hostile or bigoted then is no surprise. EOIR’s numbers and narratives suggest courts seldom grant relief and that removal orders typify the courts. To create this impression, EOIR did what it nearly always does. It mixed apples with oranges. EOIR compared these 295,617 favorable decisions — decisions coming from lawsuits defending against deportation — to all decisions made by the courts, those with and without lawsuits. With comparisons like this, grant rates were bound to appear extremely low and, as accurate numbers reveal, the truth is something else entirely.

In the last 10 years, trial courts made decisions in 2,124,022 cases, but only 486,032 of these decisions involved suits in which aliens defended against deportation efforts.⁸⁶ In other words, 1,637,990 aliens filed no lawsuits — in fact, did not seek to remain in the United States — and in nearly every case consented to removal. When the 295,617 cases that received favorable judgments are

compared to 2,124,022 decisions made from 2000 through 2009, rulings that favored aliens were a bare 13.9 percent of all verdicts. It is EOIR's comparing dissimilar cases — combining cases in which aliens opposed removal by filing lawsuits with cases in which aliens consented to removal — that drives down the percentage of favorable judgments.

The critical distinction — the distinction EOIR never makes — is the difference between cases that have applications (lawsuits opposing deportation) and those without applications. What EOIR never tells Congress or the public is that only cases with applications can potentially receive favorable judgments and only cases with applications can potentially be appealed. Without applications — without lawsuits seeking relief from removal efforts — there cannot be judgments favoring aliens and there cannot be appeals in the event these applications are denied.

Filing an application is key.⁸⁷ When only cases with applications are compared — comparing apples to apples — the true picture of a court generous with relief emerges. And asylum is not the only type of relief in which grant rates are high. Examination of adjustment cancellation, and “other relief” cases over the last 10 years shows aliens received favorable judgments 75 percent of the time.⁸⁸ Out of 204,096 applications seeking these remedies, trial courts granted 153,057.⁸⁹

EOIR's same apples and oranges math that buries accurate numbers enabled EOIR to tell Congress that appellate rates are low — only 8 percent in 2009.⁹⁰ Scrutiny shows just how untrue this is. Since 2000, 98 percent of all removal orders involving aliens who filed suits to remain in the United States were appealed.⁹¹ This lone statistic shows that aliens with applications for relief appeal deportation orders nearly all the time, while the courts' annual reports state the exact opposite.⁹² Never in any year did EOIR report that appellate rates exceeded 17 percent.⁹³ Applications like asylum, adjustment of status, and cancellation of removal, all of them suits that defend against deportation, enable aliens to file appeals when deportation verdicts are issued. EOIR's statements to Congress — statements that declare “[o]nly a relatively small percentage of immigration judge decisions are appealed to the

[Board of Immigration Appeals] BIA” — are simply not credible.⁹⁴ They are — as are so many of EOIR's statements — deceptive.

Since 2000, aliens appealed 214,404 out of 218,589 removal orders coming directly from lawsuits they had filed to remain in the United States. Despite the absolute importance of these numbers in understanding immigration courts and the people whose cases they judge, they were never shared with Congress. EOIR misrepresented trial and appellate decisions in the same way it misrepresented how frequently aliens evade court. And it did it the same way.

To get the low number on appellate rates, EOIR once more lumped together dissimilar case-loads. EOIR mixed cases where aliens filed lawsuits to defend against deportation — whose removal orders can be appealed — with cases where aliens filed no lawsuits whose removal orders cannot be appealed. Aliens who file no lawsuits — another way of saying aliens who submit no applications to defend against deportation — are more often than not in detention and usually consent to removal. They consent to removal with the assurance they will soon be freed in their native countries, and, as a result, do not — and cannot — appeal.⁹⁵

What EOIR does is under-report appellate rates by including cases that cannot be appealed in the first place, while telling Congress with the straightest of bureaucratic faces that appellate rates are low, when, in fact, they are high — very high. Much like calculating failure-to-appear rates based largely on those who always appear in court anyway, this loose math gives a false impression that is never corrected. Call it bad bookkeeping, call it poor thinking, or call it gaming the numbers. Whatever the label, this practice shields the courts from critical analysis and delivers unreliable numbers to the public. Other practices lead to other failures that loom just as large.

Since only cases with applications can later be appealed, it is these cases — and a history of non-enforcement of their removal orders — that prompt closer scrutiny. Applications reveal an alien's place of residence, his employment and the identities of family members — family members the alien often lives with. When an alien's application is denied

and he is ordered removed, actual removal, despite abundant information about him, seldom occurs.

In short, where much is known, little is done. Rather, DoJ and DHS ignore removal orders. DoJ ignores them by saying enforcement is DHS's business. DHS ignores them by declaring that it is guided by its interior enforcement strategy — not by valid court orders. DHS says its enforcement priorities,⁹⁶ which never mention immigration courts or removal orders, direct its efforts toward those who threaten national or domestic security. In other words, DHS does not pursue rule of law where pursuit would enforce judgments and deter illegal immigration.⁹⁷ Judge Edward Grant of the Board of Immigration Appeals admits this failure. “All should be troubled,” he declared at a 2006 symposium,

“[B]y the fact that only a small fraction of final orders of deportation and removal — entered after a hearing before an immigration judge, with right of appeal to the Board of Immigration Appeals — are actually executed. This fact would surely not be comforting to judges of the United States courts of appeals, who have strained in recent years to manage a burgeoning docket of immigration cases.”⁹⁸

It does not comfort the American public either. In 2003, DoJ's inspector general reported the “INS [now DHS] [is] ineffective at removing non-detained aliens.” INS removed only 13 percent of non-detained aliens in general,⁹⁹ but, even worse, INS deported only 6 percent of non-detained aliens from countries that sponsor terrorism.¹⁰⁰ When citizens and non-citizens in other American courts must obey court orders at the risk of contempt for not doing so — certain that these courts will act — the upside-down nature of immigration courts and their inability to enforce their orders becomes clear. America's immigration court system is failing and the smoke screens EOIR lays down with its annual reports each year abet this failure.

So who, then, is removed from the United States? ICE spokesman, Richard Rocha, answered this question on August 26, 2010:

“[The Obama] Administration is committed to smart, effective immigration reform, prioritizing the arrest and removal of criminal aliens and those who pose a danger to national security. In 2010 to date, ICE has removed more than 150,000 convicted criminals — a record number ICE has implemented a new policy to expedite the removal of criminal aliens and those who pose a danger to national security by ensuring these cases are heard.”¹⁰¹

Add to the number of criminal aliens detained aliens who consent to removal¹⁰² and those aliens who — after arrest at border crossings — waive their right to any hearings and return to their home countries voluntarily.¹⁰³ Plainly, though, aliens passing through immigration courts — even those who fled court or refused to leave when ordered — are not removed. Rule of law is nowhere to be found.

From 2003 through 2009, 541,867 such aliens were ordered removed by trial courts.¹⁰⁴ Seventy-eight percent of these aliens are those who skipped court — those who, when permitted to remain free during trial, chose to run.¹⁰⁵ Since these deportation orders seldom include criminal aliens, it is safe to assume few, if any, were removed and that the removal numbers ICE leadership showcases from year to year exclude them.¹⁰⁶ In fact, it is certain they are not pursued. ICE announced on August 17, 2009, that it had disbanded teams of agents who were pursuing aliens who skipped court or disobeyed orders to leave to leave the United States.¹⁰⁷

When ICE says it focuses enforcement on criminal aliens, its totals never reflect how many non-criminal aliens with removal orders are carried on its books. This is the same neglect that has produced more than a million unexecuted removal orders that DHS has never owned up to. For 2010, ICE even admitted that it did not remove a portion of those it claimed to have deported — those, in fact, *that deported themselves by “voluntarily” departing*.¹⁰⁸ Taken altogether, it was no surprise when ICE agents on June 25, 2010, voted “no confidence” in the political leadership now running the agency. Citing these appointees’ “abandonment [of

ICE’s] core mission of protecting the public,” agents warned that criminal aliens were often released by ICE — for the same offenses for which American citizens would often stand trial and go to prison — and that the American public was at risk.¹⁰⁹ For appearance’s sake, and nothing more, this agency reports glowing totals with little substance. Enforcement is a mirage.

In reality, the urgent mission of both the courts and law enforcement is defeated by excuses wholly at odds with an enforcement strategy that removes actual violators and deters those tempted to skirt federal law. The practical means to impose obedience to court orders are used with success in state and federal courts across the United States every day but are ignored by DHS and DoJ in favor of policies that continue to allow nearly a third of aliens free pending trial to abscond every year. The refusal to enforce removal orders looks past these examples of enforcement and encourages the same conduct that would land both citizens and non-citizens in jail in any other court.

DHS claimed these dismissals would allow aliens to seek “other relief” that would allow them to remain in the United States. In fact, “other relief” was *not* being sought by these litigants when DHS dismissed these cases, and nothing, not even their own removal cases, prevented these aliens from seeking other forms of relief. Aliens’ attorneys, who hopefully knew their clients’ cases better than DHS political appointees, expressed surprise at these dismissals.¹¹⁰ DHS has said nothing since announcing this policy regarding how many of these aliens are now seeking the relief DHS said was present. DHS justified these dismissals by claiming a lack of resources to prosecute them.¹¹¹ DHS’s justification is simply a pretext — an excuse to dismiss cases that would likely have resulted in removal orders, increasing the more than one million orders it now refuses to enforce. DHS initiated this scheme without notice to Congress, the public, or even those attorneys representing the aliens who received the dismissals.¹¹²

Instead of judges engaging in a perceptive case-by-case review that requests for “other relief” typically receive, DHS imposed a top-down solution that mocks judicial review. This scheme wors-

ens the growing sense of disorder that reduces public confidence in our federal institutions and risks hurtful backlash to legal immigration. The words of the late Congresswoman Barbara Jordan target these failures:

“Credibility in immigration policy can be summed up in one sentence: Those who should get in, get in; those who should be kept out, are kept out; and those who should not be here will be required to leave.... For the system to be credible, people actually have to be deported at the end of the process.”¹¹³

In fact, the present system is not credible. No federal agency is exclusively tasked with enforcing deportation orders. What enforcement there is occurs through ICE, but ICE enforces orders only when the DHS interior enforcement strategy says so, not — as it should — in obedience to court orders.¹¹⁴ Since no language in the DHS enforcement strategy even mentions immigration courts or removal orders,¹¹⁵ removal orders are treated as recommendations.

Under the Immigration and Nationality Act, DHS is sheriff, prosecutor, and jailer. All too often it is judge. This singular defect prompts frustrated judges to term their courts “play courts.”¹¹⁶ The concept of judicial imperative is largely unknown.

Judicial imperative — a judge’s authority to direct execution of his orders and see they are carried out — is absent and its absence has impact and risk. Out of the 1.1 million unenforced removal orders, 45,000 involve persons from nations that abet terror.¹¹⁷ The highest arrest rate for this group — those who evaded court or disobeyed orders to depart — was achieved in 2008. In that year, 34,000 fugitives — only 6 percent of the fugitive population — were apprehended.¹¹⁸ But, as reports show, before trials are completed many aliens, some with serious criminal records, are released from detention and soon disappear. America is at risk, not from the openness of its culture or its enlightened laws, but from those who turn these strengths against us to achieve evil ends or, as is more often the case, from those released from detention by government executives

who should know better. Release from detention involves a whole series of other risks — risks the present leadership of DHS and ICE heap upon the public.¹¹⁹

From 2003 through 2005, 280,000 out of 775,000 aliens in deportation proceedings literally walked free from DHS detention centers due to lack of bed space and never returned to court.¹²⁰ In 2007, federal officials in Houston released thousands of aliens — some child molesters, rapists, and drug dealers — despite knowledge of their criminal past and their illegal presence in the United States.¹²¹ In few nations would such concern for prisoners' rights free upon innocent communities those being held for criminal conduct and illegal presence. DHS certainly knew what it was doing (at least its intelligence reports suggest it did), but it released these prisoners upon unsuspecting neighborhoods anyway, with all the attendant risk such actions carry. These policies invite the greater risks that move beyond domestic security to national security. The same practice in large numbers continues today unabated by common sense and concern for the law-abiding.¹²² Chris Crane, president of the ICE employees union, doesn't pare his criticism:

“Criminal aliens incarcerated in local jails seek out ICE officers and volunteer for deportation to avoid prosecution, conviction, and serving prison sentences. Criminal aliens openly brag to ICE officers that they are taking advantage of the broken immigration system and will be back in the United States within days to commit crimes, while United States citizens arrested for the same offenses serve prison sentences. State and local law enforcement, prosecutors, and jails are equally overwhelmed by the criminal alien problem and lack the resources to prosecute and house these prisoners, resulting in the release of criminal aliens back into local communities before making contact with ICE. Thousands of other criminal aliens are released to ICE without being tried for their criminal charges. ICE senior leadership is aware that the system is broken, yet refuses to alert Congress to the

severity of the situation and request additional resources to provide better enforcement and support of local agencies.”¹²³

Threats to national security are no less grave. DHS intelligence summaries indicate terrorist organizations believe “illegal entry into the United States is more advantageous than legal entry for operations reasons.”¹²⁴ Deputy Secretary of Homeland Security James Loy, testifying before the Senate Select Committee on Intelligence on February 16, 2005, cautioned:

“Recent information from ongoing investigations, detentions, and emerging threat streams strongly suggests that al Qaeda has considered using the Southwest Border to infiltrate the United States. Several al Qaeda leaders believe operatives can pay their way into the country through Mexico and also believe illegal entry is more advantageous than legal entry for operational security reasons [E]ntrenched human-smuggling networks and corruption in areas beyond our borders can be exploited by terrorist organizations.”¹²⁵

Six years later, little has changed. Testifying before the Senate Homeland Security Committee on March 30, 2011, former 9/11 Commission Chair, Thomas Kean, warned of danger at the U.S. borders. Border security,” he said, remains

“[A] top national security priority, because there is an indisputable nexus between terrorist operations and terrorist travel. Foreign-born terrorists have continued to exploit our border vulnerabilities to gain access to the United States.”¹²⁶

Under the present system, judges can do nothing about these risks DHS invites and makes worse. Absent judicial authority places in the hands of non-judicial DHS officials decisions affecting not just American homes and threats from killers like Jose Alfaro in Manassas, Va., but entire American cities threatened by terrorists like Faisal Shahzad in

New York. These are failures that only courts with authentic judicial authority can address. Courts are crippled by weakness that allows those who are suspect or those who are ordered removed to thumb their noses at federal authority or, worse yet, to attempt destruction of the land that trustingly gave them safe haven. There is, of course, more to this dysfunction. The weak courts that cannot move DHS to enforce deportation orders are equally hindered by steep caseloads that congest an already clogged system. To say things are sluggish would be a compliment.

Getting any case to trial frequently takes more than a year.¹²⁷ On average any case will lie pending 15 to 20 months.¹²⁸ The life span of cases — cases that often take less than three hours to try¹²⁹ — is often not less than five years and frequently is more.¹³⁰ The fact that aliens who file lawsuits to remain in the United States appeal the verdicts they receive 98 percent of the time makes clear that not only trial courts, but also the Board of Immigration Appeals,¹³¹ the court of appeals for immigration cases, is choked by cases that take years to resolve.

In 2003, EOIR reported trial courts carried a backlog of 161,000 cases.¹³² In 2008, the OMB (Office of Management and Budget),¹³³ based on figures provided by EOIR, told the public the backlog had dwindled to 3,965 cases.¹³⁴ Actually, more than 200,000 trial matters congested court calendars that EOIR said nothing about.¹³⁵ A Syracuse University study revealed the deficit. Congress, the public, and presumably the White House had no inkling of this logjam.¹³⁶ This congestion stretched back more than 11 years.¹³⁷ Today the backlog exceeds 260,000 cases that EOIR never mentioned to Congress.¹³⁸ Trial courts are not alone, however.

Contrary to American Bar Association guidelines, the BIA fails to complete 95 percent of its appellate caseload from year to year — yet this is an improvement.¹³⁹ In 2000, 23 appellate judges had 63,763 cases strangling their dockets.¹⁴⁰ By 2002, nearly 58,000 cases had been pending up to five years.¹⁴¹ Today, eight years later, nearly 28,000 cases — just less than half the 2002 bottleneck — await judgment.¹⁴² Stasis has been standardized. More than just unmet deadlines are present here. Completing the balance is an American public that

expects its courts to perform with the same precision and candor they must bring to their own households and businesses. Immigration courts, in critical respects, do neither. Nor does the fiscal management of the courts inspire confidence. Once more, things are turned on their head.

Since 1990, American taxpayers alone have borne all increases in court budgets. Aliens pay no more today to file a case in immigration courts than they did in 1990. Through 2010, filing fees have not kept pace with the 276 percent¹⁴³ rate of increase in government spending, the 70 percent cumulative rate of inflation,¹⁴⁴ or the 823 percent increase in court budgets.¹⁴⁵ From 2000 through 2007, taxpayers even paid the court costs — some \$30 million — of aliens who appealed deportation orders¹⁴⁶ in asylum cases, but also for crimes they committed in the United States and for fraudulent marriages they entered.¹⁴⁷

Citizens and non-citizens in any other courts pay their own filing fees and court costs — but not in immigration courts. Despite years of taxpayer support, at no time have aliens been asked to contribute more to the processes of justice from which they stand to gain the most. The testimony of former BIA judge Michael Heilman revealed this problem in congressional hearings in 2003. “As an initial question,” Judge Heilman told the House Judiciary Committee,

“[O]ne can fairly ask ... what incentive is there for the typical alien to appeal from an Immigration Judge’s decision? One part of the answer lies in the fact that the appeal filing fee is very low, \$110. With that fee being waived by the BIA in about 50 percent of appeals, oftentimes even where an alien is represented by an attorney. The alien is not charged for copies of the record or for the transcript of the hearing, which often exceeds 50 pages. All of these costs are absorbed by EOIR. By contrast, to my knowledge, no-cost appeals on a civil level are a rarity.

...

“A third, and less significant change, would be to charge the appealing alien with the cost of the appeal. There are significant expenses absorbed by the Department of Justice because it foots the bill for the appeal process. As a rule, in civil proceedings, which immigration proceedings have been seen to constitute, the appealing party pays the cost of the appeal, including the transcript. The fact that any particular individual might be unable to bear this cost has not deterred this general practice in civil proceedings.”¹⁴⁸

These flaws — disabled courts, no-show litigants, unenforced orders, endless backlogs, and poor fiscal management — belie other defects, defects of a constitutional nature. Aliens face the real potential of not receiving a fair trial.

The Justice Department’s attorney discipline scheme, applicable only to the alien’s lawyer,¹⁴⁹ denies to aliens the right to effective assistance of counsel and fair trial. Private counsel is exposed to public scrutiny of alleged misconduct while federal prosecutors are exempt from the same exacting standards.¹⁵⁰ In effect, the alien’s attorney is openly put through a process that might suspend him from practice, while federal prosecutors accused of the same conduct enjoy the plush protections, including private proceedings, granted to federal employees. Private counsel have no such sanctuary. In effect, two very different processes apply to those attorneys who advocate on opposite sides of the same case.

DoJ and EOIR argue these two very different processes are equivalent and do not violate the Fifth Amendment right to fair trial. Comparison reveals the gross inaccuracy of their argument.¹⁵¹ Because the alien’s attorney is treated substantially different, indeed less well, than the government’s attorney, the alien, too is treated in an unconstitutional manner. The potential chilling effect of such disparate treatment invites all the harms that follow when a supposedly “separate but equal” practice is imposed on any class — alien or citizen. Weak courts — courts that can discipline no one — are the cause of this unconstitutional imbalance.

In the end, the failure of America’s immigration courts is not the fault of its judges or the aliens who appear before them. It is the failure of an institution and the executives it has put in charge of the courts. History labels this failure wooden-headedness. “Wooden-headedness,” writes historian Barbara Tuchman, is

“[T]he source of self-deception ... [and] a factor that plays a remarkably large role in government. It consists in assessing a situation in terms of ... fixed notions while ignoring or rejecting any contrary signs. It is acting according to wish while not allowing oneself to be deflected by the facts.”¹⁵²

The Justice Department took its self-deception a step further, though. Years of aliens skipping court — aliens its own policies allowed to remain free — has never prompted it to give accurate numbers to Congress. Instead, the Justice Department hid them and continued the same policies that led to nearly 800,000 aliens failing to appear in court and over one million unenforced deportation orders. Never during this time has DoJ attempted any meaningful reforms. In the face of these disasters, DoJ’s path has never changed. It has remained passive and inert — filing yearly reports with Congress that are misleading at best and ignoring problems that even the most optimistic budget requests won’t make go away. This inertia is nothing less than the familiar failure of leadership and management¹⁵³ and from this failure come broken courts and a dispirited American public.

Rather than broker change that complemented immigration — change that pursued rule of law and, in turn, sustained popular support — the Justice Department has chosen the corrosive way out that continues today. It has defaulted to shoddy bookkeeping and the promise that adding more judges — judges without authority — will silence all but the most vocal critics.¹⁵⁴ With such a course as this one, case backlogs will surely dwindle, while removal orders — orders that will never be enforced — will just as surely expand. In the end, the Justice Department and the courts it manages fail the American public they are intended to serve,

the immigrants they are intended to elevate, and the suspects they are intended to sanction. But where there is failure, there is also opportunity.

Rule-of-law solutions work in our rule-of-law nation. Indeed, the fates of people, the integrity of a court system, and the destiny of this nation depend on this most basic foundation. Judges who rule with fairness and firmness are no less critical to America today than they have ever been in our history. Authoritative immigration courts — courts unlike the ones America now invests in — are the answer. A reformed court, independent of the Justice Department, offers definitive, rule-of-law solutions.

At issue is America's security. At risk is America's historic openness. At a disadvantage are America's immigration courts. The "uniform Rule of Naturalization" mandated by the Constitution¹⁵⁵ is impaired by disabled courts, which today cannot begin to approach the full measures of justice that are needed. Well within its power, Congress should authorize a court with authentic judicial authority — a real court.¹⁵⁶ Its governing principle would be just ends, not temporal expedience or political gain. An independent Article I court is the platform for this rule of law solution — and indeed this platform has a strong foundation.

The foreign-born compose 5 percent of America's total active-duty armed forces.¹⁵⁷ Roughly one in 10 of those killed in Iraq and Afghanistan was born outside the United States¹⁵⁸—and this is not a recent turn in our history. Many who fled the *de facto* bondage of Europe in the mid-nineteenth century fought to end *de jure* slavery in America soon upon their arrival. Nearly one-quarter of the Union army was foreign-born.¹⁵⁹ Twenty percent of those heroes who hold the Congressional Medal of Honor came to our shores as immigrants.¹⁶⁰

America confronts a divide that strains the national fabric. Arguments on either side of these powerful issues push the American public toward division. In one America observes a direct refusal to enforce federal law going hand-in-hand with groups that advocate disobedience, invite disorder, and urge disunion.¹⁶¹ In the other, America confronts reaction that denies the positive role immigration has played and still plays in our national life.¹⁶²

Both courses dim our shining example to the world. There is much here that needs repair. There is much here also that inspires.

Order, liberty, and compassion define our laws and institutions. They should reaffirm America's Immigration and Nationality Act in the tradition of inclusion. They should demand no more from the alien than is required of the citizen. A federal court that fully realizes the worthy ends this cornerstone of federal law embraces answers this call for reform — and reforms the courts now built to fail.

Recommendations

1. Congress should replace the present immigration court system with an Article I court with presidentially appointed, Senate-approved, judges, similar to the U.S. Tax Court or the U.S. Court of Federal Claims. Trial and appellate judges would have continuing jurisdiction over the alien litigants and government agencies appearing before them. They would have authority to enforce their orders, using both legal and equitable remedies.
2. Article I immigration courts should have both civil and criminal jurisdiction. Courts would continue to rule on asylum, adjustment, and cancellation cases — the bulk of their present caseloads. Their criminal caseload would involve violations of Titles 8 and 18 of the U.S. Code — alien smuggling, marriage fraud, document fraud, and false claims of citizenship. Concurrent jurisdiction with Article III courts would assure access to constitutional protections — grand jury and jury trial — for defendants who request them. These new, more expert immigration courts would swiftly rule on high volume matters that previously have choked their Article III counterparts.
3. The courts' annual reports to Congress — the "Statistical Year Books" — need reform. EOIR's reporting methods misrepresent critical dynamics of court business. Failure-to-appear rates are significantly understated. Incomplete disclosure

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- of trial caseloads is routine. Appellate caseloads are entirely unknown. Expedited asylum matters are not reported with fidelity to congressional intent. A frank audit by the GAO is needed. The Bureau of Justice Statistics and the National Research Council — both of them available to EOIR — should redesign its reporting methods. Transparency is itself a remedy for these ills.
4. Filing fees and court costs merit significant revision. Fees have not increased since 1990, while taxpayer commitment to the courts has increased 823 percent. Court costs are nonexistent. From 2000 through 2007, taxpayers provided just over \$30 million to transcribe trial records for litigants, some of whom were convicted of crimes in the United States or had committed marriage fraud. Revising costs and fees in non-asylum cases only — and allowing the fees to remain with the courts — could produce a savings of \$13 million.
 5. Intermediate remedies are needed. Immigration courts currently have available only two judgments to address any case they hear: relief or removal. Equitable remedies that give courts jurisdiction over aliens throughout the trial and appellate processes and offer redemptive solutions for those who merit second chances, with certain removal for those who do not, provide fuller justice the present courts cannot deliver.
 6. Constitutional defects impair alien litigants' rights to effective assistance of counsel. This vital guarantee is denied by court regulations that create a dual disciplinary system that investigates, prosecutes, and sanctions only private counsel. DHS prosecutors cannot be held to account by either judges or EOIR for any alleged misconduct. This process is a product of weak courts — courts that cannot discipline either attorneys or litigants. An Article I court is the solution for this defect.

Play Courts

Trial judges describe their immigration courts as “toothless”¹⁶³ and deride them as “play courts.” Neither is an overstatement. They accurately depict courts — and frustrated judges — whose orders will likely never be executed. The courts use federal statutes, common law precedent, and regulations in making decisions.¹⁶⁴ Their judgments are controlling guidance to federal enforcement agencies, among them ICE.¹⁶⁵ Despite this, they cannot direct government agencies — ICE, for instance — to enforce their orders. To say the courts are toothless may, in fact, be generous. Compared to the important work charged to them, courts are less than weak.

Today, more than 1.1 million removal orders are ignored by ICE,¹⁶⁶ while authorized relief for many immigrants is nothing less than an unkept promise.¹⁶⁷ When orders granting relief or directing removal are final, regulations separate judges from their judgments. Judges have no authority to enforce their rulings.¹⁶⁸ They have become simple bystanders in their own courtrooms.

State and federal courts — even traffic courts — extend authority through trial and beyond. The absence of judicial authority in immigration courts explains why deportation orders lie unexecuted and why fugitives remain at large. Lacking jurisdiction, trial courts issue orders that will never be enforced unless a non-judicial officer — an ICE official to be exact — using the DHS “interior enforcement strategy” says so.¹⁶⁹ This strategy is neither statutory nor regulatory. GAO auditors have called this strategy “working-level guidance.”¹⁷⁰ Its characterization, whatever it is, belies its impact.

This strategy prioritizes DHS enforcement — enforcement that does not mention immigration courts or deportation orders.¹⁷¹ As a result, non-judicial officers at DHS dictate enforcement of court orders — not the judges who hand them down.¹⁷² This policy prompts a near total disconnect between the courts and enforcement. It removes courts from a judicial process that without them ends in disorder. It allows aliens to successfully dodge court and to ignore deportation orders with impunity. Proof of this policy failure is found in the numbers.

In 2002, 602,000 removal orders lay backlogged.¹⁷³ ICE’s 2008 report on fugitive aliens — aliens who fled court or absconded from orders to leave the United States — showed 558,000 such individuals at large.¹⁷⁴ Over one million removal orders against aliens who have ignored directives to leave the United States lie unenforced by ICE today — an 84 percent increase since 2002.¹⁷⁵ There are two causes for this growth.

Inadequate resources in prior years help explain lackluster enforcement.¹⁷⁶ But more rapid growth is sure to come and it has an entirely different explanation. The Obama Administration now forbids removal of aliens who skipped court or ignored orders to leave the United States — unless they have committed criminal offenses.¹⁷⁷ Aliens who sought the protection of American immigration courts and then dodged them and others who disobeyed orders to leave the United States continue to add to an already burgeoning backlog. And there is a third cause equally to blame: absent judicial authority.

Weak courts assure that proceedings in which the United States has invested billions of dollars mean nothing. Judges are powerless in the face of rules that cancel years of trial work by prosecutors, defense attorneys, court personnel, and enforcement agents. Not only have years of resources been wasted, but weakness in both courts and enforcement has been aggravated. What was previously a probability that a deportation order would never be enforced is now a certainty. It is also certain that this added weakness will be exploited by aliens who will now calculate that any removal order handed down by courts will never be enforced. The groundwork for this disarray was laid years ago by the Justice Department. Despite years of statistics that revealed aliens fleeing courts in huge numbers, nothing was done to correct this defect. The same disorder continues today, further abetted by EOIR statistics that bury the real numbers and by EOIR’s intentional disregard for laws and regulations already on the books.

Two critical pieces of authority — one a statute, the other a regulation — cannot be used

by courts, despite being on the books for years. The statute — § 240(b)(1) of the Immigration and Nationality Act (INA) — gives contempt powers to immigration judges.¹⁷⁸ Courtroom misconduct and frivolous legal practice fall within its terms.¹⁷⁹ On the books since 1996, it is no closer to use now than it was prior to its passage by Congress. The reason is plain: *DoJ — after 15 years — has never issued regulations enabling this authority.*¹⁸⁰ The history of the unused regulation is just as bad.

Used only in courtrooms inside detention facilities, the regulation — 8 C.F.R. § 241.3¹⁸¹ — authorizes DHS to continue custody on those ordered removed once their trials are over.¹⁸² No language limits the regulation to detention facilities. Instead, DoJ refuses to standardize its use in all immigration courts. Courts outside detention centers cannot use this regulation — or one like it — to impose conditions that assure future attendance in court or obedience to orders that require aliens to depart. Years of court-skipping and disobeying orders has changed nothing. Courtrooms — like borders — remain porous and it is what occurs in courtrooms outside detention facilities that capsizes rule of law. Disorder has been institutionalized.

Even if an alien is ordered removed, more often than not, he simply walks away from the courthouse — without any obligation to account for himself. The regulation is entirely without application where it is needed most: *those courtrooms outside detention centers.*

Contrast this with courtrooms *inside* detention centers. In these courtrooms, removal orders are promptly enforced. Release from custody — in other words, freedom — is conditioned upon compliance with terms that make obedience to court orders more likely. The alien remains in custody if conditions for release cannot be met.

Despite this disorder being well known, time-tested solutions that have worked in other courts in the United States remain largely unused in immigration courts. Given these courts' long experience with aliens who fail to appear for their hearings and tens of thousands of unenforced removal orders that are issued each year, DoJ still refuses to place authority in the hands of judges that would curb flight from court. Routine measures such as surety

bonds, bonds on the property of family members, and GPS ankle bracelets to limit absconding are largely untried, despite their success elsewhere. Nations — even great ones like the United States — are not immune to this form of man-made dereliction. When George Friedrich Hegel observed that history teaches that people and governments learn nothing from history, he was not referring to DoJ executives, but he could have been.¹⁸³ These executives unwittingly prove Hegel right.

DoJ's management of the courts has weakened rule of law and encouraged disrespect for judicial process. This exploitation — this gaming — can be measured to the same extent that aliens continue to dodge court and ignore removal orders. This mismanagement inspires all the faults of the present system: sophisticated smuggling efforts, wide conspiracies of marriage fraud, calculated illegal entry schemes, and the simple walking away from court that games the compassion of American law and most assuredly, the American people. DoJ makes matters even worse, by doing some gaming of its own through EOIR. EOIR's annual reports to Congress stretch truth to the breaking point and beyond. Against this backdrop, toothlessness — and its consequence, disorder — remain the rule.¹⁸⁴

Courts are wholly divorced from enforcement measures that impose order. DHS's efforts since 2007 to reduce absconding through detention and supervision programs have met with little success. The fact remains that failure to appear rates in 2007, 2008, and 2009 were 38 percent, 37 percent, and 32 percent, respectively.¹⁸⁵ Despite targeted efforts over the last three years toward aliens who were outside detention, more than a third failed to show for court. In any other courts, honest critics would declare American immigration courts ineffective for failing to impose order that sustains public confidence and for refusing to learn from experience.

The implication is clear. Our institutions do not learn or, if they do, they do not act. Regardless of the answer, the result is the same. Fourteen-year failure to appear rates averaging 40 percent¹⁸⁶ have produced no greater authority for courts. Courts remain weak. Judges are powerless to impose restrictions on those who pose risk of flight or refuse orders to depart.¹⁸⁷ Even after trials and appeals are

complete, courts cannot assure removal. The courts' disconnection from DHS enforcement agencies is so absolute it even denies judges knowledge of aliens who disobey orders to leave.¹⁸⁸

Judges seldom know if their orders are executed because enforcement falls outside their jurisdiction. All their case knowledge is bypassed by regulations that separate judges from their cases. Full-time judges are unaided by full-time officers tasked with enforcing court orders. Results are predictable. Prioritized DHS enforcement — fragmented enforcement — assures only partial order, another way of saying disorder. The American public is more than disserved by this neglect. It is, in fact, intentionally disserved by policies that institutionalize disorder through strategies that sound good but in the end mean nothing but more of the same.

The bottom line is this: *immigration courts cannot provide order*. Some 48 different types of DHS “immigration officials,” literally hundreds, if not thousands, in numbers, may direct arrest and removal of aliens. Judges have no such authority.¹⁸⁹

Where authentic judicial discretion would have a profound effect on the operations of these courts, it is absent. Remedies that our democracy makes available to citizens and non-citizens on a daily basis in other courts are unavailable to alien litigants in court proceedings that offer the path to citizenship or its denial. The remedy for these defects is a court that functions as a court.

Empowered courts — courts with continuing jurisdiction over their cases — would link the executive function of DHS with definitive court orders. Orders granting relief or those directing arrest and removal would receive equal dignity. Objections to judgments would prompt motions for reconsideration or notice of appeal. They would not prompt evasion. Orders would be obeyed, as in any other court, as a function of law and custom — for what is customary in immigration courts is not obedience to orders. Instead, DHS ignores them and aliens disobey them. Executive agencies obligated with enforcement responsibility would assure compliance with rulings. No longer would courts be toothless “play courts” that issue orders without consequence. No longer would immigration courts be the courts built to fail.

The Enterprise of Illegal Immigration

Immigration has entered the 21st Century, but immigration courts have not. Tools needed to address changing caseloads are absent. Many litigants appearing in court for the first time are not recent arrivals to the United States. On average, many have resided in the United States more than seven years before first coming to court.¹⁹⁰ They are not asylum-seekers, but those who entered legally and have fallen out of legal status or those whose changed circumstances require court approval of a new status.¹⁹¹ And they are not poor. Census data from 2006 revealed 57 percent of all foreign born households have income between \$37,883 and \$93,577. This range accounted for more than 8.4 million from a total of 15 million households.¹⁹² Then there is that changing side of immigration that grabs headlines and inflames public opinion. It may be summed up in one sentence: *Illegal immigration is now an enterprise.*

Courts able to direct government action — in other words, courts with jurisdiction over federal agencies — are essential for reform. This simple requirement solves years of court skipping, unenforced removal orders, backlogged cases, and tardy relief. It addresses the powerful shift in U.S. growth — one-third of which is due to illegal immigration¹⁹³ — with an empowered court, a court equal to the great opportunities legal immigration offers and the powerful risks illegal immigration threatens.

From immigration alone, the U.S. population increases by approximately two million people each year. Of this number, roughly 1.5 million are admitted to citizenship or lawful permanent residence. Another million enter illegally, whether by avoiding inspection at the borders or by overstaying their visas. According to the Congressional Research Service (CRS), roughly 500,000 of these “illegals” will remain.¹⁹⁴ Clearly, immigration courts deal with only a fraction of both totals.¹⁹⁵ Within these figures, though, is reason for optimism.

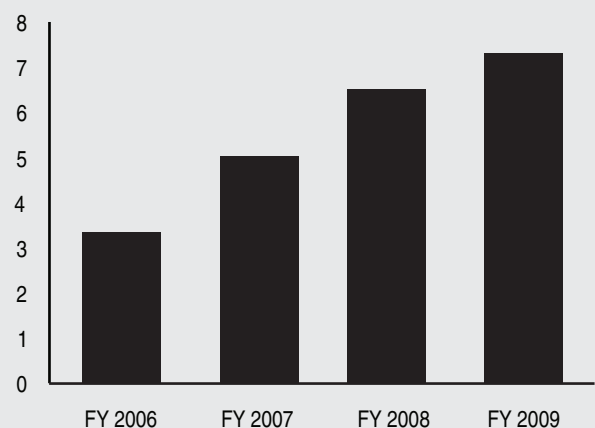
The difference between the net number of illegal aliens remaining in the United States in 2009 — the 500,000 CRS reported — and the 352,233 cases completed by trial courts¹⁹⁶ shows the potential that greater court authority and more judges will yield.¹⁹⁷ Increasing court authority¹⁹⁸ helps meet the

challenges posed by such numbers. It enables the United States to confront immigration cases on a level realistic to their scale, difficulty, and importance. The critical balance between problem and solution requires courts fully empowered and ably staffed. Such courts can impose order. They can assure liberty. Their effectiveness can be measured to the same degree their authority is increased.

Article I courts are such courts. Their purpose is to judge public rights cases — cases in which the government is always a party. They offer significant advantages over the frail administrative tribunals America now invests in. These advantages include full authority to conduct proceedings with legal and equitable discretion. With greater discretion, greater numbers of cases could be completed with comparatively fewer judges. A significant number of trials — trials inviting equitable solutions — could be shortened, if not avoided, as remedies imposed by judges set standards for conduct which the courts themselves would monitor.

Caseloads support this empowerment. Justice Department numbers suggest asylum composes a small fraction of trial decisions — by its crude reckoning, only 9.3 percent of all verdicts in 2009.¹⁹⁹ Drawing back the curtain on its accounting reveals asylum cases over the last 10 years have composed 72 percent of all applications filed with the courts²⁰⁰ and made up 63 percent of all trial court

Figure 1. Aliens' Average Number of Years in the United States Before Court Date



decisions.²⁰¹ The balance of applications — some 28 percent — involves “other forms of relief,” mainly those known as adjustment²⁰² and cancellation²⁰³ applications. But from this 28 percent came grants in 153,057 cases — well outnumbering asylum grants, which totaled only 137,322.²⁰⁴ Even more remarkable is the fact these “other relief” grants came from total applications of 204,096, meaning that 75 percent of all adjustment, cancellations and other relief applications were granted.²⁰⁵

Comparisons like these are critical in understanding immigration courts and the dynamics of their caseloads, but they are comparisons that the Justice Department never makes in its annual reports. Unlike asylum cases that weigh the conduct of aliens *before* they enter the United States, adjustment and cancellation cases weigh the conduct of aliens *after* they enter the United States. The simplistic yearly statements sent to Congress fail to tell these stories — stories that if known would urge more powerful tools to be placed in the hands of judges to definitively grant or deny relief corresponding to the facts of these cases, rather than the weak laws that offer few remedies to address alien conduct. No matter the complexity or difficulty of these cases, imperceptive verdicts of relief or removal are all that is left to feeble courts in handing down judgments.

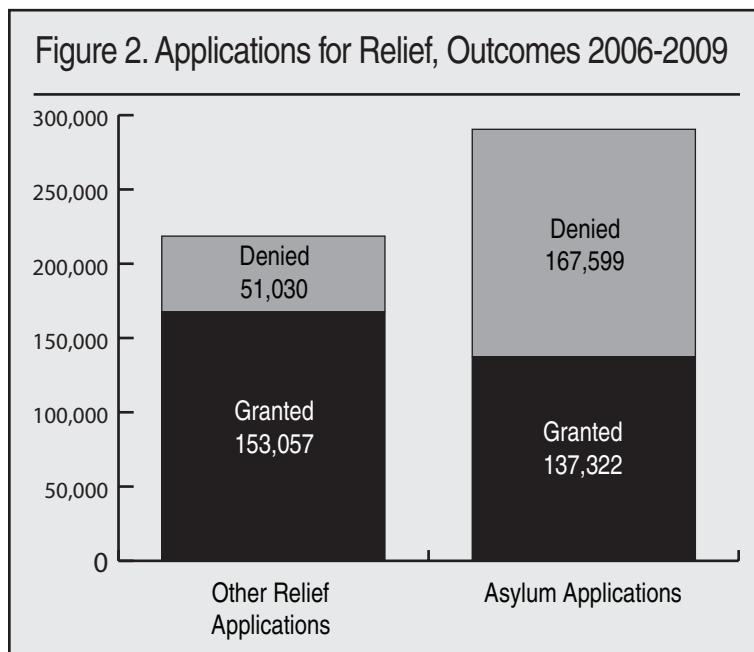
Gone is the day of lone entries across an unguarded border. Gone, too, is the day of starving

stowaways, and desperate sailors and defectors who jumped ship in American ports. Today is the day of the smuggled Chinese, beached Haitians, trafficked Mexicans, visa-overstayers, crime-prone lawful residents, and the many who entered illegally and remained undiscovered for years. Today is the day of marriage, education, and visitor fraud. Today is the day of the shrewd terrorist unchecked by immigration courts unable to control their own courtrooms, much less threats disguised by fraud.

Of the 94 foreign-born terrorists who operated in the United States between 1993 and 2004, fully two-thirds of them — 59 in total — committed immigration fraud in conjunction with their terrorist activity. These 59 committed multiple immigration offenses, totaling 79 violations in all. In 47 instances, immigration benefits acquired prior to September 11th enabled terrorists to stay in the United States after September 11th and pursue their conspiracies. In at least two instances, terrorists acquired immigration privileges after September 11th.^{206, 207}

To enter the United States, terrorists frequently sought, and usually received, visas.²⁰⁸ Of the 94 terrorists involved in actual and thwarted attacks between 1993 and 2004, 18 had student visas (F1 visas) and another four had applications approved to study in the United States. Records reveal at least 17 of these terrorists used a visitor visa, either business (B1) or tourist (B2).²⁰⁹ But their fraud did not end there.

Thirty-four were charged with making false statements to immigration officials. Thirteen terrorists overstayed their visas. In 17 instances, terrorists lacking proper travel documents and facing denial of admission headed-off their being sent home by seeking asylum — expedited asylum — upon reaching the United States.²¹⁰ Every one of the 94 terrorists who entered the United States had committed at least one immigration violation in their bids to enter or remain in America.²¹¹ Each of the 94, after entering, sought to stay.²¹² Fraud was not merely used to gain entry into the United States upon arrival, but also to “embed.” Seven of the same 94 were



indicted for acquiring or using various forms of fake identification, including driver's licenses, birth certificates, Social Security cards and immigration arrival records. Across the 19 9/11 hijackers, 364 aliases and 34 government-issued ID cards were used.²¹³ At least eight of the 19 who attacked the World Trade Center and the Pentagon were registered to vote in either Virginia or Florida.²¹⁴ Once in the United States, 16 of the 94 terrorists became lawful permanent residents — often by marrying an American. There were apparently 10 sham marriages among them. In total, 20 out of 21 terrorists who sought citizenship became naturalized U.S. citizens.²¹⁵

Under the present system, trial courts can do nothing at either extreme to more closely limit the movements of persons like these or those whose poverty propels them to the United States. Nothing judges could do then or today would have compelled the enforcement of a removal order or the placement of restrictions on such aliens before, during or after trial. Meanwhile, aliens — just like everyone else — adapt. The sincere find sanctuary. The opportunistic game the weaknesses in our enforcement schemes, cloaked behind one facade or another to unlawfully obtain benefits reserved to authentic refugees, fiancés, students, and visitors. American political will power has not stayed even in this evolution. Neither has federal law, and a large and growing illegal population is the result.

The routine judgments of relief and removal are all that are available to trial courts in any case coming before them. These judgments are simply outdated and ineffective. Alone they impair the ability of courts to more constructively deal with aliens short of removal. Paired with courts that cannot enforce the hollow orders they already issue makes for the disorder that the American public has witnessed for years. Remedies that give judges wider discretion are not simply desirable. They are needed. Some orders release aliens who would benefit from court supervision. Then there are aliens placed in deportation proceedings years after convictions for minor offenses. In the interim, many have lived spotless lives.⁵⁴ Others are ordered removed when mandated court supervision would accomplish what appeals only aggravate. Still more aliens simply disappear

when the time seems right — and worry little about arrest and less about removal. Only authoritative courts can deal with these issues.

In plain language, courts are impotent. They are unable to provide greater justice through remedies that reduce dockets, conserve resources, and provide smart alternatives to the flat orders of relief and removal — orders that in effect provide no order.²¹⁶ Courts with authentic authority serve the purposeful ends for which Article I courts are established. Swift and deliberate consideration of matters where the government is always a party *is* their purpose.²¹⁷ The legal tools of Article I courts — tools of continuing jurisdiction that impose responsibilities on aliens to report themselves, wear monitoring devices, pay taxes, and support their dependents at the risk of sanctions — are the same tools available to state and federal courts in both civil and criminal matters. These are the same obligations citizens and non-citizens outside immigration courts must obey. Yet they are unused by immigration courts, despite the long history of disobedience to court orders and the equally long history of non-enforcement of these orders by DHS.

Granting injunctive authority — the judicial ability to control conduct — to immigration courts would infuse the Bar and the executive agencies with knowledge that each order bore immediate consequence — the same as in any other court. This imperative would drive litigation forward. Jurisdiction over enforcement agencies, such as ICE, and benefit agencies, such as USCIS, would be direct and seamless. This would mark a clear departure from the fragmented environment in which litigation presently occurs. DHS authority would not diminish as judicial discretion increased. DHS would continue its present functions, subject to the same obligations that apply to any person or agency answering to an authoritative court. The distinction here lies in enabling judicial discretion, not in limiting the executive authority of DHS.

The present uncoordinated environment between the courts and DHS is not intended. It is, however, a historical fact and one that neither department seems willing to fix. EOIR's 2009 budget submission speaks to "effective coordination of investigative, legal and adjudicative resources ...

within the Department and in concert with other agencies” in securing America.²¹⁸ It states:

“The fight against terrorism is the first and overriding priority of the Department of Justice and the Administration. A key component of this effort is the securing of our Nation’s borders and the repair of the immigration system as a whole. More than ever, protecting America requires a multifaceted strategy which must include the effective coordination of investigative, enforcement, legal and adjudicative resources both within the Department and in concert with other agencies. The application and enforcement of our immigration laws remains a critical element of this national effort.

...

“[P]rograms of DHS, the source of EOIR’s caseload, represent a critical component of counterterrorism initiatives. Further, the Attorney General’s authorities with respect to the application and interpretation of immigration laws clearly impact government-wide application strategies. As such, EOIR remains an important function vis-à-vis DHS/DOJ enforcement efforts.”²¹⁹

But effective coordination requires effective components. This mission statement declares goals reachable only by empowered courts. Instead, courts are wholly unable to execute their orders and have no jurisdiction over the only agency (ICE) — a part-time agency in terms of immigration enforcement — that arrests, detains, and removes aliens from the United States. It is no overstatement, then,

to say that immigration courts cannot act as courts. They stand mute as more than a million deportation orders lie fallow. Courts observe 40 percent of those ordered to court vanishing²²⁰ — and are powerless to stop it. Weak courts do not square with secure borders, safe neighborhoods, or rule of law. The Justice Department is noteworthy for lofty words that seek and often achieve lofty ends. In the case of immigration courts, the opposite is true. Worthy mission statements are unmatched by worthy results.

At two critical junctures, one at points of entry into the United States and the other in courtrooms, order fails. Courts can do nothing before, during, and after trial to condition a litigant’s conduct. Courts can do nothing to enforce judgments. Authoritative courts are the fairest, simplest, and most efficient mechanism to achieve “application and interpretation of immigration laws” that complement “enforcement efforts.” Maintaining a status quo that allows more than a million unenforced, if not unenforceable, removal orders defeats these efforts. It is no different than porous borders. Unempowered courts cannot establish order. They cannot assure liberty. Empowered courts can do both.

Legal immigration’s rapid growth justifies a court with increased ability to reach considered ends in a deliberate and timely manner. Illegal immigration’s rise from casual trespass to calculated enterprise requires the United States do more to wisely and effectively dispose of thousands of cases consistent with ordered liberty. Redeeming the worthy and removing the violators are well within our means. A fully empowered Article I court is the solution that restores rule of law through judicial imperatives that Congress granted, under remarkably similar circumstances, to the U.S. Tax Court in 1949.

A Court of Law and Consequences

The U.S. Tax Court is a model, both in history and purpose, for an Article I immigration court.²²¹ Its forerunner dates to 1924 and was known as the Board of Tax Appeals. Much like immigration courts, this panel interpreted complex regulations and was an agency within the Treasury Department. After passage of the income tax, public outcry rose as the Board's work grew more complicated.²²² This complexity, combined with inadequate administrative and judicial structures, persuaded Congress that “disputes growing out of ... changed conditions” would increase. The “enormous strain” placed on the Bureau of Internal Revenue and the federal courts would continue to grow.²²³ A court — a real court — was needed.

Noting the tax code was a dense body of law affecting “vast amounts of people,” rulings from an authoritative court became “paramount.”²²⁴ Lawmakers understood an “adjudicating body should be independent.” Independence would avoid future charges of “inefficiency, arbitrariness, and favoritism” that initially characterized the Board and the Bureau of Internal Revenue. Unreasonable delay, large backlogs, insufficient personnel, absence of finality, lack of standards and procedures, and the unavoidable scandal that follows such defects, reduced public confidence.²²⁵

These criticisms are familiar to those agencies charged with enforcing America's immigration laws.²²⁶ Their echo in 9/11 Commission staff reports underscores the stalemate that exists when executive priorities and judicial imperatives are neglected — or, in the case of immigration courts and immigration enforcement, collide. The *9/11 and Terrorist Travel* report provides an objective assessment:

“The verdict for the INS [now DHS agencies USCIS and ICE, among others] as an institution is that a poorly organized agency with a poor public image and low self-esteem never received adequate support from within its own leadership, its parent Justice Department, the Congress, or the White House to take itself seriously or be taken seriously as having a key role in counterterrorism. Thus

no one at the White House or in the Justice Department noticed that INS leadership was unaware of the White House after-action work on the northern border in 2000 or of the July 5, 2001, White House meeting of enforcement agencies to discuss the heightened state of threat under which the rest of the government was operating. Meanwhile, the hijackers were seeking entry into the United States — and succeeding in an atmosphere in which the priority was neither enforcement nor counterterrorism.”²²⁷

Withering criticism of the tax board — like the criticisms directed at the old INS, the present DHS and today's immigration courts — became a catalyst for reform. An attempt to recreate the Board as an independent agency within Treasury failed. Instead, the Board assumed powers that cemented its role as a court of law rather than an administrative body. Its distinct mission of settling revenue disputes between the government and private parties spurred Congress to recognize its “exclusively judicial function.” This change made the Court's decisions reviewable under the same standards as those applied to federal district court judgments sitting without a jury (“clearly erroneous” or “abuse of discretion”).²²⁸ Enhancing these attributes, the Court in 1954 received authority to enforce its own orders and sanction contempt. Its independent status and unique function as a legislative tribunal steadily evolved from administrative body to Article I court.²²⁹

Statements by the Office of Management and Budget (OMB) acknowledge the immigration courts' distinct role as the “only entity” providing due process in immigration proceedings. The courts do not “compare ... to other judicial programs,” OMB found:

“EOIR is the only entity charged with providing due process to individuals in immigration proceedings. Although DHS has certain adjudicatory responsibilities in the immigration arena, none of them falls

into the category of judicial proceedings in which there is a government trial attorney contesting the individual's claims. DHS' adjudications involve only affirmative petitions, not adversarial administrative tribunals during which an individual may defend himself against charges brought against him. A comparison with other agencies devoted to immigration adjudications would be inherently difficult to perform due to EOIR's mission of providing due process. Any comparison would show that EOIR either grants or denies more claims and neither of those indications would provide a way to determine whether EOIR was performing well and fulfilling its mission. EOIR cannot compare its program to other judicial programs because immigration cases are so distinct that they do not closely mirror either civil or criminal proceedings. Instead, they are administrative cases that are carried out in an adversarial setting with a government attorney bringing charges against the alien. In addition, immigration cases are very complex, with a variety of extenuating circumstances, such as persecution, and subjective circumstances, such as "hardship." Therefore, to compare EOIR's program with other agencies involved in judicial proceedings would be inherently difficult."²³⁰

OMB's characterization squares with the courts' identity as judicial in character. OMB notes that judges frequently "circuit ride," meaning judges visit other venues to hear cases. Their rulings are binding unless overruled by the Attorney General or a federal court.²³¹ OMB concluded, however, the courts are only "moderately effective" in serving their mission.²³² Perceptibly, OMB observed that "[a]s enforcement actions by DHS increase, so too do receipts of matters at EOIR." However, "EOIR is not guaranteed commensurate increases in resources."²³³

Fiscal shortfalls explain, in part, why immigration courts are impaired. But between judgment and enforcement lies the real impairment — the

disconnect — that encourages disregard for federal law, disregard that could be overcome simply by bringing judicial authority and the mechanisms of enforcement inside the courtroom. This disconnect has permitted years of walking away from courtrooms with measures adopted only recently outside courtrooms and none adopted inside them to curb its frequency. Blaming aliens for this disorder when government does little to fix the problem is wrong-headed.

The fault is institutional. It lies with successive administrations — both Democrat and Republican — that understand this history and have reformed nothing. Were an alien or a citizen to ignore orders or fail to attend proceedings in any other state or federal court, the consequences would be certain and immediate. Contempt proceedings, if not arrest, would result. In this respect, alien litigants are treated better than the citizens and non-citizens who appear in other courts across the United States every day. Courts able to control their courtrooms and the parties before them eliminate this dysfunction. In effect, they restore rule of law.

Independence from DoJ offers more than order. When not overshadowed by the priorities of a large, flagship department, the court's work would be unobscured. Its difficult mission would be more fully understood.²³⁴ A recent DoJ statement, absent mention of the courts, reflects the historic secondary role immigration and immigration courts have played in the life of this great institution. It declares:

"The Department of Justice serves as the Nation's chief prosecutor and litigator, representing the United States in court, prosecuting crime, enforcing federal civil laws, including those protecting civil rights safeguarding the environment, preserving a competitive marketplace of integrity, defending the national treasury against fraud, unwarranted claims, and preserving the integrity of the Nation's bankruptcy system. Efforts fall into two general categories: criminal prosecutions and civil litigation."²³⁵

This is not to say the courts are ignored. But to underscore the bankruptcy mandates of DoJ

and omit immigration provides insight. More accurately, the courts and immigration were until recent years neglected — and still are. This neglect stems from administrative courts that do not fit the mission of “the Nation’s chief prosecutor and litigator.” This neglect has permitted annual reports that poorly account for the cases — and people — that come before them. What is needed is an independent court to serve the high-minded ends for which the INA strives — a court that dignifies immigration with a court equal to the importance of immigration itself.²³⁶

Given the complexity of tax disputes, a court fully vested with judicial authority was a remedy for order. That such a court should be created for immigration purposes, its structure and procedures must be substantive. Its judgments must be consequential, its jurisdiction broad and undisputed as to the enforcement agencies of DHS.

To make the tax court a respected forum, Congress found “the interests of precision, publicity of proceedings, and the establishment of a cohesive body of precedents were of paramount importance and could only be achieved by a judicial-type body.”²³⁷ A federal immigration court must be modeled on this description. In important ways it already is.²³⁸ Vesting the courts with continuing jurisdiction and the ability to enforce judgments replaces the defects that have for years encouraged disregard for the only federal courts with which many aliens — legal or illegal — have contact. With an empowered court, fraud, errant removals, delayed relief, court-skipping, and unenforced orders would recede.

Change is necessary. Old ways of doing things are inadequate. The tattered policy of separating adjudication from enforcement is a failure. This failure, however, has support. OMB finds EOIR “cannot adopt outcome measures for the adjudicatory aspect of [its mission] because [it] is an impartial body established to decide immigration cases.”²³⁹ It declares “specific outcome measures, such as an increase in the number of final orders of removal or grants of relief,” “would violate the agency’s mission.” It rightly concludes “each case is decided on its own merits.”²⁴⁰ And OMB is right, but there is more to it than this.

Success cannot be measured by removal orders or grants of relief. Such measures are false. Nevertheless, the courts’ impartial mission is advanced by sentient finders of fact and law enforcing their judgments in the same forum in which cases are tried. American courts, both state and federal, do it every day with notable success. Authoritative courts offer the superior path for the wise exercise of government authority in immigration matters. Judges with knowledge of the parties and the law of the case are the most effective extension of federal power against the present system of fragmented adjudication and enforcement.

Judicial supervision provides protections that DHS safeguards can only attempt.²⁴¹ Reforms that equip courts with discretion to affect relief or removal or any other gradient of justice authorized by law will encourage the striving, the marginalized, and the persecuted. They will just as effectively discourage the suspect applicant and the would-be offender — an effect both immigration courts and immigration enforcement presently seldom achieve.

A forward posture is needed here. The challenges by which borders are made sovereign, security assured, and rule of law restored are not subject to quick fixes. Decades of neglect cannot be reversed overnight. Wise, patient, and disciplined policymaking and good leadership are the cures. A platform upon which to build is in place. A code of law is present which in many respects should be retained. Common law precedent is well established. Judges are respected as diligent, informed jurists. Prosecutors and enforcement officers perform difficult missions with exceeding commitment. A private Bar provides attorneys whose word and work are trustworthy. These are the sinews of an effective court and the bedrock of an adversarial process that works. From these a new court can be fashioned.

The nation that can provide the means by which tyrants are defeated and peace is won, that can eradicate smallpox and polio, direct powerful rivers, search ocean depths, and explore space can just as implacably secure its borders. It can provide its judges, prosecutors, and officers with those tools required to serve the ends of justice. The country that can do these is likewise capable of giving relief to persecuted peoples and remove those whose

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presence is a violation of law. A court of law — an Article I court — serves these many purposes. The present court — along with its Justice Department management — does not. It remains a court built to fail — one whose rulings are often ignored, whose records deceive and whose consequences are empty.

The Productive Courts

Trial judges hold court daily. Some hearings require only basic evidence taking, followed by entry of an agreed or unopposed order. Trials conducted in asylum,²⁴² adjustment of status,²⁴³ and cancellation of removal²⁴⁴ form the core of most judges' caseloads. These trials usually take from one and a half to three hours from start to finish.²⁴⁵ Some matters, however, require a full day, if not several. Regardless, judges are uniformly prompt and informed. The legal processes they manage are orderly and attest to applied legal norms. Their productivity is remarkable. If one thing may be said about them, it is this: *immigration judges work*. Numbers prove it.

From 1996 through 2009, trial and appellate courts completed 4,670,036 matters coming before them.²⁴⁶ Courts issued decisions in 2,857,390 cases.²⁴⁷ Court records for 2009 give insight to the tremendous pace of decision-making. In that year, trial judges received 391,829 cases and completed 352,233, or 89 percent of all matters coming before them.²⁴⁸ Of these 352,233 completions, 232,212 were cases where judges made decisions "on the merits" or, put another way, ordered aliens deported or granted them some form of permission to remain in the United States.²⁴⁹ The courts' efficiency is also remarkable.

In 2006, the courts' busiest year on record, 218 trial judges received 351,301 cases — and completed 366,027 cases. In other words, trial judges completed 14,726 more cases than they received by finishing cases from earlier years.²⁵⁰ Such examples present a diligent court²⁵¹ — a court whose judges meet challenges unparalleled by other state and federal tribunals that not only enter judgments, but enforce them as well.

The BIA, too, measures up well. In 2006 alone it finished 41,475 appeals.²⁵² From 1996 through 2009, its members finished 493,666 alien appeals and administrative appeals from DHS,²⁵³ made up of 448,549 appeals from trial court rulings and 45,657 DHS administrative decisions.²⁵⁴ The backlog of more than 57,000 unfinished appeals identified by Attorney General Ashcroft in 2002 has steadily decreased. Still, it is high. Nearly, 28,000 cases are still on the books.²⁵⁵ To the BIA's

credit, it now finishes more cases each year than it receives.²⁵⁶

Comparisons from 2006, likewise, prove an able court. Total productivity in that year — the trial courts and the BIA put together — equaled 407,487. In the same year, the Criminal, Civil, Civil Rights, Tax, Anti-Trust, National Security, and Environment and Natural Resources Divisions at DoJ, along with U.S. Attorneys' offices, produced 289,316, trials, appeals, investigations, program assistance and advisory work.²⁵⁷ Federal district and circuit courts — with much greater resources and distinctly different caseloads — concluded 414,375 civil and criminal cases.²⁵⁸ This favorable comparison is enhanced by other numbers.

In 2006, immigration trial and appellate judges did not exceed 233. Active judges sitting on federal trial and circuit benches were 857.²⁵⁹ When the 414 senior judges are included, 1,271 judges filled district and circuit benches.²⁶⁰ A ratio of more than five Article III judges for every immigration judge reveals an efficiency and work ethic that annual reports don't capture. This level of productivity underscores a maturity in jurisprudence that justifies improvement in the court's status — a status as vital to the United States as immigration itself. The broad array of questions immigration courts consider, combined with steep caseloads, demonstrate that vitality. Still, serious defects limit the courts' effectiveness. Among them are growing backlogs.

Over the last 10 years backlogs have grown 70 percent. A Syracuse University study discovered this build-up. Today the backlog exceeds 260,000 cases — 260,000 cases that remain untried — that EOIR never mentioned to Congress.²⁶¹ On average these burgeoning caseloads leave judges no more than 73 minutes to give each case coming before them²⁶² — excluding the inventory of backlogged cases. Even worse, the number of judges — compared to growing caseloads — is still lopsided. Despite promises that judicial ranks would increase,²⁶³ steep caseloads are still the norm. Lately, more judges have been appointed and individual caseloads are shrinking.²⁶⁴ Only time will tell if these fixes are effective.

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More judges — judges empowered to enforce their rulings — are the remedy. Not enough judges may explain why expedited asylum cases — the largest and most critical group of asylum matters the courts hear — have not been reported for the last five years by EOIR.²⁶⁵ Crushing caseloads, minus an adequate corps of judges, prompted the American Immigration Lawyers Association's president to observe "If you go into these courts and see the workload, you ask: Is this a real American court?"²⁶⁶ Even with the recent increase in judges, the answer, sadly, is no.

But there are two more questions, questions not asked by TRAC. Why did EOIR not tell Congress and the public about the backlogs? Why

did it take an outsider to reveal what EOIR could have and should have revealed through its annual reports? TRAC's findings only further the case for an independent court.

While independence alone is no surety for accurate reporting, independence provides a direct relationship with Congress that makes accountability more likely. It is independence that both the American public and its immigrant population can look to for impartial and authoritative decisions that are enforced with the same diligence as they are decided. For the courts built to fail lack for more than just authority. They lack candor and absent candor their failure is complete.

The Unreported Courts

I. Asylum: The Gateway Application

Asylum is the most common type of case filed with the courts. It is also the only case that comes close to being fully reported by the Justice Department. It composes, however, a shrinking percentage of the court's business.²⁶⁷ Nevertheless, it is the gateway application — the means used to enter the United States when a visa cannot be obtained. But once asylum seekers get into the United States, nearly half give up their claims and pursue other means, such as marriage, to remain in the United States. Getting in comes first. Staying in comes next.²⁶⁸ Numbers prove it.

From 1996 through 2009, 53 percent of all asylum claims — 461,040 of 874,149 — were withdrawn, abandoned or transferred to other courts prior to trial. This total is made up of 259,359 asylum claims transferred to other courts — another way of saying changed venue — 148,599 withdrawn applications, and 53,082 abandoned claims. Nowhere does EOIR tell what happened to these cases and the aliens who filed them.²⁶⁹ Annual reports state many of these cases became new filings in the same or next fiscal year. Yet no accounting traces these cases to later filings or discloses how they were concluded. Here, Congress and the public are denied visibility on more than half of the courts' caseload. The frequency with which asylum is sought and then not pursued suggests the maxim — directing aliens to *find a way in* — and the corollary — directing that *once in, find a way to stay* — contain hard truths that only accurate numbers reveal. Not only accurate numbers, but court directives reveal the dysfunction in trial courts when litigants attempt to delay their cases to gain advantage or find a friendlier court in which to have their case heard.

A 1997 memo from then-Chief Judge Michael Creppy to trial judges addressed the “Large Venue Caseload.” Judge Creppy urged judges to carefully consider venue changes to prevent “delay, harassment [of judicial processes] ... and judge shopping.”²⁷⁰ Since 1996, 30 percent of all asylum applications were removed from trial calendars so aliens could have their cases heard in courts differ-

ent than those they were originally filed in.²⁷¹ No doubt many transfers were sincere, but many others, as Judge Creppy's memo suggests, were suspect.

Much is left unexplained with respect to asylum cases in general, but even less is known about the largest category of asylum cases — the category known as expedited asylum. It is here that the productive courts become the unreported courts.

II. Expedited Asylum: Another Gateway Application

Expedited asylum cases make up the vast majority of all asylum matters. Since 2005, expedited asylum cases have made up 64 percent of all asylum applications.²⁷² By statute, these cases must be tried within 180 days of being filed.²⁷³ Despite these large numbers and the statutory deadline, the Justice Department has reported nothing since 2004 regarding the courts' compliance with this deadline.²⁷⁴ No annual reports indicate how many claims were granted or denied or how many were transferred, withdrawn, or abandoned. No reports tell how many aliens seeking expedited asylum were detained or were released from detention and then skipped court. The disorder that Congress sought to end in 1996 when it enacted the expedited asylum statute is now disorder caused by the Justice Department²⁷⁵ — not aliens seeking asylum. When 40 percent of all aliens free pending trial evade court and when 64 percent of all asylums are expedited cases, the same disappearing acts that Congress sought to end in 1996 may still be occurring with the Justice Department complicit in this cover-up.

Not reporting how quickly these cases are heard and what becomes of the people who seek expedited relief returns the courts to the same delays, uncertainty and court-dodging that prompted Congress to create expedited asylum in the first place. Blame for this disarray rests squarely upon the institution that has created it and the indifferent reporting that has enabled it. Some history puts things in context.

With passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress noted the *enterprise* that illegal entry into

the United States had become. Playing upon the predictable sympathetic response of American customs agents, aliens showed up at U.S. airports with fraudulent entry documents or no documents at all. Claiming a “fear of persecution”²⁷⁶ if returned to their home countries, aliens entered the United States with the permission of American officials. Lengthy delays between their admission and their asylum hearings allowed many to disappear — to literally run away. Stated the House Judiciary Committee Report:

“One urgent problem in recent years has been the arrival at U.S. airports of smuggled aliens who possess fraudulent or otherwise invalid travel documents, or who have destroyed their documents en route, and who make claim to asylum in order to be able to remain in the United States. Because of delays in the asylum system, hearings were often scheduled for months later. If not detained, the aliens would most often disappear and become long-term illegal residents.”²⁷⁷

The solution to this problem was *not* a blanket refusal of admission to aliens making claims of persecution who possessed only fraudulent papers — and sometimes only a pity-filled story. Instead, the present statutory scheme — a fact-finding method — was adopted by Congress that still allowed many to enter. It works this way:

Under “expedited asylum” an alien who willfully misrepresents himself to gain entry into the United States is inadmissible. Such an alien may be removed without any further hearings or review — unless he indicates a fear of persecution. Aliens who make such claims are placed into an expedited asylum process and receive a “credible fear” hearing to determine if there is support for their claim.²⁷⁸ An asylum officer — a DHS employee — makes this determination.

One method requires an alien to submit an asylum application “affirmatively” at a DHS Asylum Office. If denied, the applicant must then be referred to an immigration court within 75 days of filing his asylum claim. The second method for

expedited asylum directs that an alien file an application “defensively” with an immigration court, if DHS refuses his claim of persecution.²⁷⁹ Since both fraud and persecution are at issue, such cases must be heard swiftly. Urgency gives the proceeding the name “expedited.” But neither the innate urgency of these cases nor the requirements of the statute have made any difference to EOIR. No one — not Congress and certainly not the public — knows whether the courts are meeting the 180-day deadline to hear these cases or what becomes of those aliens who file these claims and are permitted to remain free pending trial.

Indeed, over the past six years, compliance with this mandate is entirely unknown. EOIR last reported on it in 2004.²⁸⁰ For that year, 89 percent of all expedited matters were tried before the deadline had passed.²⁸¹ Since then, reports say nothing about whether this statutory deadline has been met for a caseload that composes more than three-fifths of all asylum cases. What EOIR *has* reported to Congress in the last six years does not begin to address the 180-day mandate at all. Instead, EOIR sidesteps the issue. EOIR acknowledges the deadline and congressional expectations and says little more.²⁸² EOIR specifically omits how many cases are completed on time and how many are not — despite full disclosure of these numbers in years past.²⁸³ All that EOIR reveals are caseload figures showing how many expedited cases were received and completed.²⁸⁴ It produces graphs showing that at least half of all asylum cases received each year fit the expedited asylum profile.²⁸⁵ Production figures show more cases completed than received.²⁸⁶ Yet EOIR refuses to tell how many cases were heard within the statutory 180-day deadline. Other factors — factors relating to backlogs — provide insight to this failure. Getting any case to trial frequently takes more than a year.²⁸⁷ Add to this time the fact that many aliens, whose asylum cases take a year or more to adjudicate, entered the United States legally through visas more than a year before their first appearance in court.²⁸⁸ By the time appeal to the BIA is concluded, another eight months and up to year and a half passes, but often, it is more. At a minimum, another year will pass, if the matter is appealed to a circuit court.²⁸⁹

The life span of litigated cases — the trials of which generally take less than three hours²⁹⁰ — is frequently five years or more. The life span of backlogged cases is even longer. The insight, if not the answer, is too many cases and not enough judges and, more specifically, not enough judges with authority. Regardless, this dysfunction does not excuse EOIR from its statutory obligation to faithfully report statistics that accurately describe the courts' efforts — an obligation it appears incapable of doing. EOIR's absent reporting does not correct these problems. Rather, it aggravates them. A bottleneck stretching back 11 years uncovered by Syracuse University's TRAC program in 2009 went unreported by EOIR until its presence could not be denied by court officials.²⁹¹ In this case, as in others, absent reporting buried lagging caseloads and, just like bad bookkeeping and misleading numbers, its effects are felt well beyond their immediate impact.

Under the present system, the 180-day rule for expedited asylum adjudication burdens the courts beyond their present ability to meet deadlines and satisfy deliberate justice.²⁹² But it is no excuse for deceptive reporting and mute numbers that fail to tell whether large numbers of aliens seeking expedited asylum still run when chance permits. EOIR fails to report on a caseload occupying nearly 65 percent of the total asylum cases and the vast majority of all applications filed with the courts. Resources — material, legal, and, most of all, human — are insufficient. The corps of judges, despite recent improvements, is too small²⁹³ and court staffs smaller still.²⁹⁴ Official reports to Congress disclose nothing regarding backlogs or the conditions causing them. Yet the law is plain — 180 days to hear and decide such cases — and plainly unmet by being disregarded. And, if not disregarded, then simply *unreported*.²⁹⁵ More judges should help, but more judges alone are not enough. Authoritative courts augmented by sufficient resources are the solution.

America's history as a haven from persecution and a harbor for industry, innovation, and employment assures greater failure of immigration courts — and public disgust — if these practices continue. Candor in annual reports that would alert Congress and the public to problems is lacking. The need for an independent court — a court

divorced from executive priorities and political considerations — fills the need for accountability and transparency this agency cannot — and will not — provide. The problems of immigration courts recommend a solution. For the courts now built to fail that solution is an Article I court.

III. Failures to Appear in Court: Lies, Damned Lies and Statistics

Failure of aliens to appear in court — another name for court evasion — is a chronic problem, a huge one that has never been admitted by EOIR. The problem, however, is two-fold. First is the fact itself: *many aliens evade court*. Second is the way EOIR reports these failures: *EOIR games the numbers*. In short, its numbers are slippery and truth is a casualty.

From 1996 through 2009, 40 percent of aliens who were free pending trial never showed for court. In raw numbers, 769,842 aliens out of 1,913,507 aliens free before trial failed to appear.²⁹⁶ For their failure to obey federal law and appear at their hearings, these persons were ordered removed from the United States.²⁹⁷ Within these numbers were 45,000 persons from nations that abet terror.²⁹⁸ Never across 14 years of reporting have these misses been truthfully reported. Accurate numbers

Table 1. Failure to Appear Rates, 1996 to 2009

	Reported Rate	Actual Rate
1996	21 %	38 %
1997	21 %	35 %
1998	25 %	34 %
1999	24 %	34 %
2000	21 %	31 %
2001	20 %	30 %
2002	25 %	45 %
2003	22 %	37 %
2004	25 %	42 %
2005	39 %	59 %
2006	39 %	59 %
2007	19 %	38 %
2008	16 %	37 %
2009	11 %	32 %

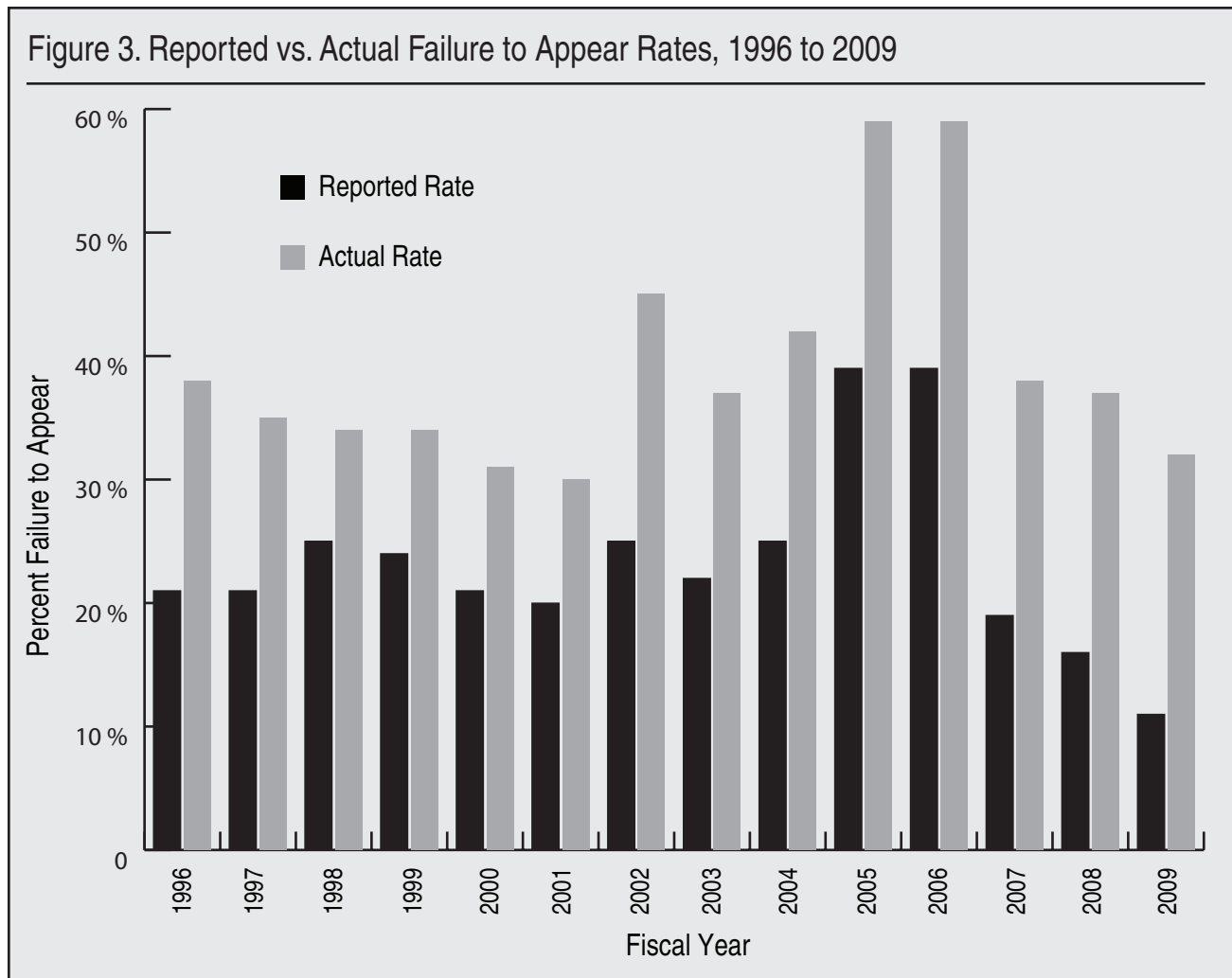
that would have alerted Congress and the public to the severity of this court dodging were at best understated. At worst, they led lawmakers to look past hundreds of thousands of aliens abandoning court and disappearing from federal law enforcement. EOIR's cosmetic reporting has fueled what ICE has termed the "burgeoning fugitive alien problem in the United States."²⁹⁹

Admittedly, EOIR discloses that non-detained aliens fail to appear in large numbers. It goes further by reporting these dynamics in tables that depict these broad failures. But this agency cannot let the numbers speak. It consistently uses made up, meaningless numbers which belie how frequently aliens evade court. It artfully does this by measuring what it calls the "overall failure to appear rate" — a rate that throws together aliens free before trial with aliens held in detention throughout trial. From one fiscal year to another, EOIR headlines much lower and unrepresentative numbers throughout its

annual reports, insisting that failures to appear in court are much smaller than candid bookkeeping supports. The very serious problem of aliens running from court is perpetuated by EOIR itself. This dynamic, however, does not get past DHS.

In laying out the facts regarding court evasions, DHS, in 2006, pulled no punches. Its ability, it stated, "to detain and remove illegal aliens with final orders of removal" was hindered by [their] "propensity ... to disobey orders to appear in immigration court" and the "penchant of released illegal aliens with final orders [of removal] to abscond."³⁰⁰ Unenforced removal orders resulted. The story begins, though, with aliens the United States permits to remain free pending trial.

The aliens most likely to evade court are those who are not detained. Two groups compose this population. One group is those aliens released from detention who assure officials they will appear in court. The other group is those who were never



detained, but instead are summoned to court.³⁰¹ Together they are the non-detained population. They are the story that EOIR does not tell.

A third population figures in this discussion. This is the detained population, those held in detention pending trial. From 1996 through 2009, 1.3 million aliens held in custody finished their cases.³⁰² Their failures to appear in court were negligible.³⁰³ Less than 2 percent of this population, as of 2001, missed their court dates.³⁰⁴ When they did miss, trial courts declared their failures unintentional because they involved illness or transportation breakdowns, conditions over which detainees had no control.³⁰⁵ When illness passed or transportation arrived, court appearances were made. Judges acknowledged these innocent misses by simply ordering new hearing dates. Removal orders were never issued.

In calculating failure to appear rates, EOIR defaults to its old standby — apples and oranges math. It adds together these two very different groups, the detained and the non-detained, and does this (so it says) to determine the “overall failure to appear rate.” In doing so, it provides poor guidance. Combining these two populations produces dramatic results. It shrinks failure to appear rates and makes things look much better than they are. Shrinkage occurs because detained aliens — aliens who must appear in court — always make their court dates. Non-detained aliens, by contrast, often evade court — in 2005 and 2006, they skipped court 59 percent of the time.³⁰⁶ Shrinkage also occurs because, historically speaking, detained and non-detained aliens who show for court significantly outnumber the non-detained aliens who fail to show. When calculated like this, failure to appear rates are bound to decline. They are certain to look much lower and for purpose of reporting to Congress much better. A fresh — and truthful — approach is needed.

A truthful approach simply means figuring failure to appear rates based solely on non-detained aliens.³⁰⁷ Calculation like this yields accuracy because it compares the same population — those aliens free pending trial. Failures to appear in court, EOIR admits, are not driven by those in detention.³⁰⁸ The driver is non-detained aliens — those

free pending court. Despite this, EOIR reports failure to appear rates based largely on those aliens who nearly always appear in court — the detained population. When aliens held in custody are removed from calculations, similar populations are compared and accurate readings are taken.³⁰⁹ EOIR’s old — and misleading — way of doing things is not only substandard, but also perpetrates a fraud upon on a problem of national dimensions.

In 2008, EOIR stated aliens’ “overall failure to appear rate” was 16 percent.³¹⁰ EOIR combined the detained and non-detained populations to produce this figure. When only the non-detained population is measured, the failure to appear rate more than doubles. Dividing non-custodial detained aliens who failed to appear (38,200) by the total non-custodial population (103,571) reveals 37 percent of those outside custody chose to evade court.³¹¹ The same math reveals 38 percent evaded court in 2007 — double the number (19 percent) EOIR reported to Congress.³¹² Comparing like populations shows that accurate failure to appear rates have been significantly understated by this agency over the last 14 years.³¹³ In short, suspect statistics produce suspect results.

EOIR’s numbers simply cannot be trusted.³¹⁴ This distrust is not just about the method EOIR has used to tell Congress how many aliens evade court. It is, instead, about an agency that has muted numbers that would have given Congress and the public accurate statistics that revealed the true depth of the problem. Distrust of these numbers, likewise, has a context well beyond EOIR’s annual reports. In a time of peace, these slack numbers may be viewed by some as harmless understatement. In a time of porous borders, drug cartels, alien smuggling, immigration fraud, and a war on terror, they conceal risk to national security and compromise to American neighborhoods. They disguise the actual weakness of courts and enforcement. Inevitably, they diminish public confidence. The five years on either side of September 11, 2001 — when viewed without EOIR’s blinders — reveal disturbing numbers EOIR never shared with Congress.

Court evasions did not decrease after 9/11. They increased. From 1996 through 2000, 251,309 of the 726,164 aliens free pending trial disap-

peared.³¹⁵ By fractions, 35 percent of those persons the United States allowed to remain free never showed for court.³¹⁶ What happened next is a horror story. Over the five years following 9/11 failures to appear in court skyrocketed. From 2002 through 2006, 50 percent of all of litigants free pending trial — 360,199 out of 713,974 — evaded court.³¹⁷ Raw numbers reduced to reliable statistics prove the point. They show the problem is much larger than EOIR admits. They are tangible evidence of a problem not going away anytime soon, unless courts are vested with greater authority to control government and alien conduct. Failures to appear are aggravated not just by EOIR's bad numbers, but also by EOIR's mislabeling what it actually measures.

In reality, EOIR does not measure failure to appear rates. What EOIR calls the “failure to appear rate” is really the “in absentia” order rate — the frequency of removal orders for failures to appear out of total court decisions.³¹⁸ EOIR's preferred nametag for court evasions — failure to appear rate — does not simply mislabel. It misleads. The following explains why.

First, EOIR declares “failures” of *detained* aliens to appear in court are so rare they are not broken out in annual reports. Then it includes them in its calculations without disclosing their number.³¹⁹ Secondly, detained aliens' failures to appear and the consequences of their missing court are distinctly different from those of non-detained aliens. Detained aliens who miss court are given new dates to appear because their misses are unintentional. Non-detained aliens who fail to appear do so intentionally. They are ordered removed. Thirdly, the effect of including detained litigants in calculations has for years masked the severity of court evasion.

EOIR uses a label — “failure to appear rate” — and this label mischaracterizes litigants, aliens all, as absconders when the problem is actually limited to one part of one group: *non-detained aliens who evade court*. This label impairs congressional oversight. It promotes stereotypes. It denies understanding of a grave problem and it delays needed reforms. The opportunity for EOIR to have provided Congress and the public with critical analysis has been ignored by an agency that invoked for the courts an “important” role in counter-terrorism,³²⁰ and then

blurred what its grave responsibility should have prompted it to clearly disclose. Errant reporting is not incidental in the life of these courts. It is, in fact, routine and its effect is nothing less than corrosive.

Liberty and order fail when essential facts are cloaked inside a phrase — “overall failure to appear rate” — that hides the truth.³²¹ Mislabeling misleads and errant reporting compounds the defect. Instead of precision and candor, Congress receives audits from DoJ and EOIR that prove Mark Twain's observation that there are three kinds of lies — “lies, damn lies, and statistics.” EOIR's 2009 annual report further proves there is more truth than humor to Twain's adage.

IV. Failures to Appear In Court in 2009: Creative Accounting 2.0

For 2009, EOIR told Congress that failures to appear in court dropped to historically low levels.³²² The numbers — when clearly stated — tell a far different story. EOIR declared that only 11 percent of alien litigants failed to keep their court dates.³²³ The real number was 32 percent.³²⁴ — 32 percent of aliens free pending court evaded their hearings. EOIR reported a figure nearly three times lower than the actual number.

Not only did EOIR once more merge two different groups — those outside detention with those inside detention — to lower the true figure, it also dropped a whole category of litigants whose failures to appear had been included in past years' calculations. Dropping this category — litigants whose court misses resulted in their cases being closed³²⁵ — caused 2009 failures to appear to decline. Had they been included, failures to appear in court would not have decreased. They would have remained where they have been since 1996 — ranging between 30 percent and 38 percent of aliens free pending court. Only by removing this category from calculations did EOIR manage to show a decline in failures to appear. EOIR did not stop here, however. It went well beyond its convenient apples and oranges math. It rewrote history and, as usual, told no one.

EOIR lowered historic failure to appear rates — rates from 2005 through 2008 — and never told anyone. Not Congress, not the public, not

advocates on either side of the immigration debate. None were told about this rewrite of evasion rates. Skepticism is once again justified by bookkeeping that does not square with transparency, much less honesty. EOIR lowered failure to appear rates for 2005 through 2008 by doing the same thing it did in 2009. Cases administratively closed in these years for failure to appear in court were dropped altogether from calculations.³²⁶ In doing so, court history was rewritten.³²⁷ Once again, EOIR merged two different groups — this time those whose cases more directly related to failures to appear and those whose cases did not — and *excluded* both from its reports. EOIR implicitly admitted that a portion of these administrative closures directly related to aliens who missed court.³²⁸ Rather than break out these figures and include the relevant cases while excluding the irrelevant ones, EOIR excluded both.²³⁹ In turn, failure to appear rates dropped — not just for 2009, but all the way back to 2005. Practices such as this invite distrust and affirm the public's growing sense that government is serving its own ends not those of the public.

Disbelief of EOIR's reporting is justified. Because administrative closings — cases closed, at least in part, because aliens failed to appear in court — rose from 2006 through 2008,³³⁰ this category grew, rather than declined, and its exclusion from failure to appear calculations invites more doubt. Equally troubling is the fact that EOIR did not reveal how it finally accounted for these cases it excluded. Nowhere in its 129-page annual report does EOIR state what happened to these cases it chose not to count in a category critical to understanding court performance and alien conduct. EOIR's bookkeeping on this point — as on so many others — is, once more, substandard.

Guidance authored by the National Research Council³³¹ indicts EOIR's weak accounting:

“Statistics that are publicly available from government agencies are essential for a nation to advance the economic well-being and quality of life of its people. Its public policy makers are best served by statistics that are accurate, timely, relevant for policy decisions, and credible. ... [T]he operation

of a democratic system of government depends on the unhindered flow of statistical information that citizens can use to assess government actions.”³³²

How EOIR developed this bookkeeping is irrelevant. One thing is certain, though. It did not adopt the commonsense methods used by the Bureau of Justice Statistics (BJS) — another agency within Justice — to describe court evasions. BJS also calculates failure to appear rates, but it calculates them much differently — and honestly. To determine failure to appear rates of felons in state criminal courts, BJS compared only non-detained persons.³³³ At all times, detained persons are excluded from its yardsticks. BJS samples only those persons released from detention who miss court against the entire non-detained population. Its comparisons — and its findings — are instructive.

While as many as 59 percent of non-detained aliens fled immigration courts, not more than 24 percent of state court defendants dodged court after being released.³³⁴ As many as 21 percent of state court defendants who evaded court were rearrested.³³⁵ Not more than 6 percent of fugitive aliens who skipped court were caught.³³⁶ Authoritative state courts complemented by effective state enforcement diminished court evasion. Not so with those who evaded immigration courts. Frail courts could do nothing about this disorder — and the Justice Department did nothing as evasions went all the way to 59 percent. The end result was just as predictable as it was avoidable. As recently as 2006, DHS predicted many fugitive aliens would never be found.³³⁷

Despite a history of aliens evading court — a history that goes back decades — no measures to strengthen courts have been proposed. Aliens still cannot be compelled to appear in court. Courts can neither impose conditions that encourage attendance nor sanction failures to appear with anything other than removal orders that will never be enforced. When more than one million aliens illegally enter the United States each year or enter legally but overstay their visas,³³⁸ a problem of national scope begs a solution of national scope. When 40 percent of those persons allowed to remain free over the last 14 years

fail to appear in court, the same nation-wide problem requires a court of equal magnitude.³³⁹

If no-show rates in state and federal courts were like those in immigration courts, investigation and reform would follow. If a citizen or non-citizen in any other court chose without good cause to avoid court, his arrest would be certain. But not in immigration courts. Court-dodging prompts deportation orders that seldom result in arrest, much less removal. Forbidding trial courts authority to regulate appearance has caused — and now fuels — a problem already out of control. Instead of providing order, judicial frailty promotes a policy of “rule and release.” Judges rule and, without authority to do more, the litigant is released — often to disappear. Courts are further hindered by EOIR’s outdated regulations.

By regulation, EOIR declines to monitor its courts’ orders — orders granting relief as well those directing removal.³⁴⁰ This is nothing less than disarming a court system through rules that DOJ could, along with DHS, revise at any time. Appearance and supervision mechanisms like ankle bracelets and reporting routines, mechanisms used broadly in state and federal courts across the country, remain largely untried in immigration courts.³⁴¹ Their use by immigration enforcement officials is, however, widespread.³⁴² The high cost of rearrest and the likelihood that many who skip court are never found has not brought reform or anything like it. The simple need for effective courts recommends reforms that bring authority into courtrooms.

Failure to appear rates — evasion rates — do not measure accident. They measure intent. They measure calculation that more can be gained by evading court than by obeying court orders. Weak immigration courts only reinforce such calculations. In the logic of aliens looking at all their options, weak courts are not a variable. They are a constant. Allowing enforcement agencies to pursue arrest and detention policies free of judicial review is not a strength. It is a weakness. Enforcement without judicial review eventually prompts the same misconduct it was intended to stop — just like it does now. Courts that can impose order and at the same time adjudicate liberty interests provide the seamlessness between courts and enforcement agen-

cies that DOJ and DHS have rejected. Rejecting rule of law solutions denies to courts the authority to act as courts. This rejection gives to ICE discretion to prioritize deportation orders and, in the end, to ignore them. In reality, court orders are not enforced, but ICE enforcement priorities are. Regardless of good intent, prioritization is simply at odds with effective judicial processes and an American public that expects non-citizens to obey the same laws that citizens must obey.³⁴³ There is a better way and that better way is an authoritative court.

In authoritative courts, judges would act as judges. Working in concert with enforcement personnel, prosecutors, and private counsel, they would impose restrictions that assure appearance throughout proceedings. For what actually happens in immigration courts shows why courts are ineffective. Many aliens ordered removed walk from courtrooms never to be seen again — or never came to court to begin with. Upon receiving orders that direct their removal from the United States, few aliens obey them. They know — know from their attorneys, family, friends, and their community — that enforcement is so rare that removal orders,³⁴⁴ like visas, are meaningless.³⁴⁵ A Justice Department Inspector General study gives proof.

In 1996, DOJ’s Inspector General found that the old INS program for deporting illegal aliens was mostly ineffective. The IG concluded that 89 percent of non-detained aliens ordered removed were not deported. They were not deported because they could not be found.³⁴⁶ The same is true today. The authority of authentic courts — courts that gauge their orders between unfettered freedom and close custody — temper evasion. Such authority reduces incarceration by applying milder measures wherever feasible. Once available to courts — as they are to non-judicial officers at DHS — evasion will diminish. Trial courts fixing terms by which evasion becomes less likely use their historic ability to impose order that other state and federal courts do every day. Courts like this would restore public confidence.³⁴⁷ They would provide a unified structure in which to conduct immigration proceedings. Using these means to achieve enforcement sustains the priceless objectives of the INA and mirrors the same practices nationwide in other court systems. If citi-

zens and non-citizens must appear in other courts at the risk of contempt and arrest, aliens appearing in immigration courts should be treated no differently. This kind of unity assures authority to order relief and removal before a judge who can enforce both.

Continuing the failed policies of the past assures the same outcomes in the future. These failures fit the classic definition of folly.³⁴⁸ Folly, history teaches, is the continued pursuit of a failed course of action expecting different outcomes. It is worsened by knowledge that the course of action is counterproductive and that practical alternatives are present. Defects in America's immigration court system are now, more than ever, evident. Alternatives are present³⁴⁹ and so far their rejection is complete. Justice Department policies that for years have failed are proof that folly — not experience and certainly not wisdom — has governed the conduct of court executives. Quite simply, it never had to be this way.

Respect for our legal institutions is given as required. Since respect for America's immigration courts has seldom been required, in return, it has seldom been received. That immigration courts have not exercised greater authority to control alien conduct and direct government action reveals the same indifference — the same wooden-headedness — that allowed American borders to remain porous. Reforms that empower courts, enforce order and dignify litigants are not the products of indifference. They are the mandates that respond to legal and illegal immigration with a court equal to problems and opportunities each offers. Without authoritative courts, what has been learned is lost and the same mistakes will be repeated.

America invests in a court system molded by the immigration that began its arrival on our shores in the mid-nineteenth century.³⁵⁰ The Immigration and Nationality Act is, as a result, woven with understanding gained from each new immigrant class. As immigration has changed, laws and institutions that adjudicate and enforce it have changed. Change is again necessary.

No greater compassion may be found in any nation's laws than those that apply to the immigrant. Dignifying the refugee who flees persecution and fairly judging those whose entry is prompted by poverty — poverty of both property and oppor-

tunity — confirms this nation as foremost among the civilizations of history. Indeed, between 1820 and 2006, more than 72 million immigrants legally came to the United States.³⁵¹ Such numbers measure this nation's confidence not only in itself, but in those it has welcomed. A court whose strength follows this confidence is now essential to make effective the courts now built to fail.

V. Removal Orders: Enforcement Is a Mirage

Evasion rates brushing 60 percent in recent years and ever increasing unenforced removal orders evidence the dysfunction of America's immigration courts. The American public is convinced that things are out of control³⁵² — that immigration is not controlled by America, but by the many seeking the benefits of American residence at the price of compromised security and heightened costs to taxpayers.³⁵³

Removal orders make up 80 percent of all verdicts. From 1996 through 2009, trial courts issued 2,279,234 removal orders.³⁵⁴ Fifty-six percent of these orders — 1,287,685 altogether — were issued in detention centers.³⁵⁵ If records are correct, 96 percent of these orders were enforced and actual deportations followed.³⁵⁶ A 2003 GAO audit supports this conclusion. The audit revealed:

“INS [now DHS] remains effective at removing detained aliens. Both our 1996 report and a 1998 U.S. General Accounting Office (GAO) report examined the INS's removal of detained aliens with final orders, and these reports found that the INS removed 94 percent and 92 percent of detained aliens, respectively.”³⁵⁷

Non-detained aliens — aliens free pending trial — are a much different story. In fact, non-detained aliens *are* the story. Non-detained aliens frequently evade court. Between 1996 and 2009, nearly 770,000 aliens did so and, if DHS reports are correct, they never looked back.³⁵⁸ Though deportation orders quickly followed,³⁵⁹ they were just as quickly ignored. Today, 1.1 million aliens who evaded court or disobeyed orders to leave the United States remain at large.³⁶⁰ Within this group

are 45,000 people from nations that aid terror.³⁶¹ DHS believes few, if any, of these people will ever be removed.³⁶² New enforcement rules imposed on ICE and CBP by Obama appointees assure that few aliens who skipped court or disobeyed orders to leave will be pursued, much less removed. A CBP officer — speaking on condition of anonymity — tells how enforcement efforts are sabotaged by lax policies and why removal orders remain unenforced:

“Each division is given a list in their area of fugitives. Now they are *only* [officer’s emphasis] allowed to go after the ones with [a] moderately high criminal history. They are to leave the rest alone.”³⁶³

Chris Crane — an ICE employees’ union president — confirmed this laxity. On June 25, 2010, he outlined the crippling non-enforcement strategy pursued by DHS senior management. Crane warned that a

“majority of ICE [removal] officers are prohibited from making street arrest or enforcing U.S. immigration laws outside of the institutional (jail) setting. This has effectively created “amnesty through policy” for anyone illegally in the United States who has not been arrested by another agency for a criminal violation.”³⁶⁴

So much for enforcement that removes criminal aliens and sustains public confidence. So much also for the courts that labor over removal decisions only to have them ignored at the whim of political appointees. Rule of law has become an afterthought in the hands of these DHS executives.

A third group of aliens completes this total. It is a hybrid of the first two and, by its nature, complicates enforcement. Our ability “to detain and remove illegal aliens with final orders of removal,” DHS reports, “is influenced by the practice of some countries to block or inhibit the repatriation of [their] citizens.”³⁶⁵ These countries include China and Iran. Presently, 139,000 illegal aliens, among them 18,000 convicted felons, cannot be removed.³⁶⁶ After serving their sentences in the Unit-

ed States, they can only be held 180 days. They are then released into the American population.

In 2002, 602,000 removal orders lay backlogged.³⁶⁷ Nine years later, 1.1 million orders collect dust and DoJ says it neither monitors nor enforces its own courts’ removal orders while DHS refuses to disclose just what removal orders fill its inventory.³⁶⁸ The last report on fugitive aliens — those who evaded court or who ignored deportation orders — was published in 2008. Since then nothing from DHS is known.³⁶⁹

Courts in disarray and enforcement agencies in denial are the landmarks by which America’s bearings are taken in its immigration courts. Courts estranged from enforcement and enforcement separated from court-ordered deportation rulings explain this inertia.³⁷⁰ A 2006 DHS report predicted 62 percent of those persons released from detention during trial proceedings would receive removal orders. These persons, DHS stated, would probably never be removed.³⁷¹ Experience confirms prediction. The removal rate of fugitive aliens in 2008 — an agency high — was 6.1 percent.³⁷² In other words, only 34,155 fugitives from a population of 595,000 were apprehended.³⁷³ But it was a marked improvement from 2003. Then only 1,900 fugitive aliens were taken into custody.³⁷⁴ Whether the alien is a court-dodger, a visa overstayer, or a fugitive alien on the run, removal orders are rarely enforced and numbers show just how unserious — and dishonest — the federal government is about enforcing immigration laws and reporting the truth.

While DHS admits to a backlog of nearly 600,000 fugitive aliens, it says nothing of aliens who have no criminal records, yet are subject to removal orders — aliens who ran from court and aliens who have disobeyed orders to leave the United States. The same CBP officer advised:

“I sincerely doubt [you] will find an accurate figure. Obama does not want the figures out. You are not just talking about illegal aliens. This number includes ... illegal aliens, non-immigrants, refugees, immigrants, asylees [and] ... parolees [who were

ordered removed]. If I had to take a guess I would say several million.”³⁷⁵

To be sure, no administration — not just the Obama administration — wanted these numbers out. But none of this should really surprise anyone. In 2003, DoJ’s inspector general found “INS ineffective at removing non-detained aliens.” INS, the IG found, removed only 13 percent of non-detained aliens in general and only 3 percent of non-detained asylum seekers with final orders of removal.³⁷⁶ Worse yet, only 6 percent of non-custodial aliens from countries that sponsor terrorism were removed.³⁷⁷ Removal efforts directed at criminal aliens fared best — but many of them were in custody and stayed there until federal enforcement caught up with them. Thirty-five percent were later deported.³⁷⁸

Courts and enforcement face challenges years in the making. They are hampered by laws and legal tools fashioned in a different age for different problems. These challenges run the gamut from the world’s poor and persecuted all the way to illegals with membership in MS-13. Each of these groups designs to enter America: one to prosper, the other to profiteer. A court that can authoritatively address both is essential to a nation that must confront both. Such a court offers strength to enforcement, haven to the refugee, opportunity to the ambitious, and warning to the lawbreaker. A court that can effectively do all these is the answer to the courts that are now built to fail.

VI. Errant Detention and Removal: Mistakes Are Made and Courts Are Helpless

Delay and error are just as harmful as unenforced orders. Common is the meritorious case in which an alien has waited years for relief in matters little disputed, if at all.³⁷⁹ More worrisome are wrongful detentions and removals. Through bureaucratic error, non-citizens actively engaged in proceedings³⁸⁰ find themselves on planes bound for nations that torture.³⁸¹ Ethnicity coupled with language barriers and mental illness or disability places American citizens behind bars.³⁸² Worse still, this combination sometimes places them outside the United States.³⁸³ While the brunt of errant enforcement is borne by

those whose profile suggests removal is warranted, its critics warn that DHS dragnets are overbroad.³⁸⁴ Studies and freedom of information requests recount as many as 322 to as few as eight citizens ensnared by Customs and Border Protection.³⁸⁵ The Associated Press has documented more than 55 such cases since 2000. Immigration attorneys, say reports, count hundreds more.³⁸⁶ DHS officials are not indifferent to these errors. They seek alert measures to avoid such failures and better target their efforts.³⁸⁷

Though small in total numbers, these incidents prove that more authoritative courts are a backstop against bureaucratic processes that sometimes get it wrong. These incidents are predictors as well. As both legal and illegal immigration resume their growth, these misfires will increase.³⁸⁸ Avoidable delay and errant enforcement — just like high evasion rates and unenforced removal orders — erode public confidence. Authentic, authoritative courts are the surest safeguard against these failures.

Immigration trial and appellate courts consider the most compelling questions found in law — questions of life and death³⁸⁹ — and yet are powerless to do more than issue orders they cannot enforce. To vest greater authority in these courts makes available to non-citizens a fully dimensional court capable of rulings that are enforced with the same certainty with which they are handed down. With such a court, the most compelling questions found in law are dignified with a court of equal gravity.³⁹⁰ Private attorneys who favor increased court authority amplify this argument. One, Peter Reed Hill, writes:

“I have often marveled, and sometimes lamented, that Immigration Judges do not have full power over the INS, now the Department of Homeland Security. Sometimes Immigration Judges try to assert their “authority” over the INS, such as to terminate proceedings if INS is too dilatory about adjudicating a pending relative petition necessary for their final adjudication of a case, but this type of effort by Immigration Judges to exercise their institutional authority is rare. Whatever control the Immigra-

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tion Judges have over the INS is really de facto control, not legal control. The system would be a lot fairer for immigrant families, or mixed nationality families, and for those who came to the United States at an early age and do not know their home countries and the languages of their native lands If immigration judges were given equitable powers, the individual justice rendered in the Immigration Courts would improve vastly Congress has plenary power over immigration decisions. Congress would never let Immigration Judges become this powerful. These judges might be able to do the right thing more often.”³⁹¹

Present-day immigration courts are incapable of rendering such thorough justice. The opposite is standard. A court unable to enforce its rulings substitutes for the authentic one that marshals cases to trial, rules upon their merits, and ushers in finality. A court of consequence changes all this. Authentic courts possess authority that drives cases forward. Authentic courts issue judgments changeable only by appeal and not by delay, disappearance or disregard. U.S. immigration courts lack this imperative and, without reform, will remain the courts built to fail.

Unconstitutionally Separate, Inherently Unequal

Not only can trial courts not enforce their own rulings, they cannot provide order within their own courtrooms. The inability of a judge to control his courtroom — a *disability* imposed by Justice Department regulations — also deprives aliens of their Fifth Amendment right to fair trial. Regulations do this by chilling the right to effective assistance of counsel — itself a violation of the Sixth Amendment. A dual system of attorney discipline treats attorneys representing aliens in a wholly unconstitutional manner. When compared to how their government counterparts are disciplined for the same misconduct, a separate and unequal process comes clearly into relief.

In short, government attorneys and private attorneys are treated dramatically differently in disciplinary matters. So different, in fact, that while private attorneys are exposed to public notice of their alleged wrongdoing, government attorneys avoid the same process almost entirely. DoJ insists that the different tracks by which attorney misconduct is adjudicated are separate and equal.³⁹² The certain guidance of history is the direct opposite: separate and equal means inherently unequal.³⁹³ This inequality is found not only in theory, but in practice. Weak courts produce this government-made disorder and the constitutional defects that follow. This disorder begins with judges unable to discipline their own courtrooms. It ends with aliens classified as second best when compared to the interests of government — a Department of Justice that in this case has lost its way.

Judges have no contempt authority. Attorneys and litigants cannot be sanctioned for delaying tactics or rude behavior.³⁹⁴ This anticipated, if rare, conduct cannot be addressed by the judge before whom the violation occurs. Against the weight of legal history — against the whole logic of judicial economy — judges must deal *outside* the courtroom with problems that occurred *inside* the courtroom.³⁹⁵ All that judges possess to discipline their courtrooms is discretion to complain about an attorney — nothing more.³⁹⁶

When a judge observes misconduct, he files an administrative complaint. Rather than conduct a

contempt hearing or admonish an offending party with sanctions — and end the matter right there — an administrative process takes over that once more separates the judge from his case and, in this instance, his courtroom. Once again, judges become mere witnesses, this time to conduct that interrupted proceedings. Considered sufficiently skilled to determine the fates of those appearing before them, judges are disqualified to discipline the same people they may order returned to their homelands or grant the path to citizenship. Rather than being able to warn litigants or attorneys — with the effect that a warning might avert worse conduct — judges are made bystanders by regulations. In truth, courts can sanction no one. Instead, a fragmentary process begins and the involvement of trial judges ends. And what begins are two remarkably different — and arguably unconstitutional — processes.

Judges can initiate disciplinary proceedings against both private and government counsel, but their cases will be heard at different times and in different agencies by officials remote to the court where the violations occurred.³⁹⁷ Such proceedings are separate and being separate they can neither be equal nor approach the equality which must be present when an enumerated right — such as the Fifth Amendment right to fair trial — is at issue.³⁹⁸ This is another recipe for failure and this failure falls hardest on the alien and his attorney.

DoJ disciplines private counsel.³⁹⁹ DHS disciplines prosecutors.⁴⁰⁰ DoJ strives to discipline in public.⁴⁰¹ DHS does not.⁴⁰² DHS disciplines pursuant to executive branch rules that include exhaustive employee protections. Government attorneys also receive merit system board hearings, if requested, following their own agency's ruling.⁴⁰³ Contrary to EOIR's statement, DHS has not "adopted a formal disciplinary process for its employees that provides similar hearing and appeal rights as EOIR's ... disciplinary process."⁴⁰⁴ Nothing could be less truthful. In fact, DHS attorneys enjoy safeguards that pale the processes of EOIR. The cause of this upside down approach to courtroom discipline is absent judicial authority. Issues that other courts dispose swiftly and accurately are sent from the courtrooms

where violations allegedly occurred. Inequality — the violation of procedural due process — follows.

Complaints against an alien’s attorney are heard at EOIR offices in Falls Church, Virginia.⁴⁰⁵ They mimic state bar disciplinary mechanisms which offer none of the lavish protections granted to federal employees. Matters regarding DHS prosecutors reside with the Chief Counsel where the immigration court is located⁴⁰⁶ and will be determined through a process distinctly different from that of private counsel.⁴⁰⁷ These different mechanisms are constitutionally deficient because they are substantively different. Simple questions reveal these defects.

How is impartiality assured when an agency sits in judgment of its own or the complaints of its own? How is fairness preserved when different disciplinary processes are administered by different officials in different agencies regarding the same conduct which led to the judge’s complaint? Consistent standards applied by jurists in a unified forum are the only constitutional solution.

Unified proceedings — proceedings before an authoritative jurist — serve the interests of both alien and government. Unified proceedings avoid regulatory double standards and the implication that the right to fair trial is inhibited by regulations or determined by which side of the case a person finds himself. Indeed, EOIR saw these potential defects as it created the present disciplinary scheme:

“A chief concern of many commenters was that this rule would have a chilling effect on an immigration practitioner’s ability to advocate zealously for his or her client, suggesting that both the First Amendment right to freedom of speech and the Sixth Amendment right to counsel were implicated by such a rule.”⁴⁰⁸

No matter how wide the protections granted to aliens, EOIR’s disciplinary scheme provides only half the reach that it should, with government counsel still excluded from coverage.⁴⁰⁹ “Fairness and integrity” — the fairness and integrity mentioned in the disciplinary regulations themselves — require proceedings the present disciplinary rules

neglect. Excluding government counsel from the same standards to which private counsel must answer stops far short of protecting aliens from the potential of prosecutorial misconduct. Due process and equal protection demand level — and here the same — playing fields.⁴¹⁰ Processes offering separate and inherently unequal treatment between opposing sides do not assure fairness. Certainly, they are inefficient. Worse, they are unconstitutional.⁴¹¹ Prejudice to Fifth Amendment protections is the risk and the reality.⁴¹² The plain differences between how an alien’s attorney is subject to discipline compared to that of the prosecutor shows that prejudice is embedded in the disciplinary schemes adopted by these two major departments. The potential for chilling effective advocacy is more than aggravated by this framework. It is created by it.

The rules that divert disciplinary matters into two separate proceedings achieve what they were intended to avoid. Intended to put in place a mechanism by which incompetent and unethical practice are noticed and sanctioned, these rules presume to investigate and punish conduct deemed contemptuous and even criminal.⁴¹³ While the first purpose is unquestionably appropriate — similar, in fact, to the function of state bar associations⁴¹⁴ — it fails because it does not apply to government counsel. It fails its second purpose for the same reason. In determining questions of misconduct, it applies only to private counsel. By placing private counsel on a significantly different footing than government counsel, its failure is complete. Instead of avoiding constitutional pitfalls, EOIR falls into those of its own creation. The three-part test assessing whether an individual received due process enunciated in *Mathews v. Eldridge* reveals the defects of dual discipline that DoJ and DHS have adopted.⁴¹⁵ *Mathews* involves an interest test. Its analysis weighs the competing interests of the private litigant versus those of the government.

Succinctly put, the interest at stake — the substantive right to fair trial — is impaired by regulations that deny the procedural right to effective counsel. This occurs in two ways. First is the distinction — a false one — made between government and private counsel. Government counsel is exempt from disciplinary measures to which private counsel

must submit. Second is the fallacy that adding more safeguards will overcome constitutional defects. Regardless of how many regulations are added to protect the alien, maintaining a separate but equal approach only enlarges constitutional challenges.⁴¹⁶ Authoritative courts — courts that secure fair trial for both government and alien — are the solution. The present courts, along with their disciplinary scheme, are both cause and effect. Further analysis supports this conclusion.

The Supreme Court in *Yick Wo v. Hopkins* ruled that alienage does not excuse the type of discrimination in which the Justice Department now engages. It found:

“The rights of the petitioners ... are not less, because they are aliens and subjects of the Emperor of China. ... The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: “Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. ... The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.”⁴¹⁷

Fifth Amendment protections are often analyzed as “prophylactic.” In other words, they protect an underlying right contained in the Amendment itself.⁴¹⁸ *Miranda* warnings are not rights themselves, but are instead safeguards that protect the underlying right to silence — the arch-protection from self-incrimination. Their purpose is to assure trustworthy evidence⁴¹⁹ — in other words the avoidance of coerced confessions — which promotes fair trials.⁴²⁰ EOIR’s disciplinary scheme is, among other

purposes, intended to protect the underlying right to fair trial by adjudicating allegations of misconduct. Rather than protective, EOIR’s rules are just the opposite. They are unprotective.

EOIR’s recent expansion of its disciplinary scheme simply increases the grounds for which private counsel may answer that government counsel avoids. While the purpose of disciplinary rules is rationally related to a deliberate governmental end, the process is not. The process offers the same dislocated procedures typical of immigration litigation. Legally unable to sanction both private and government counsel — the true underlying reason for this scheme — EOIR defaults to a process that violates the substantive guarantee to fair trial by denying the procedural right to effective counsel. Unconstitutionality is evident in a process separate and unequal.

The absent authority that prompts fragmented discipline defies fair trial protections. Separation from the courtroom — separation from a judge who knows the case and the people involved — injects disorder that unified proceedings avoid. The mechanisms by which misconduct complaints are adjudicated, one quasi-judicial and the other nothing less than the generous protections federal employees acquire through employment, expose these failures. Proposals made during the Bush Administration do not resolve these issues. They aggravate the same constitutional defects already in place.

Even though Attorney General Gonzales announced in August 2006 that the contempt powers authorized by Congress would be enabled by DoJ, these powers were not solutions at all. Instead, they risked bringing inside the courtroom the disparity that now exists *outside* the courtroom. Under the Gonzales’ plan, private counsel and their clients were subject to sanction.⁴²¹ Government counsel and witnesses were not.⁴²² Equal protection and due process would be, as a result, denied. Unsurprisingly, the regulations were never issued. All the while judges are handcuffed, not for exercising too much authority, but by possessing too little.

Congress is not to blame. Judges were granted contempt authority by statute in 1996.⁴²³ Since then, DoJ has denied its use to the same judges Congress intended to empower.⁴²⁴ Across three adminis-

trations, two Democratic and one Republican, this essential judicial authority remains unknown in the courtrooms it was intended to serve.⁴²⁵ This default reveals the Justice Department unresponsive to the competing demands of prosecuting civil and criminal violations, defending civil liberties and, under the same roof, addressing compelling judicial questions through quasi-judicial courts.⁴²⁶ It shows the Justice Department dignifying its own regulatory scheme over the authority of Congress. In prescribing rules to address attorney conduct on June 27, 2000, EOIR stated:

“In exercising its plenary powers over immigration, Congress has granted express authority to the Attorney General to “establish such regulations ... as (s)he deems necessary for carrying out (her) authority” under the laws relating to the immigration and naturalization of aliens. 8 U.S.C.1103(a)(3).”⁴²⁷

Admitting the authority of Congress to regulate immigration, yet refusing to follow mandates that would empower judges to sanction conduct reinforces the paradox that defines immigration courts. Despite Congress’ unmistakable statutory language regarding measures to combat “fraud, abuse, and frivolous submissions,” the authorized regulations remain unissued⁴²⁸ and nearly 20 years have passed. Alternatives to strengthen courts and assure order are unproposed. Flaws that inhibit finer jurisprudence persist. The need for a court of consequence continues.

Explicit in the contempt authority granted by Congress in 1996 is discretion. Implicit is its measured use. EOIR’s explanations support this. Its October 2006 answers to AILA leadership express the contempt authority being tempered by circumspection. “[I]t will be used only in very limited circumstances,” declares EOIR, “where the conduct is clearly in contempt of the immigration judge’s proper exercise of authority.”⁴²⁹

Autonomous judges, then, would not be interlopers. They would be adjudicators. They would decide contempt issues with the same consideration that any question before them receives. Empowered courts would be a surety for due process, equal

protection and the standard for order. Enforcement agencies would not lose ground in this dynamic. DHS would maintain its present authority. Its ability to stay court decisions — and continue to hold detainees — when seeking reconsideration of a decision or appellate review of a trial court would not be disturbed by authoritative courts.

DoJ’s reluctance to establish this authority — a tacit admission of doubt that it can do so — has at least two sources. The first is an unstated opinion that its attorneys may not discipline the employees of a sister department.⁴³⁰ The Gonzales proposal to enable contempt authority avoided specific mention of any application to DHS attorneys and enforcement personnel.⁴³¹ The second is the intra-agency rivalry that existed between the courts and old INS. This strain still defines relationships between the courts and DHS components.

Strong institutional resistance to one group of attorneys serving as administrative judges holding other attorneys in contempt still influences these relationships. Both are understandable. Both are fixable. To impose penalties, however, only on alien litigants and their counsel invites meritorious equal protection and due process challenges that reach the opposite of what Congress intended. Only a statutory court — the real fix here — avoids the constitutional second-guessing and inter-departmental rivalries that impair effective adjudication and enforcement.

Judges are not indifferent to these defects. They express frustration with absent litigants and “prioritized” removal orders. These defects diminish federal law and reduce respect for the courts. Prioritization by DHS has led to a singular focus on the arrest and removal of criminal aliens that only encourages illegal entry, visa overstaying, court evasion, and disobedience to removal orders. It discourages those legal immigrants who play by the rules and wait their turn.

Judge Dana Marks Keener advised the Senate Judiciary Committee in 2002 that neither the risk of terrorism nor the fact of unexecuted orders has prompted issuance of the regulations intended by Congress to strengthen courts. Characterizing the court’s ability to sanction as “toothless,” Judge Keener stated:

“[P]romulgation of contempt authority could provide the Immigration Court with an important tool to enforce INS [now DHS] compliance with its orders and to assure that terrorists in Immigration Court proceedings comply with orders closing those proceedings for national security reasons. The Attorney General has issued new regulations for protective orders in national security cases, but the sanctions for violation of those orders are ineffective where they are needed most. The prompt issuance of regulatory authority for contempt power could resolve this problem. At present, the sanction of mandatory denial of any discretionary relief when a protective order is violated is a toothless sanction in those cases where it matters most ... Unless and until the Department of Justice promulgates regulatory authority for the contempt power given to the Immigration Court by Congress, there is no real sanction for a ter-

rorist who flaunts a protective order of the Immigration Court.”⁴³²

The present system limits judges’ ability to affect the noblest aims of the Immigration and Nationality Act while protecting the public interest.⁴³³ The better, historical approach involves greater control by the courts over cases and their parties throughout proceedings. It involves private attorneys on an equal footing with government counsel. A unified approach with courts separate from the executive, yet central to both adjudication and enforcement is essential for achieving optimal results regardless of outcomes. Indeed, optimal results depend upon judges able to discipline their courtrooms — judges who can assure effective and equal treatment of both alien and government when questions of misconduct arise. Otherwise, courts will remain toothless — for those who should be removed and those who should be redeemed. An independent, Article I court is the answer.

Blueprint: Article I Immigration Court

Creating an Article I immigration court does not require a whole new set of laws. Laws that address the civil and criminal aspects of immigration are already on the books. Instead, a court of law is the remedy to meet caseloads, large and small, with definitive authority. A federal court at the heart of this system is an indispensable piece in the machinery of justice. It is a part not interchangeable with any other. This kind of court would place in the hands of competent jurists, many of whom already serve, the ability to work in an environment divorced from the often conflicting executive priorities of immigration interdiction, benefits distribution, inter-agency rivalries, and political disputes.⁴³⁴

I. The Trial Court

An Article I court should be the singular forum to judge immigration cases.⁴³⁵ This court would adjudicate both civil and criminal cases. Concurrent jurisdiction with Article III courts in select criminal matters would provide a viable alternative for overcrowded federal district courts. An Article I court's expertise would amplify federal response by bringing to bear the experience of knowledgeable jurists and prosecutors. This specialization is justified because the U.S. Code has historically set immigration crimes apart from other federal offenses. Felonies and misdemeanors that U.S. Attorneys previously have had little, if any, time to prosecute would no longer be ignored. Such reforms could expand use of prosecutors from DHS as special assistant U.S. Attorneys.⁴³⁶

Article I courts offer distinct advantages. Being able to provide incentives in terms of lower criminal penalties and shorter waits from beginning of prosecution to the end engages a court that confronts immigration crime with courts that can address it. Using judges to determine issues of fact and law in an Article I setting would be balanced by the opportunity to be tried by a jury in a federal district court. Only by consent of the parties — both the government and the alien — could a case originally started before a federal district court be transferred to an Article I immigration court. The right to speedy trial would be preserved. Cases would not linger.

Most offenses dealing with immigration crimes are found in Title 8 of the U.S. Code. These statutes, distinct in their application to immigration crimes, include alien smuggling (§ 1324), sham marriages (§ 1325), illegal entry after deportation (§ 1326), refusal to depart after a final order of removal (§ 1253), human trafficking (§ 1328), and the hiring of illegal aliens (§ 1324a). However, crimes relating to document fraud are found in Title 18 and include passport and visa fraud (§§ 1541-1546). These statutes are augmented by offenses prohibiting misuse of citizenship papers (§ 1423), impersonation or misuse of documents in naturalization proceedings (§ 1424), unlawful procurement of citizenship (§ 1425), falsification of naturalization papers (§ 1426), and unlawful sale of citizenship documents (§ 1427). Importantly, 18 U.S.C. § 1015(e) makes it a felony offense to falsely claim citizenship to obtain federal or state benefits. All these statutes share a common fault. Their prosecution — though growing — is still exceptional.

Crimes under Title 8, while frequently committed, are often not prosecuted,⁴³⁷ despite immigration crimes now making up the bulk of federal felony prosecutions.⁴³⁸ This infrequency recommends an Article I court.⁴³⁹ Not every violation of federal criminal law should be before federal district courts. Reserved to them should be the most serious civil disputes and criminal violations. Otherwise, priorities are skewed. The most voluminous, not the most severe, take center stage. Resources are stressed as court administrators, for instance, meet demands for personnel through temporary work assignments.⁴⁴⁰ Judges and U.S. Attorneys become “reactive” rather than “proactive” in the face of mounting numbers.⁴⁴¹ An Article I court is one solution that meets demands presently underserved by both Article III courts and their quasi-judicial counterparts known as immigration courts. Enforcement efforts unaided by well-resourced courts provide notable examples.

Recent interdiction initiatives along the Southwest Border like Operations Streamline I and II reveal how enforcement is frustrated by courts struggling to stay even with huge caseloads. These initiatives evidenced sincere efforts to secure borders

and deliver substantive justice — and the experience has been instructive. Heavy caseloads — made heavier by illegal entry cases — resulted in 14 new district court judgeships being proposed in 2008.⁴⁴² It is here that an Article I court demonstrates a lasting practical value.

Put in place in October 2005 near Del Rio, Texas, Operation Streamline’s enforcement resulted in every person caught illegally crossing the border being charged with at least a misdemeanor offense. Held in custody throughout proceedings, violators, upon conviction, were eventually deported and any future illegal entry risked felony prosecution. In 2007, DHS officials credited the program with a 20 percent drop in apprehensions along the U.S.-Mexico border.⁴⁴³ Whatever the successes, there was significant downstream impact. “The government front-loaded this system,” stated former immigration judge Joe Vail. He continued:

“It has almost tripled the size of the border patrol since 1996, and last year brought in the National Guard. It has done nothing to increase the personnel [needed] to process and adjudicate these cases, including federal court judges, prosecutors, federal public defenders, plus the support personnel you need to do all this.”⁴⁴⁴

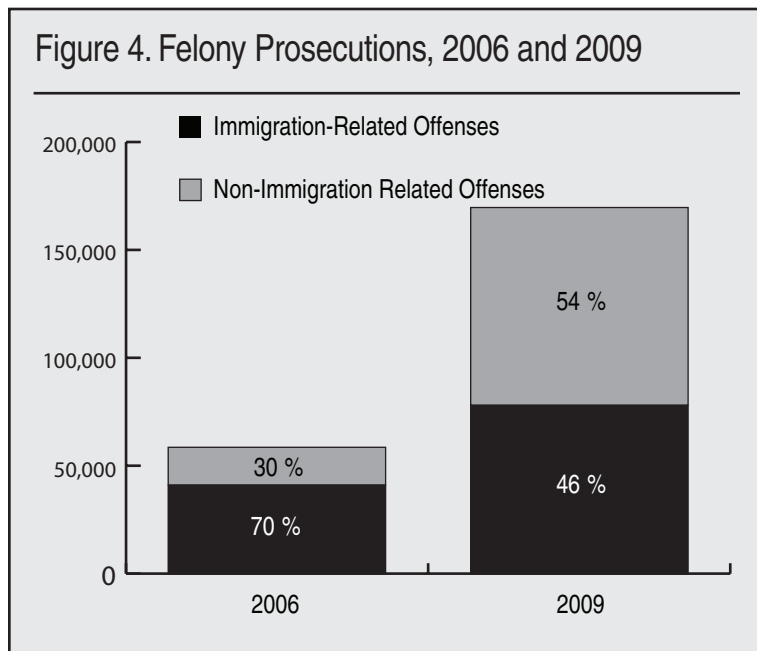
New Mexico’s chief federal judge, Martha Vazquez, wasn’t impressed either. “There’re not enough marshals, enough U.S. attorneys, judges, court officers, courtrooms, not enough of anything.”⁴⁴⁵ Statistics prove Judge Vazquez right. In 1994, the total number of defendants charged in the five U.S.-Mexico border districts equaled 9,112. By 2007, these same districts witnessed prosecutions totaling 24,821,⁴⁴⁶ a 270 percent increase. In the same year, immigration-related felony cases, including fraudulent document offenses, increased to 17,876 cases with 20,070 defendants. Charges of improper reentry by an alien after an order of removal⁴⁴⁷ accounted for 74 percent of all immigration cases and 69 percent of all immigration defendants.⁴⁴⁸

When Judge Vasquez said “not enough” she could not have been more right.

More broadly, when document fraud offenses — offenses relating to fraudulent citizenship, naturalization, passport, and identification papers — are included, felony immigration cases nationwide grew 356 percent, from 5,031 cases in 1995 to 17,912 in 2006.⁴⁴⁹ Of the 58,702 felonies prosecuted by U.S. Attorneys in 2006, 30 percent of the total were immigration-related offenses.⁴⁵⁰ In 2009, immigration cases made up 54 percent of the entire federal criminal caseload. In raw numbers, 91,590 prosecutions out of 169,612 involved immigration violations.⁴⁵¹ DoJ’s 2008 National Gang Intelligence Center report found criminal street gangs commit nearly 80 percent of all crimes in the United States. Most illicit drugs are distributed by them. Several compete with major Mexican drug cartels and align themselves with native-born crime syndicates.⁴⁵² Their membership numbers one million — and most of their members entered the United States illegally.⁴⁵³

This trend anticipates a significant long-term presence, if not permanence, of immigration crimes. It validates the need for innovation and flexibility in the legal mechanisms America uses to address the problems and opportunities immigration offers. The 1.2 million aliens arrested in 2006 seldom appeared before federal courts. When their slimmest fractions did appear, the effect on business

Figure 4. Felony Prosecutions, 2006 and 2009



was dramatic.⁴⁵⁴ Federal courts in border districts allocated much of their resources to minor offenses with few convictions and minimal, if any, sanctions and even outright dismissals.⁴⁵⁵ DHS now seeks felony charges against repeat offenders with such cases going directly to district courts.

This progress from “catch and release”⁴⁵⁶ to arrest and prosecute — another way of saying “catch and return” — discloses a maturing of federal enforcement unaided by judicial resources. American borders, as well as the American interior, should not evolve into “surge” areas. Efforts should be patient and farsighted. Federal resolve should emplace alert policing combined with deliberate adjudication. Such efforts would assure the public that justice is served as borders and neighborhoods are secured. Numbers once more illustrate the results Article I immigration courts can achieve.

In 2007, U.S. district court caseloads grew to 344,901, an increase of 10 percent from the previous year. Case completions for the same period came to 323,434. Overall filings per trial judge (678 judges⁴⁵⁷) increased from 461 to 509.⁴⁵⁸ This increase excludes dramatic growth in immigration misdemeanors handled by federal magistrates.⁴⁵⁹ By contrast, immigration trial courts alone completed 366,027 matters with not more than 218 trial judges in 2006. Completions equaled 1,679 cases per judge. When the BIA’s appellate work is figured in, another 41,475 cases were completed. Total court production equaled 407,502 cases.⁴⁶⁰ Immigration trial and appellate judges obviously measure up to high volume caseloads. So should their authority to deal with them.

Article I courts with authentic judicial authority and adequate resources offer progress for hard-hit areas like the Southwest border, but they also provide what is needed where immigration courts already exist. Experience underscores the adverse impact⁴⁶¹ of stepped-up interdiction efforts on courts and prosecutors when huge caseloads generated by initiatives like the Streamline efforts land on unprepared courts.⁴⁶² Article I courts used in these situations would free district courts and their magistrates to handle more serious crimes and their equally important civil dockets. Along with their traditional immigration caseloads, Article I courts

would take on high volume Title 8 and Title 18 offenses now crowding federal district courts. Briefly, these courts would work like this:

Article I immigration courts would offer streamlined criminal proceedings. All charges, for instance, would still originate with grand juries, though with the consent of the parties the criminal information process could be used. Judges would sit as the finders of fact and law. Their jurisdiction would extend to all immigration misdemeanors and felonies. Their sentencing guidelines would be the same used by federal district court judges. But their purpose would be the swift resolution of immigration crimes through less severe penalties.

Article I courts confer more than swift resolution of criminal and civil disputes. Lifetime appointments and their costs would be avoided.⁴⁶³ Enhanced authority and enforcement would result in more deliberate consideration. Case completion time would contract. If the U.S. Tax Court model was adopted, judges would serve 15 year terms. Following this model, judges who had completed their terms, but were not serving active commissions, could continue service at the Chief Judge’s recall.⁴⁶⁴ Recall would augment the active corps of judges, so that artificially high or low static numbers would be avoided. Since Article I courts serve a function reserved to Congress, their mandate could include the Title 8 and Title 18 offenses now over-filling federal district courts. Reducing district court congestion and vindicating federal law in areas underserved by federal prosecution — underserved as a function of resources as well as political resolve — are further advantages Article I courts offer. Likewise, a court able to enforce its own civil judgments and exercise equitable authority are among the most necessary — and simplest — reforms leading to effective courts instead of the courts built to fail.

II. Increased Civil Authority

A federal immigration court would more than enable the contempt powers authorized in 1996. It would more than resolve the uneasy relationship between DoJ and DHS regarding enforcement issues. Such authority would provide intermediate remedies — remedies falling between relief and removal. Judges presented with persuasive evidence could

“suspend” or “probate” some removal orders upon fixed conditions demanding personal accountability. Giving these kinds of second chances to individuals convicted of offenses that might otherwise prompt removal widens the latitude of courts to remove those aliens who fail the trust reposed in them by authoritative courts. Granting merited leniency would conserve court resources. This brand of authority replaces the weak and restrictive alternates of relief and removal and provides judicial tools that meet immigration violators head-on.

Equitable authority readily addresses cancellation of removal actions. Its utility is its insistence that lawful conduct that is required of the citizen is expected no less from the non-citizen. In broadening court authority, federal law resumes its historic dignity — equal in what it demands and in what it gives. Equitable authority recognizes that immigration has changed in ways in which the INA has lagged. Expanding the present (and historic) remedies of relief and removal with equitable remedies that incorporate dimensions of both updates authority necessary to a court of consequence.

Immigration benefits un contemplated in 1952 now occupy the federal code. Cancellation did not exist before 1996.⁴⁶⁵ Temporary Protected Status (TPS) was authorized in 1990.⁴⁶⁶ These new benefits require new remedies. Equitable authority offers the right kind of tools for immigration courts as illegal populations continue to grow.

Cancellation of Removal. Cancellation, though only recently on the scene, is long overdue for reform.⁴⁶⁷ The action itself, like all actions by aliens, is defensive. It allows an alien litigant to demonstrate facts that should “cancel” his removal. The stunted options of relief and removal fall well short of giving trial courts discretion to impose redemptive solutions on deserving litigants — litigants who have lived between seven and 10 years in the United States. These very limited options are a defect and, without more, simply blunt instruments that cannot approach justice. Intermediate remedies that apply to cancellation for both permanent and non-permanent residents provide the right fix.

Cancellation, engages a fact-sensitive inquiry. Judges and litigators alike register frustration

with a court process that requires a thorough consideration of all relevant facts, but inhibits rulings of equal depth. No tools are available to courts to affect lawful conduct short of a removal order — and, by then, it is too late. Should a judge believe that ordering removal is too severe a remedy and granting relief is too mild, he has no alternatives. Holding trial then becomes an end in itself, rather than the standard purpose of being the means to an end.⁴⁶⁸ In fact, not all cases require full-blown hearings. An intermediate remedy contemplates facts largely undisputed and readily understood by the trial court. Less proof taking than full-blown cancellation actions could be anticipated. A by-product of this ramping up in court authority is the conservation of court resources.

Injunctive authority would enable a court to order removal in the situation of a permanent or non-permanent resident who qualified for cancellation,⁴⁶⁹ but who the court determined should be removed. The court could then suspend or probate that order upon explicit conditions for stated periods. Conditions would include those any person, citizen or non-citizen, would expect to obey inside or outside court. They are the same conditions imposed by state and federal courts upon civil litigants and criminal defendants, native and foreign-born. They would be no more demanding than what lawful conduct requires of all persons. Failure to observe them would result in removal.

Such routine conditions are consistent with lawful presence in the United States. Support of one’s dependents, avoidance of becoming a public charge, payment of tax liability and maintaining gainful employment are conditions consistent with lawful status. They require no more from the alien than from the citizen. Proof of compliance would not involve a “probation officer” to monitor success. Instead, objective proof (e.g., cancelled checks, pay stubs, probation records from state or federal courts, tax returns, etc.) would verify obedience. The injunctive, intermediate remedy would require stipulation of removability and consent to the injunctive order.

A litigant who did not deserve removal, but who did not merit relief, could at court discretion qualify for intermediate relief. By stipulation of the

parties, the court could prescribe an order enjoining removal. The order would be freighted with removal if the litigant failed to comply. He would enjoy relief, if his conduct satisfied the conditions imposed by the court. Any subsequent order dissolving the injunction and directing removal would be appealed on the reasonableness of the court's revocation of the injunctive order. By court rule, appeal would be decided within ninety days of the appellate record being completed at the BIA. Trial and appellate work would contract, as fewer cases were tried and as issues on appeal were reduced to determining whether revocation was reasonable. Only those who qualified for cancellation and any further requirements of the intermediate remedy statute would be eligible for intermediate relief.

Temporary Protected Status. Other forms of relief available under the INA fit the equitable relief model. Temporary Protected Status is one of them.⁴⁷⁰ Equitable discretion would aid TPS renewal disputes. This litigation involves TPS recipients being denied permission to remain in the United States by DHS officials, which is often a product of very minor offenses.⁴⁷¹ More authoritative decision-making would place TPS aliens on a footing to present equities favoring relief.⁴⁷² It would also submit them to a rigorous process that orders of relief and removal cannot impose on conduct.

TPS and cancellation actions illustrate opportunities to provide more complete justice through authoritative courts. Courts would fix terms by which relief and removal were determined. Authorizing courts to impose injunctive solutions would serve congressional intent of not only preventing fraud, but discovering its presence also. Such authority offers wider gradients of justice for aliens to demonstrate worthwhile imposing standards that protect the public from aliens that pose risk by shortening trial processes and expediting appeals through authentic courts.

III. The Appellate Court

A U.S. Court of Immigration Appeals. An Article I appellate court should parallel the design of federal circuit courts. A U.S. Court of Immigration

Appeals would replace the Board of Immigration Appeals. It would be composed of 21 members and would function *en banc*, in three-judge panels, and in single judge capacities. Each judge would serve an appointment of 15 years. Judges would be nominated by the President and approved by the Senate.⁴⁷³ Original court members would serve staggered terms of five, 10 and 15 years. With higher caseloads, retired members could be recalled to service by the Chief Judge.⁴⁷⁴ Trial judges too could be called to serve on the appellate court in the same way in which U.S. district court judges occasionally serve on circuit courts of appeal. Appellate judges could likewise be assigned to trial duties. This kind of flexibility would avoid the rigidity now present in the Board of Immigration Appeals.

Criticism directed at the Board often relates to its backlogs⁴⁷⁵ and the few oral arguments it hears.⁴⁷⁶ The new court would complete 95 percent of its caseload from year-to-year. By regularly hearing oral arguments, it would be a more openly deliberative body. Three-judge panels would resume hearing arguments — as they once did — across the country. Rotation like this would make oral arguments more available to the government and private litigants closer to the venues in which cases were originally tried.⁴⁷⁷ It would provide a convenient and necessary earpiece to appellate judges whose base has always been Washington-centered. This appellate court, like its trial court counterparts, would be accessible to litigants nationwide. Accessibility is one issue, but huge backlogs are another.

In 2000, the BIA carried a backlog of 63,763 cases⁴⁷⁸ — a blockage which nearly ground its work to a halt. By 2002, the backlog was barely reduced to just under 58,000 cases.⁴⁷⁹ Adding seats to the BIA did not help. Twenty-three judges' positions were authorized — and 19 members were serving — when these 58,000 cases went undecided.⁴⁸⁰ Some cases had been pending at the Board more than five years.⁴⁸¹ Reforms adopted by Attorney General Ashcroft in 2002 eliminated this continuing failure.⁴⁸² The Ashcroft changes imposed efficiencies and the logjam dramatically ebbed. Critics charged, however, that improvements were not improvements at all. Reforms, they declared, produced loss in well-reasoned opinions and cursory

affirmances of trial court findings.⁴⁸³ Federal circuit courts also complained.

Many of the nearly 58,000 cases the BIA eventually completed fell on the circuit courts of appeal, courts that were unprepared to handle such a spike. This loading up was instructive, though. No successor court, for whatever reason, can adopt the view that decisions can wait or that even small backlogs are acceptable. Among the primary purposes of Article I courts are their swift resolution of matters that concern the government and private litigants.⁴⁸⁴ Article I cases are called “public rights” cases and because public interest is so high with regard to immigration issues and the future of America so closely linked with enlightened immigration policy, court processes should accelerate as the authority of a new court increases. U.S. circuit courts of appeal hear and decide 95 percent of their caseloads within a year. There is no reason an Article I court of appeals for immigration cases should be held to a lower standard or that aliens should have longer wait times for their cases to be decided than those appearing before other courts.

Remaining a court system in which proceedings are open should also not be altered by Article I status. If anything, immigration courts should strive for the greatest transparency possible in both trial and appellate cases. All but the most sensitive matters should be subject to public scrutiny. Even in the darkest hours following 9/11, no more than 600 non-citizens were deprived of public hearings. Hearings were not secret. Aliens had counsel and were not limited in speaking publicly about their cases.⁴⁸⁵ Maintaining transparency “enhances the quality of deportation proceedings” by “assuring ... that proceedings are conducted fairly and properly”⁴⁸⁶ — the same as in any other court.

When matters were not appealed to an Article III circuit court, an order directing the trial court to enforce the final order would be entered. All parties would be noticed to the appeals court’s ruling. Enforcing relief or removal would integrate the court, its officers, and support agencies. The trial court would order parties to appear prior to execution of judgment. In such a deliberate context, DHS agencies would perform their judicially ordered mandate.

Bonds coupled with electronic monitoring, routine reporting, and other affirmative requirements that assure appearance — and prevent absconding — could be ordered before, during, and after trial. The fact that so many alien litigants — presently⁴⁸⁷ and historically⁴⁸⁸ — disappear before and during proceedings prompts these measures. That both citizen and non-citizen litigants in civil and criminal courts outside the immigration context must account for themselves pursuant to similar rules works no greater obligation upon the foreign born than on the native. No greater expectation for obedience to the law is presumed on the alien than on the citizen.

Merger of All Appeals in the U.S. Court of Appeals for the Federal Circuit. Appeal from the BIA to the federal circuit courts of appeal begins the final stage of most litigation. Rather than accord, this phase has prompted major discord among the circuits in the interpretation of immigration statutes. Dissonant rulings have caused more than one lawmaker to urge consolidation of all immigration appeals in the U.S. Court of Appeals for the Federal Circuit.⁴⁸⁹ One plan increases membership of the federal circuit from the presently authorized 12 judges to 15 judges.⁴⁹⁰ Consolidation, advocates say, would reduce caseloads on the already overburdened circuits and promote consistency and predictability throughout the system.

This proposal has merit the present system lacks. Questions remain, however, as to whether three additional judges are enough. This panel could be supplemented with visiting Article III judges (circuit judges, district judges, and judges from the U.S. Court of International Trade) to provide even further assistance.⁴⁹¹ But considering that in 2007 alone 10,382 appeals from the BIA filled appellate calendars, out of a total of 58,410 cases,⁴⁹² second thought recommends a court enlarged by seven, instead of three, additional seats. A unifying voice — the voice of a single court — is a remedy for today’s discord within the circuits and backlogs that defy deadlines. A court built for success — not failure — needs this realistic remedy.

Annual Funding: Disorder by the Dollar

The trajectory in federal spending for America's immigration courts over the last 24 years has been one steep line upward. In 1987, immigration courts were budgeted at \$20.5 million.⁴⁹³ By 2010, Congress authorized \$298 million for the courts⁴⁹⁴ — a 1,450 percent increase. With exception of a few million dollars in filing fees sent to the courts from DHS, both trial courts and the BIA have been entirely taxpayer funded.⁴⁹⁵

So what does America get for all these dollars? The answer should be substantial justice for the foreign-born, effective and impartial enforcement, and the confidence of the American people. The accurate answer is the American taxpayer underwrites a system wracked by deception and disorder. As budgets have risen, court performance and immigration enforcement have declined. Once more numbers prove it — this time in multiples.

From 1986 through 1988, the GAO assessed America's immigration courts and their enforcement mechanisms. Its 1989 report to Congress declared urgent need for improvement. Improvement, though, has been nothing but a pipedream. The report found that from 1986 through 1988, 27 percent of aliens free pending trial failed to appear in court.⁴⁹⁶ From 1996 through 2009, 40 percent of aliens free before trial disappeared.⁴⁹⁷ The same report found “[a]liens have nothing to lose by failing to appear for hearings and, in effect, ignoring the deportation process.”⁴⁹⁸ Proving the GAO right, ICE announced on August 10, 2009, that it would not deport aliens who skipped court or disobeyed an order to leave the United States — unless they have serious criminal records.⁴⁹⁹ And as enforcement has softened, illegal populations have climbed. GAO believed 2.2 million illegal aliens were present in the United States in 1989.⁵⁰⁰ By 1996, the number increased to four million. In 2007, the Census Bureau said 12 million illegal aliens resided in the United States — a 545 percent increase over 18 years.⁵⁰¹ Before they could reside, however, they first had to enter and trends indicate massive volumes of illegal immigration, especially at the Southwest Border.

The GAO found 45,000 aliens were arrested for illegal entry into the United States in 1959.

In 1987 alone, 1.2 million aliens committed the same offense.⁵⁰² By 2006, nothing had changed — 1.2 million aliens wound up in federal custody for illegal entry. Not until 2007 did increased border enforcement diminish arrests.⁵⁰³ Even when arrests occurred and trials were held, much like today, little happened. From 1986 through 1988, GAO found “millions of aliens had entered the country illegally,” but only about 10 percent annually — 22,000 out of 220,000 — were actually deported.⁵⁰⁴ Twenty years later, in 2008, ICE removed 34,000 — roughly 6 percent — from a population of 595,000 fugitive aliens.⁵⁰⁵ While GAO estimated that 220,000 deportation orders lay unexecuted in 1987,⁵⁰⁶ by 2002 the number had grown to 602,000.⁵⁰⁷ Through 2009, total unenforced removal orders stand around 1.1 million.⁵⁰⁸ Nor have the courts, despite the best efforts of judges, accelerated their decisionmaking. GAO's 1989 report found deportation proceedings often took five years or more to complete.⁵⁰⁹ Today, virtually the same cases take virtually the same amount of time⁵¹⁰ and some backlogs stretch back 11 years.⁵¹¹ Slow courts and sparse enforcement did not go unnoticed. Visa-holders — confident of success if they remained in the United States without permission — simply ignored their departure dates. Half of all illegals in 1996 — some two million — overstayed their visas.⁵¹² Others quickly followed. By 2006, 45 percent of all illegal aliens — 5.5 million to be exact — were overstayers.⁵¹³ And budgets continued to grow as disorder increased.

In 1987, \$265 million was committed to immigration enforcement.⁵¹⁴ By 2009, CBP received \$7.6 billion for border security initiatives⁵¹⁵ and ICE got \$4.3 billion for its efforts.⁵¹⁶ Courts also ramped up to address growing caseloads. In 1987, 69 trial judges presided in 22 cities.⁵¹⁷ By end of 2008, 226 trial judges held court in 55 cities.⁵¹⁸ In 1990, the courts claimed 527 full-time employees. By 2010, 1,558 full-timers had jobs at EOIR.⁵¹⁹ There were five judges on the BIA and 25 staff attorneys at EOIR in 1986. By 2002, 23 judges filled this appellate court with over 100 staff attorneys at EOIR.⁵²⁰ Today, 15 judges hold appointments to the BIA.⁵²¹

So what has all this spending accomplished? To the authentic refugee, the ambitious entrepreneur, the talented student, and the foreign visitor who shops our markets, but more importantly takes home our ideas,⁵²² these courts — and the great principles behind them — are a certain success. But gamed records that mislead the public, fraud-filled applications, unjustified delays, and unenforced judgments with neighborhoods and national security left compromised prove this system has failed. More precisely, court executives — executives who have sanitized yearly reports to Congress and standardized dysfunction — have failed and a court system struggles in the lengthening shadow of their deceit. Courts built to fail are not the product of accident. They are, instead, the result of neglect and intent — neglect by allowing things to get this way and intent by disguising this neglect inside numbers that disguise disorder and impair liberty.

Tax dollars support private litigation — even the litigation of those convicted of crimes in the United States and those who entered fraudulent marriages.⁵²³ From 2000 through 2008, EOIR spent \$29 million paying for the transcripts of alien litigants appealing deportation orders.⁵²⁴ Factoring in court personnel time another \$4.7 million went to process these records. Altogether just under \$34 million was allocated from taxes to underwrite private litigation — just over \$4.3 million per year.⁵²⁵

The Justice Department separated the courts and enforcement in 1983. When separation occurred, the enforcement agency, INS, insisted on keeping all fees — even those fees paid to file cases before the trial courts.⁵²⁶ As a result, sums that would have supported the courts stayed with enforcement. When INS moved to DHS in 2003 — and along the way became USCIS, CBP, and ICE — things didn't change much in some respects. Trial court filing fees stayed with DHS and were still deposited into the former INS "Immigration Examination Fees" account. How much in fees DHS receives each year from trial court filings is unknown, nor does DoJ say what the BIA receives from appellate filings.⁵²⁷

In reality, trial court fees — fees for filing cases other than asylum — have never come close to supporting the courts or for that matter enforce-

ment. Transfers in 2008 and 2009 from DHS disclose \$8 million — \$4 million each year — sent to EOIR to cover the costs of producing transcripts for appeals.⁵²⁸ No agency forecasts suggest court revenues could, in part, be met by increased fees. No agency statements suggest that court costs be recovered from litigants, as is the case in nearly every state and federal court across America.⁵²⁹ There are better ways to do things and USCIS provides a model.

In contrast to the courts, USCIS is largely a fee-supported agency. Its processing of immigration applications of all types creates heavy caseloads and, consequently, significant expense. As a result, USCIS annually re-examines its fee structure.⁵³⁰ Fees are assessed to meet strategic objectives in addition to staffing and office needs⁵³¹ across all USCIS missions.⁵³² No such prudence guides the courts.

From 1990 through 2010, spending for America's immigration courts grew 827 percent. In 1990, courts were funded at \$36.2 million. For 2010, Congress authorized \$298 million in spending.⁵³³ Over this same period, federal spending grew 276 percent⁵³⁴ and the cumulative inflation rate totaled 70.08 percent.⁵³⁵ Regardless, EOIR never sought to keep — much less increase — filing fees in non-asylum cases. Aliens pay no more to file a case today than they did in 1990. Though federal district and circuit court filing fees significantly increased in 2005 to \$350⁵³⁶ and \$450,⁵³⁷ respectively, no similar attention to the bottom line can be found with regard to immigration courts. Filing fees in immigration trial courts have been capped at \$100 since 1990 and BIA filing fees are stalled at \$110.⁵³⁸ Though immigration courts rival the production of federal district and circuit courts, they remain underfunded for their mission — not by the public, but by those who appear before them. EOIR cites global conditions and increased DHS enforcement to justify its budget requests.⁵³⁹ Its pleas for increased funding cite the importance of well-resourced courts to coordinate with enforcement agencies.⁵⁴⁰ Never, though, in its 129-page annual report — or any other court statements — does EOIR discuss keeping non-asylum filing fees or charging court costs. This is where wooden-headedness comes in.

Court executives had alternatives — good ones — and, of course, ignored them. Two in-house studies looked at increasing fees and recouping costs through charges that other state and federal courts routinely charge citizens and non-citizens in private litigation. The first, “A Feasibility Study for Establishment of a Court Cost Recovery System within the United States Immigration Courts and Board of Immigration Review,” found, as would OMB some eight years later, that caseload pressures are significant and funding is uncertain.⁵⁴¹ The study isolated the problem:

“Of particular significance were the spiraling costs involved with providing administrative services such as ... contracted preparation of court transcripts. This project has sought to examine the extent of the problem as well as the feasibility of cost recovery as a means of overriding these organizational funding difficulties.”⁵⁴²

Said differently, transcript costs were budget-busters. In 1999, transcripts alone cost the courts \$2.3 million. When employee labor was factored in, transcripts cost taxpayers — not alien litigants — more than \$2.7 million.⁵⁴³ Authority to charge these costs to litigants was clear then — and clear today — under both federal regulation⁵⁴⁴ and statute.⁵⁴⁵ Federal law provides for collecting “*Fees and Charges for Government Services and Things of Value*.”⁵⁴⁶ “It is the sense of Congress,” states the measure,

- (a) ... that each service or thing of value provided by an agency ... to a person ... is to be self-sustaining to the extent possible.
- (b) The head of each agency ... may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable.

Each charge shall be —

- (1) fair; and
- (2) based on —
 - (A) the costs to the Government;
 - (B) the value of the service or thing to the recipient;
 - (C) public policy or interest served; and
 - (D) other relevant facts.

The regulation — 8 C.F.R. § 1103.7 — gives DoJ discretion to increase fees “subject to policies prescribed by the President.”⁵⁴⁷ Both the statute and the regulation support reasonable charges that make government services “self-sustaining.” In other words, DoJ with permission of the White House could raise filing fees anytime, but the only thing it raised was taxpayer commitment.

The second study found support within the agency for cost and fee reform. The courts, the study noted, imposed filing fees that were kept by INS.⁵⁴⁸ Keeping these fees and imposing costs would put in place a fiscal structure that would improve adjudication through adequate funding.⁵⁴⁹ Importantly, AILA (the American Immigration Lawyers’ Association) members supported fee based services. AILA warned that fees should be waived for indigent applicants, as is presently done. A portion of fees, it stated, could be used to enhance pro bono programs.⁵⁵⁰ Whatever the reason, fees and costs were never imposed and Congressional testimony from 2002 shows this issue did not fade.

At a House Judiciary Committee hearing on February 6, 2002, former BIA judge Michael Heilman testified that low filing fees and non-existent court costs encourage appeals. He faulted the use of tax dollars to underwrite transcripts for private litigants. Judge Heilman stated:

“As an initial question, one can fairly ask ... what incentive is there for the typical alien to appeal from an Immigration Judge’s decision? One part of the answer lies in the fact that the appeal filing fee is very low, \$110. With that fee being waived by the BIA in about 50 percent of appeals, oftentimes even where an alien is represented by an attorney. The alien is not charged for copies of

the record or for the transcript of the hearing, which often exceeds 50 pages. All of these costs are absorbed by EOIR. By contrast, to my knowledge, no-cost appeals on a civil level are a rarity.

...

“A third, and less significant change, would be to charge the appealing alien with the cost of the appeal. There are significant expenses absorbed by the Department of Justice because it foots the bill for the appeal process. As a rule, in civil proceedings, which immigration proceedings have been seen to constitute, the appealing party pays the cost of the appeal, including the transcript. The fact that any particular individual might be unable to bear this cost has not deterred this general practice in civil proceedings.”⁵⁵¹

With plenty of legal authority, internal support within its headquarters, congressional knowledge of the issue, and disappearing dollars, EOIR and DoJ were once more passive and inert. Reforms that would have helped put the fiscal house in order — and demonstrated leadership at an elevated executive level — never happened. The woodenheads won.

Costs are imposed to better deliver substantial justice. American taxpayers have for decades supported litigants who would in any other court be expected to pay their own way.⁵⁵² Requiring non-asylum litigants to pay their own costs on appeal asks no more of them than citizens and non-citizens in other courts. Otherwise, the foreign-born are treated decidedly better than their native-born counterparts. Imposing costs on alien litigants summons from them obligations largely met by citizens whose ranks they wish to join. Census data clearly show the foreign-born are not poor.⁵⁵³ Indeed, they prosper in the United States. Reforming a fee and cost structure unchanged in 22 years is a prudent

response to changed circumstances — circumstances in which many aliens now appearing in immigration courts have resided in the United States more than seven years.⁵⁵⁴ Paying their own court costs is simply a down payment on the broad processes of justice in which all of us — citizens and non-citizens alike — are stakeholders.

Immigration courts are a bulwark of freedom. They alone are the judicious, consonant voice in a sometimes uneven and chaotic process. Their role is as critical to the innocent persecuted as it is to those who commit crime. For every application coming before the courts implicates three built-in premiums that address these two extremes and everything in between. One is security,⁵⁵⁵ another is fraud,⁵⁵⁶ and the last — and most important — is the ancient injunction to do justice. “Justice, justice, shalt thou pursue” decrees the Old Testament lawgiver in Deuteronomy.⁵⁵⁷ His cry thunders across the ages and informs our laws and institutions even today. These premiums invoke the historic strengths of federal courts — courts alert to sham and impassive to heated opinion, courts bringing to bear authority, discernment, and fiscal soundness that the courts built to fail cannot offer.

For years, the federal government has understood a court system that cannot enforce its own orders nor use commonsense remedies to broaden relief and, where appropriate, remove those who violate federal law. Choosing by design or default to maintain a disconnected court system that has led to more than one million unexecuted removal orders is folly. If not reformed, the present system risks more of the same disregard for federal authority and a consequent decline in rule of law. An Article I court is the remedy for this dysfunction and is a certain step toward “a uniform Rule of Naturalization,” a “more perfect Union,” and courts built to succeed.

End Notes

¹ Jack M. Balkin, “The Declaration and the Promise of a Democratic Culture,” www.yale.edu/lawweb/jbalkin/articles/declar1.htm. “The Constitution,” argues Balkin, of Yale Law School, “exists to fulfill the promises made by the Declaration; it provides a legal and political framework through which those promises can be redeemed in history. Thus, if we want to understand the meaning of the Constitution, we must understand the meaning of those promises. The Constitution creates a structure of government; but the Declaration tells us why governments are instituted. . . . The Declaration is a prophecy of redemption.” Our democracy, concludes Balkin, recognizes the “important connections” between “political freedom, social status, and economic independence.”

² Dinesh D’Souza, *What’s So Great About America*, New York: Penguin Books, 2002. See also Stephanie King, “Critique: Becoming American,” *Helium*, March 6, 2007, www.helium.com/items/198514critiquebecomingamericanbydineshsouza. Stephanie King, in her critique of the chapter “Becoming American” observes that D’Souza believes that “in America one has choice.”

³ Ronald Inglehart and Christian Welzel, *Modernization, Cultural Change and Democracy: The Human Development Sequence*, New York: Cambridge University Press, 2005, p.6: “Human development theory is a theory of human choice, or — more precisely — a theory of the societal conditions that restrict or widen people’s choices. Democracy is one of these conditions. It institutionalizes civil liberties, providing people the legal guarantees to exert free choices in their private and public activities. And since human choice is at the heart of democracy, the civic values that make it work effectively, are those that actually emphasize human choice.”

⁴ “Report on the Activities of the Committee on the Judiciary of the House of Representatives during the 104th Congress,” House Report 104-879, January 2, 1997, <http://ftp.resource.org/gpo.gov/>

reports/104/hr879.104.txt. The Background section on the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 says: “The United States is a nation of immigration. This proud tradition has been tarnished in recent decades by failures to set clear priorities in our system of legal immigration and to enact and enforce the measures necessary to prevent the rising tide of illegal immigration. Unlimited immigration is a moral and practical impossibility. In the words of the 1981 report of the Select Commission on Immigration and Refugee Policy, ‘[o]ur policy — while providing opportunity for a portion of the world’s population — must be guided by the basic national interests of the United States.’”

⁵ “Statement of Jan Ting to the National Commission on Terrorist Attacks Upon The United States,” December 8, 2003, www.9-11commission.gov/hearings/hearing6/witness_ting.htm.

⁶ Once an alien has been ordered removed by EOIR, DHS (through ICE and its sub-agency DRO (Detention and Removal Operations)) is charged with executing removal. See *EOIR 2009 Year Book*, p. B1, www.justice.gov/eoir/statspub/fy09syb.pdf.

⁷ Edward R. Grant, “Symposium on Immigration Appeals and Judicial Review,” *Catholic University Law Review*, 55 *Cath.U.L.Rev.* 923, p. 2, Summer 2006.

⁸ While federal district courts (Article III court under the Constitution) and, for example, the U.S. Tax Court (an Article I court under the Constitution) have Article II agencies (agencies controlled by the Executive) which enforce their orders, immigration courts have no such enforcement authority or Article II agencies to enforce their orders.

⁹ 8 U.S.C. § 1101, *et seq.* Prior to the enactment of IIRIRA (Illegal Immigration Reform and Immigrant Responsibility Act of 1996), deportation,

removal, and exclusion were distinct proceedings under the INA. Now all proceedings seeking to expel aliens from the U.S. are termed “removal” proceedings. Persons subject to removal include aliens in the U.S. illegally, aliens physically present but inadmissible, and persons who, after being legally admitted, committed crimes or other acts that render them removable. In short, deportation equals removal. If an alien defends himself from removal by claiming adjustment of status or cancellation, the case is heard by trial courts in “removal” — the name of the remedy that government prosecutors ask the trial court to impose. The courts’ annual reports never break out, for example, how many adjustment cases or how many cancellation cases courts hear each year. Likewise, alien appeals are never broken down by asylum, adjustment, or cancellation. There is, in fact, less transparency on appellate matters than on trial matters.

¹⁰ Once an alien has been ordered removed by EOIR, DHS (through ICE and its sub-agency DRO (Detention and Removal Operations)) is charged with executing removal. Courts cannot direct the execution of their own orders whether they grant relief to an alien or direct his deportation from the U.S. See *EOIR 2008 Year Book*, p. B1, www.justice.gov/eoir/statpub/fy08syb.pdf.

¹¹ “Immigration Control: Deporting and Excluding Aliens from the United States,” p. 31, U.S. General Accounting Office, GAO/GGD-90-18, October 1989, archive.gao.gov/f0302/140072.pdf.

¹² *Ibid.* p.1. States the GAO: “[T]heir [aliens] non-appearance may also be due partly to the general lack of repercussions ... for failing to appear.”

¹³ Office of Inspector General, U.S. Department of Justice, “The Immigration and Naturalization Service’s Removal of Aliens Issued Final Orders,” Rep. No. I-2003-004, February 2003, www.npr.org/documents/2005/mar/doj_alien_removal. States the report: “[W]e examined three important subgroups of nondetained aliens and found that the INS was also ineffective at removing potential high-risk groups of nondetained aliens. The sub-

groups we examined were aliens: from countries that the U.S. Department of State identified as sponsors of terrorism — only 6 percent removed, [those] with criminal records — only 35 percent removed, and [those] who were denied asylum — only 3 percent removed.”

¹⁴ Grant, *op. cit.*

¹⁵ According to estimates from the Pew Hispanic Center, nearly half of all the unauthorized migrants now living in the United States — approximately 12 million — entered the country legally (usually with a visa) through a port of entry. At these ports of entry, such as an airport or a border-crossing point, they were subject to inspection by immigration officials. “Modes of Entry for the Unauthorized Migrant Population,” Pew Hispanic Center, May 22, 2006, pewhispanic.org/files/fact-sheets/19.pdf.

¹⁶ “Immigration Control: Deporting and Excluding Aliens from the United States,” p. 22, U.S. General Accounting Office, GAO/GGD-90-18, October 1989, archive.gao.gov/f0302/140072.pdf. History is a distant mirror on the present. The article states: “By avoiding the deportation process, aliens prolong their stay in the United States. This affords them the opportunity to establish roots in the community and undertake positive and beneficial activities that can be used to support claims for relief from deportation should they be reapprehended.”

¹⁷ Myron Weiner, *The Global Migration Crisis*, New York: Addison Wesley Publishing Co., 1995, p. 28. Writes Weiner: “If there is a single ‘law’ in migration, it is that a migration flow, once begun, induces its own flow. Migrants enable their friends and relatives back home to migrate by providing them with information about how to migrate, resources to facilitate movement, and assistance in finding jobs and housing.”

¹⁸ An Internet search using the term “marriage fraud” or “marriage fraud ring” reveals scores of investigations and prosecutions across the United

States. Most marriages of foreign nationals to U.S. citizens are legitimate; still, marriage fraud is common. See Jim Leusner, “83 Arrested In Florida Sham-Marriage Probe,” *Orlando Sun-Sentinel*, May 10, 2008; Laura Butler, “12 Are Indicted In Marriage Fraud; Total Rises To 35,” September 29, 2010, www.kentucky.com/2010/09/29/1457115/12areindictedinmarriagefraud.html.

¹⁹ Jessica Vaughan, “Faisal Shahzad: So Easy, Anyone Can Do It,” Center for Immigration Studies, May 7, 2010, www.cis.org/vaughan/faisalshahzad. States the article: “A review of the information that has been released on Times Square bomber Faisal Shahzad’s immigration history reveals a familiar pattern of a terrorist easily taking advantage of weak spots in America’s immigration system. [On] December 22, 1998 ... [Shahzad] was issued [a] student visa in Islamabad.”

²⁰ “Green card” simply refers to lawful permanent residence. A green card holder is a lawful permanent resident.

²¹ Jessica Vaughan, “Marriage Fraud A Growing Problem,” August 6, 2010, www.cis.org/Vaughan/MarriageFraudonFox. States the article: “Marriage is the most common way for a foreign national to gain permanent residency While many of these marriages are perfectly legitimate, there is a lot of fraud, and little prosecution of it — so marriage to a U.S. citizen or to someone with other legal status is a very popular way for an illegal alien to launder his or her status. There are national security implications — a number of terrorists have obtained green cards and U.S. citizenship through marriage to a U.S. citizen, such as the Times Square bomber. Faisal Shahzad’s green card and citizenship application sailed through the process, even though some law enforcement agencies suspected he was possibly involved in terrorism.”

²² Faisal Shahzad Sentencing Transcript, *New York Post*, October 5, 2010, www.nypost.com/p/news/local/manhattan/read_the_faisal_shahzad_transcript_zDoUXlGEMoqZMwzsIRrlkM. Said Shahzad: “[B]race yourselves, because the war with

Muslims has just begun. Consider me only a first droplet of the flood that will follow me... This time it’s the war against people who believe in the book of Allah and follow the commandments, so this is a war against Allah [The] defeat of the U.S. is imminent and will happen in the near future ... which will only give rise to [the] Muslim caliphate.”

²³ *Ibid.* The relevant portion reads: “THE COURT: All right. You became a naturalized American citizen some years ago, isn’t that right? THE DEFENDANT: Yes. THE COURT: Not very long ago. THE DEFENDANT: Yes. THE COURT: When was that? THE DEFENDANT: I think it was April last year. THE COURT: Last year. Didn’t you swear allegiance to this country when you became an American citizen? THE DEFENDANT: I did swear, but I did not mean it. THE COURT: I see. You took a false oath? THE DEFENDANT: Yes.”

²⁴ *Illegado* is Spanish for “an illegal one.”

²⁵ See Keith Alexander and Henri Cauvin, “Ingmar Guandique Convicted of First-Degree Murder of Former Intern Chandra Levy,” *The Washington Post*, November 23, 2010, www.washingtonpost.com/wp-dyn/content/article/2010/11/22/AR2010112203633.html; and see Emily Babay, “Ex-cellmate Says Guandique Admitted Killing Levy,” *Washington Examiner*, November 4, 2010, washingtonexaminer.com/local/2010/11/ex-cellmate-says-guandique-admitted-killing-levy (“Morales [the government’s witness against Guandique] said he and Guandique became friends because they were associated with allied gangs — Morales with the Fresno Bulldogs and Guandique with MS-13.”).

²⁶ Matthew Barakat, “Man Charged With 3 Counts of Murder In Va. Attacks,” Associated Press, February 11, 2011, news.yahoo.com/s/ap/20110211/ap_on_re_us/us_manassas_shootings#mwpphucontainer.

²⁷ Josh Meyer, “Ex-agent’s Security Breach Detailed,” *Los Angeles Times*, December 6, 2007. States the article: “In court documents and interviews, federal authorities said that as part of a criminal conspiracy, Nada Nadim Prouty, 37, illegally accessed top-secret FBI investigative files on five occasions and most likely shared the information with the suspected Hezbollah operative. When she pleaded guilty to unauthorized computer access and naturalization fraud charges three weeks ago, authorities revealed only that Prouty had accessed the FBI’s Hezbollah files once, and said nothing about her sharing information about ongoing investigations with anyone else.”

²⁸ Dinesh D’Souza, *What’s So Great About America*, New York: Penguin Books, 2002. See also Stephanie King, “Critique: Becoming American,” *Helium*, March 6, 2007, www.helium.com/items/198514critiquebecomingamericanbydineshdsouza. Stephanie King, in her critique of the chapter “Becoming American”, writes that D’Souza believes the “reasons for immigration are a result of ... extremely difficult [lifestyles], and compares America’s prosperity to the meager life of citizens from Third World countries. He describes hardships which include overcrowded transportation, pollution, unsafe drinking water, lack of education for children, and corrupt governments, and explains that even back-breaking labor cannot solve these problems. D’Souza says that the media presents America as a land in which citizens have large homes, televisions and vehicles, and even the lower classes are well off. He mentions that in America, normal laborers can purchase high priced coffees or go on European vacations, and that unlike Third World countries, most Americans do not have to fear starvation. D’Souza continues his essay by explaining that in contrast to other countries, in America being wealthier than someone else does not correlate with social superiority. He says that in America social equality and egalitarianism are more attainable than in India and other countries with aristocracies. He says that America exemplifies economic opportunities, and a better life, but that there is more to what makes America is appealing. D’Souza says that ‘in America, one has a choice.’”

²⁹ Jan C. Ting, “Immigration and National Security,” *Orbis*, vol. 50, no. 1 p. 41, Winter 2006, www.fpri.org/orbis/5001/ting.immigrationnationalsecurity.pdf: “The greatest threat to U.S. homeland security comes from illegals who enter the country through its porous borders in order to attack. The tide of illegal immigration must be stemmed in order to secure the United States against terrorism. It is all too easy for illegal immigrants to slip in beneath the radar, eschewing the legalization process and never being detected and deported. And as long as the benefits of illegally immigrating outweigh the costs, the influx will continue.”

³⁰ Katherine McIntire Peters, “Justice Overwhelmed,” *Government Executive*, July 15, 2006, www.govexec.com/features/0706-15/0706-15s3.htm. Wrote the author: “One Homeland Security official reported that intelligence assessments indicate terrorist organizations ‘believe illegal entry into the U.S. is more advantageous than legal entry for operations reasons.’”

³¹ U.S. Department of Justice, *FY 2002 Performance and Accountability Report*, Strategic Goal 5.2A, www.justice.gov/archive/ag/annualreports/ar2002/sg5finalacctpartone.html. “As of September 30, 2002, there was a 406,000 case backlog of removable unexecuted final orders and a 196,000 case backlog of not readily removable unexecuted final orders of removal, for a total of 602,000 unexecuted orders. [NOTE: Aliens “not readily removable” include those who are incarcerated, officially designated as in a Temporary Protected Status and those who are nationals of Laos, Vietnam, or Cuba (countries with whom the United States does not have repatriation agreements).]” See also U.S. Immigration and Customs Enforcement, *ICE Fiscal Year 2008 Annual Report*, p. 4, www.ice.gov/doclib/news/library/reports/annual-report/2008annual-report.pdf. This report states that in 2008 “ICE arrested 34,155 fugitives, which is an increase of more than 12 percent over the previous year. This has led to a six percent reduction in the number of open fugitive alien cases from the beginning of the fiscal year with nearly 37,000 fugitive alien cases resolved. At the end

of FY08, there were 557,762 such cases remaining.” A review of the courts’ history strongly suggests the number of unexecuted removal orders at the end of 2009 equaled 1,109,551 and that unexecuted removal orders are much greater than ICE admits. Adding together the number of removal orders from 2003 through 2009 — orders which the 2003 IG report and ICE’s own 2008 report suggests remain unenforced — shows the United States added 541,867 removal orders to the 602,000 that remained unexecuted as of 2002. From 2003 through 2009, non-detained aliens ordered removed each year respectively were 70,002 in 2003, 69,720 in 2004, 132,099 in 2005, 126,545 in 2006, 54,552 in 2007, 48,398 in 2008, and 40,551 in 2009. For verification, see *EOIR 2004 Year Book*, p. D2, www.justice.gov/eoir/statspub/fy04syb and *EOIR 2009 Year Book*, p. D2, www.justice.gov/eoir/statspub/fy09syb.pdf. The figure 1,109,551 assumes a 3 percent removal rate that the 2003 IG report calculated for non-detained asylum seekers. Without the 3 percent removal rate, the total, including the 602,000 unexecuted orders identified in 2002, was 1,143,867. The contradictory findings of DoJ’s unexecuted removal orders report in 2002 and ICE’s 2008 alien fugitive numbers cannot be reconciled. The higher figure is the more accurate because neither ICE (nor its predecessor INS), by its own admission, ever removed more than 34,155 aliens who were subject to final orders of removal in any year since 2003. In fact, more aliens outside detention were ordered removed each year after 2002 than ICE removed in any single year. This is not to say some did not return, adjust their presence in the US to a legal status or, in some instances, die, but no numbers suggest that the huge backlog of unexecuted orders can be explained away solely by these factors. The figure of 1.1 million is also supported by ICE’s announcement on August 18, 2009 that it would not remove aliens who skipped court or disobeyed orders to depart the U.S. This policy has caused an increase in unexecuted removal orders that builds on the 557,762 orders disclosed in 2008. See Anna Gorman, “Immigration Official Says Agents Will No Longer Have To Meet Quotas,” *Los Angeles Times*, August 18, 2009, articles.

latimes.com/2009/aug/18/local/me-immigration18. Said the story: “The head of Immigration and Customs Enforcement announced Monday in Los Angeles that he has ended quotas on a controversial program designed to go after illegal immigrants with outstanding deportation orders. This announcement came when teams of Immigration and Customs Enforcement (ICE) agents were expected to increase the number of annual arrests in the controversial fugitive operations’ program, according to agency memos.” Based on the courts’ history and the new ICE policy advising that aliens subject to final orders of removal who have no criminal convictions will not be removed, unexecuted removal orders at the end of 2009 equaled 1,109,551.

³² As much as 45 percent of the total unauthorized migrant population (approximately 12 million) entered the country with visas that allowed them to visit or reside in the United States for a limited amount of time. Known as “overstayers,” these migrants became part of the unauthorized population when they remained after their visas had expired. “Modes of Entry for the Unauthorized Migrant Population,” Pew Hispanic Center, May 22, 2006, pewhispanic.org/files/factsheets/19.pdf.

³³ Daniel Gonzalez, “U.S. Not Cracking Down On Immigrants With Expired Visas,” *Arizona Republic*, May 10, 2010, www.azcentral.com/news/articles/2010/05/10/20100510illegal-immigrants-overstay.html. States the article: “Not every illegal immigrant in the United States snuck across the border. A very large number, perhaps as many as 5.5 million, entered legally with visas and then never left. But unlike the hundreds of thousands of illegal immigrants apprehended at the border every year, very few visa violators are ever caught. The Border Patrol’s Tucson sector, the busiest in the nation, logged 241,673 apprehensions last fiscal year. In comparison, federal agents in Arizona tracked down and arrested 27 people who had overstayed their visas. Visa violators represent nearly half of the 11 million illegal immigrants in the country. But they have been largely ignored amid a national clamor to secure the border.”

³⁴ Anna Gorman, “Immigration Official Says Agents Will No Longer Have To Meet Quotas,” *Los Angeles Times*, August 18, 2009, articles.latimes.com/2009/aug/18/local/me-immigration18. Said the story: “The head of Immigration and Customs Enforcement announced Monday in Los Angeles that he has ended quotas on a controversial program designed to go after illegal immigrants with outstanding deportation orders.”

³⁵ Jan C. Ting, “Immigration and National Security,” *Orbis*, vol. 50, no. 1, p.1 Winter 2005, Foreign Policy Research Institute, www.fpri.org/orbis/5001/ting.immigrationnationalsecurity.pdf.

³⁶ 8 C.F.R. §1003.10 (“Immigration judges. (a) *Appointment*. [I]mmigration judges are attorneys whom the Attorney General appoints as administrative judges within the Office of the Chief Immigration Judge to conduct specified classes of proceedings, including hearings under section 240 of the Act. Immigration judges shall act as the Attorney General’s delegates in the cases that come before them.”) See ecfr.gpoaccess.gov.

³⁷ Once an alien has been ordered removed, DHS carries out the removal. EOIR does not maintain statistics on alien removals from the United States. *EOIR 2007 Year Book*, p. B1, www.justice.gov/eoir/statspub/fy07syb.pdf.

³⁸ *Ibid.*

³⁹ In “Chapters from My Autobiography” Twain confessed confusion. “Figures often beguile me,” he quipped, “particularly when I have the arranging of them myself; in which case the remark attributed to [British Prime Minister Benjamin] Disraeli would often apply with justice and force: There are three kinds of lies: lies, damned lies, and statistics.” Mark Twain, “Chapters from My Autobiography,” *North American Review*, No. DCXVIII, July 5, 1907.

⁴⁰ Of the 1,913,507 aliens the United States permitted to remain free pending trial from 1996 through 2009, 40 percent of this number —

799,842 — never came to court. Composites for 5 year periods may be found in each year book. EOIR 2000 Year Book, p. L1-L2, Figures 15-17 and p. T1, Figure 23, www.justice.gov/eoir/statspub/fy00syb.pdf; EOIR 2004 Year Book, p. H1-H4, Figures 10-12 and p. O1, Figure 20, www.justice.gov/eoir/statspub/fy04syb.pdf; EOIR 2008 Year Book, p. H1-H4, Figures 10-12 and p. O1, Figure 23, www.justice.gov/eoir/statspub/fy08syb.pdf; EOIR 2009 Year Book, p. H1-H4, Figures 10-12 and p. O1, Figure 23, www.justice.gov/eoir/statspub/fy09syb.pdf.

⁴¹ *Ibid.*

⁴² A summons to appear in immigration courts is known as a “Notice to Appear.” It is issued by DHS to an alien who DHS charges is “removable” (*i.e.* deportable) from the United States.

⁴³ See *EOIR 2008 Year Book*, p. H1- H4, Figures 10-12, and p. O1, Figure 23, www.justice.gov/eoir/statspub/fy08syb.pdf. Using the 5 year composite in the 2008 Year Book shows EOIR repeated its earlier finding that 39 percent of aliens failed to appear in court 2005. In fact, 59 percent were no-shows. In 2006, EOIR once more reported 39 percent of aliens made no court appearance. The real number was again 59 percent.

⁴⁴ Composites for five-year periods may be found in each Year Book. See *EOIR 2000 Yearbook*, p. L1-L2, Figures 15-17 and T1, Figure 23, www.justice.gov/eoir/statspub/fy00syb.pdf; *EOIR 2004 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 20, www.justice.gov/eoir/statspub/fy04syb.pdf; *EOIR 2008 Year Book*, p. H1- H4, Figures 10-12 and p. O1, Figure 23, www.justice.gov/eoir/statspub/fy08syb.pdf; *EOIR 2009 Year Book*, p. H1-H4, Figures 10-12, www.justice.gov/eoir/statspub/fy09syb.pdf. For 2009, 32 percent of alien litigants free pending court disappeared. EOIR reported the failure to appear rate was 11 percent. Total failures to appear equaled 33,209, while the total of aliens free pending court equaled 105,054. Dividing 33,209 by 105,054 shows that 32 percent of aliens failed to appear in court in 2009,

nearly three times higher than the 11 percent as stated by EOIR. Failures to appear in 2009 did not decrease substantially as EOIR asserts. They remained consistent with failure to appear rates in 2007 and 2008 — 38 percent and 37 percent respectively. Similar calculations of the failure to appear rate for the years 1996 to 2009, as shown in the table on page 5.

⁴⁵ See Note 40.

⁴⁶ *Ibid.*

⁴⁷ From 1996 through 2009, trial courts issued removal orders in 2,279,234 cases. Of this total, 1,287,685 were issued against aliens in detention facilities. The balance of removal orders — 991,549 — were issued against aliens free pending their court dates. Removal orders were issued against 769,842 aliens who failed to appear in court and 221,707 aliens who kept their court dates but lost their trials. Put another way, 78 percent of all removal orders against those the U.S. allowed to remain free pending trial come from those who failed to keep their court dates, while 22 percent of removal orders are issued against those who followed orders to appear in court but lost their trials. See *EOIR 2000 Year Book*, p. I3, Table 12, p. L1—L2, Figures 1517, and p. T1, Figure 23, www.justice.gov/eoir/statspub/fy00syb.pdf; *EOIR 2004 Year Book*, p. D2, Figure 5, p. H1H4, Figures 1012, and p. O1, Figure 20, www.justice.gov/eoir/statspub/fy04syb.pdf; *EOIR 2008 Year Book*, p. D2, Figure 5, p. H1 H4, Figures 1012, and p. O1, Figure 23, www.justice.gov/eoir/statspub/fy08syb.pdf; *EOIR 2009 Year Book*, p. D2, Figure 5, p. H1 H4, Figures 1012, and p. O1, Figure 23, www.justice.gov/eoir/statspub/fy09syb.pdf.

⁴⁸ Department of Justice, *FY 2008 Congressional Budget Submission*, Administrative Review and Appeals, http://www.justice.gov/jmd/2008justification/pdf/07_ara.pdf. The 2008 EOIR budget justification states unequivocally:

“The fight against terrorism is the first and overriding priority of the Department

of Justice and the Administration. A key component of this effort is the securing of our Nation’s borders and the repair of the immigration system as a whole. More than ever, protecting America requires a multifaceted strategy which must include the effective coordination of investigative, enforcement, legal and adjudicative resources, both within the Department and in concert with other agencies. The application and enforcement of our immigration laws remains a critical element of this national effort. ...

“While it is recognized that EOIR’s primary mission is not counterterrorism, the immigration enforcement programs of DHS, the source of EOIR’s caseload, represent a critical component of counterterrorism initiatives. Further, the Attorney General’s authorities with respect to the application and interpretation of immigration laws clearly impact government-wide enforcement strategies. As such, EOIR remains an important function vis-à-vis’ DHS/DOJ enforcement efforts.”

Department of Justice, *FY 2008 Congressional Budget Submission*, Administrative Review and Appeals, p. 2, 5.

⁴⁹ *Ibid.*

⁵⁰ See Department of Justice, *FY 2010 Congressional Budget Submission*, “Overview for Administrative Review and Appeals”, www.justice.gov/jmd/2010justification/pdf/fy10-ara.pdf; and see also *FY 2009 Congressional Budget Submission*, “Overview for Administrative Review and Appeals,” www.justice.gov/jmd/2009justification/pdf/fy09-ara.pdf; *FY 2008 Congressional Budget Submission*, “Overview for Administrative Review and Appeals,” www.justice.gov/jmd/2008justification/pdf/07_ara.pdf; *FY 2007 Congressional Budget Submission*, “Overview for Administrative Review and Appeals,” *FY 2006 Congressional Budget Sub-*

mission, “Overview for Administrative Review and Appeals.”

⁵¹ “A key component of this effort is ... the repair of the immigration system as a whole. More than ever, protecting America requires a multifaceted strategy which must include the effective coordination of investigative, enforcement, legal and adjudicative resources both within the Department and in concert with other agencies.” Department of Justice, *FY 2009 Congressional Budget Submission*, “Overview for Administrative Review and Appeals”, p. 1, www.justice.gov/jmd/2009justification/pdf/fy09-ara.pdf.

⁵² See Department of Justice, *FY 2011 Budget and Performance Summary*, “Overview,” p. 3, www.justice.gov/jmd/2011summary/pdf/doj-budget-summary.pdf. States the Summary: “The Department maintains substantial responsibilities with respect to immigration, including enforcement, detention, judicial functions, administrative hearings and litigation, among others. The Department’s Executive Office for Immigration Review (EOIR) serves as the frontline presence nationwide in immigration matters.”

⁵³ Between 2002 and 2006, 360,199 out of 713,974 non-detained aliens failed to keep their court dates, a total of 50.4 percent. See *EOIR 2006 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 20, www.justice.gov/eoir/statspub/fy06syb.pdf.

⁵⁴ Composites for five-year periods may be found in each Year Book. *EOIR 2000 Year Book*, p. L1-L2, Figures 15-17, and p. T1, Figure 23, www.justice.gov/eoir/statspub/fy00syb.pdf; *EOIR 2004 Year Book*, p. H1-H4, Figures 10-12, and p. O1, Figure 20, www.justice.gov/eoir/statspub/fy04syb.pdf; *EOIR 2008 Year Book*, p. H1-H4, Figures 10-12, and p. O1, Figure 23, www.justice.gov/eoir/statspub/fy08syb.pdf; *EOIR 2009 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 23, www.justice.gov/eoir/statspub/fy09syb.pdf.

⁵⁵ *ICE Fiscal Year 2008 Annual Report*, p.4, www.ice.gov/doclib/news/library/reports/annual-report/2008annual-report.pdf. (“At the end of 2008, there were 557,762 such [open fugitive] cases remaining.”) ICE has not reported its removal records for 2009 or 2010. Its August 2009 announcement that it would not remove aliens who skipped court or disobeyed orders to depart the U.S. has caused an increase in unexecuted removal orders that builds on the 557,762 orders disclosed in 2008. See Anna Gorman, “Immigration Official Says Agents Will No Longer Have To Meet Quotas,” *Los Angeles Times*, August 18, 2009, articles.latimes.com/2009/aug/18/local/me-immigration18.

⁵⁶ See Note 31.

⁵⁷ See *EOIR 2009 Year Book*, p. B1, www.justice.gov/eoir/statspub/fy09syb.pdf.

⁵⁸ See *EOIR 2009 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 23, www.justice.gov/eoir/statspub/fy09syb.pdf.

⁵⁹ See Note 31. Using previous reports from DHS and EOIR, the number of unexecuted orders of removal now equals 1,109,551. This number has increased 84 percent since 2002, when DoJ reported 602,000 orders against fugitive aliens remained unenforced.

⁶⁰ *EOIR 2009 Year Book*, p. H1-H4, Figure 10, www.justice.gov/eoir/statspub/fy09syb.pdf. Stated EOIR: “FY 2009 has the lowest failure to appear rate of the five years that are represented (2005-2009).”

⁶¹ In its annual *Year Book* EOIR features a highlights page — page A1 — with each report to Congress. With regard to failures to appear, the 2009 *Year Book* states: “The failure to appear rate decreased to 11 percent in FY 2009.” See p. H1-H4, Figure 10, www.justice.gov/eoir/statspub/fy09syb.pdf.

⁶² *EOIR 2009 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 20, www.justice.gov/eoir/statspub/fy08syb.pdf. The figure of 32 percent is calculated in this manner. EOIR reported 25,330 litigants free pending trial evaded court in 2009. EOIR excluded from its calculations cases administratively closed in 2009, essentially saying administrative closures — after 14 years — were no longer relevant. EOIR's stated: "In previous years, administrative closures were included to calculate the failure to appear rate. However, due to a larger percentage of administrative closures not relating directly to failure to appear, the failure to appear rate is calculated using immigration judge decisions and in absentia orders only." *EOIR 2009 Year Book*, p. H1, note to Figure 10. Rather than separate those cases not directly relating to failures to appear from those which directly related to failures to appear, EOIR chose the overbroad exclusion of *all* cases administratively closed. Therefore, administrative closures for 2009 are included by adding the 7,879 administrative closures obtained from TRAC Immigration at Syracuse University, which received these numbers through a Freedom of Information Act request. Failures to appear in 2009 thus equaled 33,209. The next step is to determine how many litigants were actually free pending trial. EOIR does not disclose this number. This number can be obtained, though, by taking the total number of non-detained aliens (76,492, see p. H2) and adding to it the total number of released aliens (20,683, see p. H3) and adding 7,879, the number of those free pending trial whose cases were administratively closed. The total sum of these numbers is 105,054. Dividing this total by those who failed to appear (33,482) shows that 32 percent of aliens failed to appear in court in 2009.

⁶³ EOIR defines administrative closures in a glossary attached to its annual report. EOIR states: "Administrative closure of a case is used to temporarily remove the case from an immigration judge's calendar or from the Board of Immigration Appeal's docket. Administrative closure of a case does not result in a final order. It is merely an administrative convenience which allows the removal of cases from the calendar in appropriate situations. A

case may not be administratively closed if opposed by either of the parties." *EOIR 2009 Year Book*, "Appendix A - Glossary of Terms," p.2, www.justice.gov/eoir/statspub/fy09syb.pdf.

⁶⁴ *EOIR 2000 Year Book*, p. L1-L2, Figures 15-17 and p. T1, Figure 23, www.justice.gov/eoir/statspub/fy00syb.pdf; *EOIR 2004 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 20, www.justice.gov/eoir/statspub/fy04syb.pdf. For the failure to appear rate from 1996 to 2001, see the table in note 44.

⁶⁵ *EOIR 2009 Year Book*, p. N1, Figure 22, www.justice.gov/eoir/statspub/fy09syb.pdf. Applications or lawsuits completed in 2009 totaled 69,442.

⁶⁶ *Ibid.* p. I1, Figure 13. Asylum applications completed in 2009 totaled 39,279.

⁶⁷ *Ibid.* p. I2, Figure 14. Out of the 69,442 cases with applications, the courts completed 44,830 asylum applications in 2009.

⁶⁸ Subtracting total asylum cases completed in 2009 (44,830) from total cases with applications that were completed in 2009 (69,442), leaves 24,612 cases that EOIR fails to explain. More than likely these cases make up the lawsuits EOIR calls "forms of relief other than asylum" found on page R3 of each fiscal year's statistical *Year Books*. But this is guesswork. Nowhere does EOIR account for all the applications it receives from year to year.

⁶⁹ TRAC Immigration, "Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow," June 17, 2009, trac.syr.edu/immigration/reports/208. The National Research Council — an agency of the National Academy of Sciences — generates standards applicable to EOIR and its statistics gathering methodology. States the article: "Congress ... ordered the Justice Department to develop a method to create what it called 'defensible fiscal linkages' between two agencies, the EOIR and the Border Patrol. To do this, the Department was instructed to spend up to \$1 million for 'a contract with the National Academy of Science to

develop, test and select a budget model that accurately captures the fiscal linkages and leverages them into an estimate of DOJ's immigration-related costs.”

⁷⁰ Margaret E. Martin, Miron L. Straf, and Constance F. Citro, eds., *Principles and Practices for A Federal Statistical Agency*, 3rd ed., National Academies Press, 2005, p.3, available at books.nap.edu/openbook/0309095999/html/index.html. The National Research Council's mission “is to improve government decision making and public policy, increase public education and understanding, and promote the acquisition and dissemination of knowledge in matters involving science, engineering, technology, and health. The institution takes this charge seriously and works to inform policies and actions that have the power to improve the lives of people in the U.S. and around the world.” See sites.nationalacademies.org/NRC/index.htm.

⁷¹ Ronald Inglehart and Christian Welzel, *Modernization, Cultural Change and Democracy: The Human Development Sequence*, New York: Cambridge University Press, 2005, p. 8-9. “[T]he perspective of human development guides one to focus on liberal democracy... What is required... to make civil liberties [effective] ... in society is the rule of law ... From their original invention in classic Athens, civil rights have been institutionalized to limit state power and despotic government. But to fulfill this function, civil rights need rule of law, honest uses of state power, and law-abiding [leaders] that make the institutional presence of civil rights effective.”

⁷² “The Other Immigrants,” *Wall Street Journal*, November 18, 2009. “The immigration debate has long been preoccupied with illegal aliens. But what about foreign-born professionals seeking green cards who stand in line and play by the rules? ... The costs of losing this human capital are high. Between 1990 and 2007, an astounding 25 percent of publicly traded companies in the U.S. that were started with venture capital had an immigrant founder. Many foreigners come initially to study or do research at our superior colleges and universities. But the barriers to remaining are forcing

them out. A survey of 1,200 international students taken in March shows we can no longer take for granted that skilled immigrants will want to stay and work in America. Some 55 percent of Chinese, 53 percent of Europeans and 38 percent of Indian students worried about being able to obtain permanent residence in the U.S.” See Pam Meister, “Our Broken Immigration System — Penalizing Those Who Follow The Rules,” *Big Government*, December 17, 2009, biggovernment.com/pmeister/2009/12/17/our-broken-immigration-system-penalizing-those-who-follow-the-rules/. States the article: “All you ever hear about when immigration is discussed is the issue of amnesty for illegal aliens. Meanwhile, the legal aliens in the queue — those who dot all the Is and cross all the Ts — are lost in the shuffle... Legal aliens who seek a green card or citizenship also have to lay out a lot of money, between lawyers' fees and immigration applications — and the taxes they pay... Their very lives are put on hold ... [B]ecause [a legal immigrant] has done everything by the book, he can't hide — the government knows who he is and can find him [and place him in deportation]. He's not like an illegal alien who snuck over the border and no one knows who he is.”

⁷³ See Pam Meister, “Our Broken Immigration System,” *Big Government*, December 17, 2009, biggovernment.com/pmeister/2009/12/17/our-broken-immigration-system-penalizing-those-who-follow-the-rules/.

⁷⁴ Lee Davidson, “Long Immigration Waits Show Why Some Come Illegally,” *Deseret News*, July 18, 2010, www.deseretnews.com/article/700049081/Long-immigration-waits-show-why-some-come-illegally.html. Quotes the article: “I think almost any immigration attorney that you ask will say that the immigration system is simply broken. That's why we have people who have broken the law, says Roger Tsai, president of the Utah Chapter of the American Immigration Lawyers Association. ‘But we also have broken laws.’”

⁷⁵ “Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and

Professionalism in the Adjudication of Removal Cases, Executive Summary,” American Bar Association Commission on Immigration, Feb. 2010, p. ES-11, www.americanbar.org/content/dam/aba/administrative/immigration/coi_executive_summary.authcheckdam.pdf.

⁷⁶ While a judge on the immigration court, the author noted that a significant number of cancellation actions involved men and women whose past lives included low-grade or harmless criminal violations which years later prompted their being summoned to court or, in other cases, were used as evidence of a criminal past. Though relevant, standing alone they were often insufficient to order an alien removed. Authentic judicial authority and statutory amendments are needed to address such cases, which frequently take a disproportionate amount of time that could be avoided by increasing authority in judges. More powerful courts — courts that maintain jurisdiction throughout the life of a case — would help eliminate the backlogs caused by these cases.

⁷⁷ American Immigration Lawyers Association, “Restore Fairness and Due Process To Our Immigration System,” Position Paper, Winter 2008, www.aila.org/content/default.aspx?docid=25512. States the position paper: “In America, the punishment should fit the crime. Not allowing judges to consider the circumstances of a case violates this principle and does not solve the problem of undocumented immigration. In many cases, our current laws require the deportation of long-term residents based on minor crimes and judges are given little to no discretion to forego their deportation. We need to allow judges to consider the circumstances of each individual case including the severity of the crime and decide what is best for that situation.”

⁷⁸ *ICE Fiscal Year 2008 Annual Report*, U.S. Immigration and Customs Enforcement, p. 3-4, www.ice.gov/doclib/news/library/reports/annual-report/2008annual-report.pdf.

⁷⁹ American Immigration Lawyers Association, “Restore Fairness and Due Process To Our Im-

migration System,” Position Paper, Winter 2008, www.aila.org/content/default.aspx?docid=25512. States the position paper: “Low-level immigration officials act as judge and jury, and the federal courts have been denied the power to review most agency decisions... The law [should not be] in the hands of agency clerks ... [Instead,] ... federal judges [should be empowered] to review agency decisions ... Important issues of fairness and justice are at stake, and we should ensure that there is adequate judicial review of immigration orders and decisions. Our judicial system is one of checks and balances, and immigrants deserve their day in court.”

⁸⁰ César Cuauhtémoc García Hernández, “No Human Being Is Illegal,” *Monthly Review*, June 2008, <http://monthlyreview.org/080616garcia.php>. Claiming U.S. immigration law is rooted in racism, the author expands on his position. Hernández states: “This article examines the racist foundation of the modern immigration law regime in the United States, with an emphasis on laws governing deportation, and urges the left to begin an earnest discussion of immigration policy outside the liberal promotion of a guest worker program. The left’s immediate goal must be to shift the debate toward a wholesale revision of the urgent care strategy employed by immigrants’ rights advocates in the wake of recent raids. Such criticism is necessary, but insufficient. Meanwhile, the left’s ultimate goal should be to replace the current model of immigration control with a radically different model premised on the inherent right to travel and thrive, even across borders. ... The border and the Border Patrol are children of the same xenophobia, justified by the pseudoscience of eugenics. In 1882 Congress responded to widespread hostility to Chinese immigrants by enacting the first law that effectively excluded all members of a particular nationality from the United States. By 1911 eugenics had gained so much support within policy-making circles that the Senate’s Dillingham Commission concluded that the country would be debased unless migration from southern and eastern Europe — mainly Italians, Jews, and Poles — was substantially curtailed. At roughly the same time, Immi-

gration Commissioner William Williams boasted of using immigration laws to bar ‘the riffraff and the scum which is constantly seeking to enter.’”

⁸¹ TRAC Immigration, “Immigration Judges,” trac.syr.edu/immigration/reports/160/, July 31, 2006. In TRAC’s report on immigration judges, then-Attorney General Alberto Gonzales is quoted. States the report: “Attorney General Alberto Gonzales, in a short January 9, 2006 statement, appeared to limit his criticism to the failings of individual immigration judges rather than the possible existence of more systematic problems in the operation of the court. After noting he was convinced that a majority of the immigration judges were discharging their duties in a professional way, the attorney general said there were some whose conduct ‘can aptly be described as intemperate or even abusive and whose work must improve.’ And, in a comment that appeared to be addressed directly to the judges, Gonzales insisted that all those who appeared before the courts be treated with ‘courtesy and respect. Anything less would demean the office you hold and the department in which you serve.’ ... Judge Richard Posner added to this impression by writing that Syracuse University’s TRAC analysis ‘of the decisions of most of the nation’s immigration judges [in] tens of thousands of different asylum cases ... provides powerful evidence that the problems of the immigration court go far beyond the failings of a few rotten apples — the individual judges criticized by Attorney General Gonzales. Rather, the examination of the case-by-case records appears to document a far broader problem: long-standing, widespread and systematic weaknesses in both the operation and management of this court.’”

⁸² See *EOIR 2000 Year Book*, p. I2-I3, Figure 12, www.justice.gov/eoir/statspub/fy00syb.pdf, and *EOIR 2001 Year Book*, p. I2-I3, Figure 12, www.justice.gov/eoir/statspub/fy01syb.pdf. These reports affirm a fairly consistent pattern of courts ordering removal approximately 80 percent of the time. Across the last 14 years removal orders maintain this average. In 1996, 82 percent of aliens appearing in immigration courts were ordered

deported and 83 percent were ordered deported in 1997. In 2000, 79 percent were ordered removed and in 2001 the number dropped only slightly to 78 percent. Orders granting relief to aliens average about 13 percent across the same 14 years and termination orders round out the balance of orders at an average of 7 percent. Seldom, however, is anyone ever removed.

⁸³ Through the last 14 years, trial courts made decisions in 2,857,390 cases. EOIR routinely advises Congress that removal orders compose 80 percent of all decisions. See *EOIR 2000 Year Book*, p. I2, Table 12, www.justice.gov/eoir/statspub/fy00syb.pdf; *EOIR 2004 Year Book*, p. D1, Figure 4, www.justice.gov/eoir/statspub/fy04syb.pdf; *EOIR 2008 Year Book*, p. D1, Figure 4, www.justice.gov/eoir/statspub/fy08syb.pdf; *EOIR 2009 Year Book*, p. D1, Figure 4, www.justice.gov/eoir/statspub/fy09syb.pdf. Calculated this way, trial courts granted relief — in other words permission to remain in the United States — in 13 percent of all decisions. These grants totaled 383,355 decisions. *EOIR 2000 Year Book*, p. I2, Table 12; *EOIR 2004 Year Book*, p. D2, Figure 5; *EOIR 2008 Year Book*, p. D2, Figure 5; *EOIR 2009 Year Book*, p. D2, Figure 5. The rest of the courts’ work involved what are called “termination orders” and unspecified “others.” See *EOIR 2000 Year Book*, p. I3, Table 12; *EOIR 2004 Year Book*, p. D2, Figure 5; *EOIR 2008 Year Book*, p. D2, Figure 5. A termination is a type of completion in which a case is closed by a trial court or the Board of Immigration Appeals without a final order of removal or deportation. A case is terminated when the respondent is found not removable as DHS originally charged. The alien can always be charged again. These cases equaled 7 percent or 201,173 of all court decisions.

⁸⁴ Between 2000 and 2009, trial courts granted relief in 295,617 applications out of the 486,032 applications that were actually decided “on the merits” — in other words, decisions on whether an alien would remain in the United States or be deported. Over the last 10 years, the courts completed 756,189 lawsuits filed by aliens. Of these applications, 270,157 were abandoned, withdrawn or transferred prior to trial. This left 486,032 cases

which that were actually tried. Trial courts ruled in favor aliens in 295,617 of these cases. Verdicts in favor of aliens included asylum cases with 137,322 grants, withholding and deferral cases under the Conventions Against Torture with 5,238 grants, and relief granted in 212(c) waivers, suspension of deportation, adjustment and cancellation cases for both lawful and non-lawful permanent residents with 153,057 grants. See *EOIR 2004 Year Book*, p. D2, Figure 5, p. K4, Figure 19, p. M1, Table 9, p. N1, Figure 22, and R3, Table 15, www.justice.gov/eoir/statspub/fy04syb.pdf; *EOIR 2008 Year Book*, p. D2, Figure 5, p. K4, Figure 19, p. M1, Table 9, p. N1, Figure 22, p. R3, Table 15, www.justice.gov/eoir/statspub/fy08syb.pdf; *EOIR 2009 Year Book*, p. D2, Figure 5, p. K4, Figure 19, p. M1, Table 9, p. N1, Figure 22, and p. R3, Table 15, www.justice.gov/eoir/statspub/fy09syb.pdf. Aliens outside detention file the vast majority of lawsuits, while aliens in detention typically accept orders of removal, filing applications for relief much less often. This distinction is critical because of its “downstream” effect regarding appeals. Only aliens who file lawsuits can later appeal orders of deportation.

⁸⁵ Trial courts considered 756,189 applications for relief from 2000 through 2009. 295,617 of these applications received grants. See *EOIR 2004 Year Book*, p. N1, Figure 22, www.justice.gov/eoir/statspub/fy04syb.pdf; *EOIR 2008 Year Book*, p. N1, Figure 22, www.justice.gov/eoir/statspub/fy08syb.pdf; *EOIR 2009 Year Book*, p. N1, Figure 22, www.justice.gov/eoir/statspub/fy09syb.pdf.

⁸⁶ From 2000 through 2009, the courts made decisions in 2,655,549 cases, but only 2,124,022 cases had decisions involving grants and denials of relief. Aliens filed no applications for relief in 1,691,843 of the cases. Applications for relief were filed in 486,032 of these decisions, while in 295,617 of these same applications aliens received relief. See *EOIR 2004 Year Book*, p. D1-D2, Figures 4 and 5, p. K4, Figure 19, p. M1, Table 9, p. N1, Figure 22, p. Q1, Table 15, and p. R3, Table 15, www.justice.gov/eoir/statspub/fy04syb.pdf; *EOIR 2008 Year Book*, p. D1-D2, Figures 4 and

5, p. K4, Figure 19, p. M1, Table 9, p. N1, Figure 22, p. Q1, Table 15, and p. R3, Table 15, www.justice.gov/eoir/statspub/fy08syb.pdf; *EOIR 2009 Year Book*, p. D1-D2, Figures 4 and 5, p. K4, Figure 19, p. M1, Table 9, p. N1, Figure 22, p. Q1, Table 15, and p. R3, Table 15, www.justice.gov/eoir/statspub/fy09syb.pdf.

⁸⁷ An alien who does not file a lawsuit or an application to remain in the United States usually does so when he or she advises a trial court that they have no grounds upon which to seek asylum and have no significant enough personal connections to the U.S. to enable the filing of an adjustment or cancellation application.

⁸⁸ The courts issued a total of 218,589 removal orders involving applications over the last 10 fiscal years, 167,559 asylum denials, and 51,030 denials chiefly involved adjustment and cancellation matters, (forms of relief available to lawful and non-lawful residents, but not to those seeking asylum). From 2000 through 2009, 204,096 applications were filed by aliens seeking these forms of relief available to lawful and non-lawful residents. Trial courts granted 153,057 of these applications and denied 51,030 of them. Grant rates for these forms of relief equal 75 percent since 2000. For verification see *EOIR 2004 Year Book*, p. N1, Figure 22, p. I2, Figure 14, and p. R3, Table 15, www.justice.gov/eoir/statspub/fy04syb.pdf; *EOIR 2008 Year Book*, p. N1, Figure 22, p. I2, Figure 14, and p. R3, Table 15, www.justice.gov/eoir/statspub/fy08syb.pdf; *EOIR 2009 Year Book*, p. N1, Figure 22, p. I2, Table 14, and p. R3, Table 15, www.justice.gov/eoir/statspub/fy09syb.pdf.

⁸⁹ See Note 88.

⁹⁰ *EOIR 2009 Year Book*, p. Y1, Figure 32 and p. N1, Figure 22, www.justice.gov/eoir/statspub/fy09syb.pdf. In FY 2009, EOIR reported 8 percent of trial court decisions were appealed to the BIA. What EOIR critically failed to add was that only 69,442 cases out of the 290,233 cases that trial courts considered actually had applications for relief. Stated differently, 76 percent of all cases trial

courts decided had no applications to consider. And without a lawsuit or application to rule upon, there could be no judgments favoring aliens and no appeals in the event applications were denied.

⁹¹ *EOIR 2004 Year Book*, p. K3, Figure 19, www.justice.gov/eoir/statspub/fy04syb.pdf; *EOIR 2008 Year Book*, p. K3, Figure 19, www.justice.gov/eoir/statspub/fy08syb.pdf; *EOIR 2009 Year Book*, p. K3, Figure 19, www.justice.gov/eoir/statspub/fy09syb.pdf. From 2000 through 2009, aliens appealed 214,404 out of 218,589 removal decisions issued by trial courts or 98 percent of all removal decisions. Over this same period, aliens filed approximately 756,189 applications for relief. Overall, aliens appealed 28 percent of all applications filed with the court and 98 percent of all removal orders that included an application for relief.

⁹² *EOIR 2009 Year Book*, p. Y1, Figure 32, www.justice.gov/eoir/statspub/fy09syb.pdf. In FY 2009, 8 percent of trial court decisions were appealed to the BIA.

⁹³ *EOIR 2004 Year Book*, p. Y1, Figure 32, www.justice.gov/eoir/statspub/fy04syb.pdf. In FY 2003, EOIR stated that aliens appealed 17 percent of all trial court decisions, neglecting to add that only cases in which applications are filed can be appealed. In the same year, 33,652 aliens with applications for relief actually appealed denial or removal orders out of a total 46,650 removal orders, or 72 percent of all removal orders in which an application for relief was filed.

⁹⁴ *EOIR 2008 Year Book*, p. Y1, Figure 32, www.justice.gov/eoir/statspub/fy08fyb.pdf. Only 9 percent of trial decisions were appealed by aliens in 2008 (20,670 out of 229,316 decisions). Only 10 percent were appealed in 2007 (21,847 out of 222,618 decisions).

⁹⁵ See *United States v. Ramos*, 623 F.3d 672 (9th Cir. 2010). Ramos had stipulated his removability before an immigration judge and, despite there being problems with the stipulation, the Ninth Circuit court held that no relief was available to

Ramos. As a result, the removal order was affirmed. Also see 8 U.S.C. § 1229a(d). An immigration judge's ability to enter stipulated removal orders "facilitates judicial efficiency in uncontested cases" and serves to "alleviate overcrowded federal, state, and local detention facilities." Stipulated Requests for Deportation or Exclusion Orders, 59 Fed.Reg. 24,976 (May 13, 1994). See also Inspection and Expedited Removal of Aliens, 62 Fed.Reg. 10,312, 10,321-22 (Mar. 6, 1997). 8 C.F.R. § 1003.25 provides an immigration judge with discretion to "enter an order of deportation, exclusion or removal stipulated to by the alien (or the alien's representative) and the Service." The amended regulation, however, permits an immigration judge to enter stipulated orders of removal for aliens without legal representation, and requires that the stipulation include: (1) An admission that all factual allegations contained in the charging document are true and correct as written; (2) A concession of deportability or inadmissibility as charged; (3) A statement that the alien makes no application for relief under the [Immigration and Nationality] Act; (4) A designation of a country for deportation or removal under section 241(b)(2)(A)(i) of the Act; (5) A concession to the introduction of the written stipulation of the alien as an exhibit to the Record of Proceeding; (6) A statement that the alien understands the consequences of the stipulated request and that the alien enters the request voluntarily, knowingly, and intelligently; (7) A statement that the alien will accept a written order for his or her deportation, exclusion or removal as a final disposition of the proceedings; and (8) A waiver of appeal of the written order of deportation or removal. 8 C.F.R. § 1003.25.

⁹⁶ The INS interior enforcement strategy, issued in 1999 and adopted by DHS, developed priorities for enforcement efforts. The first priority is the detention and removal of criminal aliens. The second is the dismantling and diminishing of alien smuggling and trafficking operations. The third addresses responding to community complaints about illegal immigration including those of law enforcement. The fourth priority regards investigating and prosecuting immigrant benefit and

document fraud. The fifth involves deterrence of employers' use of unauthorized aliens. Overall, the strategy aims to deter illegal immigration, prevent immigration related crimes, and remove those illegally in the United States. Congressional Research Service, "Immigration Enforcement Within the United States," p.7, April 6, 2006, www.fas.org/sgp/crs/misc/RL33351.pdf. Nowhere in the "Interior Enforcement Strategy" are immigration courts or enforcing their removal orders mentioned.

⁹⁷ Memorandum of Assistant Secretary for Immigration and Customs Enforcement John Morton to all ICE Employees, August 20, 2010, p.1, www.ilw.com/immigrationdaily/news/2010,0630-ice.pdf. States the memorandum: "ICE is charged with enforcing the nation's civil immigration laws. This is a critical mission and one with direct significance for our national security, public safety, and the integrity of our border and immigration controls. ICE, however, only has resources to remove approximately 400,000 aliens per year, less than 4 percent of the estimated illegal alien population in the United States. In light of the large number of administrative violations the agency is charged with addressing and the limited enforcement resources the agency has available, ICE must prioritize the use of its enforcement personnel, detention space, and removal resources to ensure that the removals the agency does conduct promote the agency's highest enforcement priorities, namely national security, public safety, and border security."

⁹⁸ Edward R. Grant, "Symposium on Immigration Appeals and Judicial Review," *Catholic University Law Review*, 55 Cath.U.L.Rev. 923, p. 2, Summer 2006. A 2003 DoJ Inspector General's Report, the report to which Judge Grant referred at the symposium, found that only 3 percent of failed asylum-seekers were actually deported.

⁹⁹ Office of the Inspector General, U.S. Department of Justice, "The Immigration and Naturalization Service's Removal of Aliens Issued Final Orders," Report Number I-2003-004, February 2003, p. i, www.npr.org/documents/2005/mar/doj_alien_removal. States the report: "[W]e exam-

ined three important subgroups of nondetained aliens and found that the INS was also ineffective at removing potential high-risk groups of nondetained aliens. The subgroups we examined were aliens: from countries that the U.S. Department of State identified as sponsors of terrorism — only 6 percent removed, [those] with criminal records — only 35 percent removed, and [those] who were denied asylum — only 3 percent removed."

¹⁰⁰ *Ibid.* p. ii-iii. Stated the report: "We found that the INS is even less successful at removing nondetained aliens from countries identified by the U.S. Department of State as state sponsors of terrorism. In 2001, seven countries received this designation: Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria. During the period we reviewed, 2,334 aliens from these countries were ordered removed. Of those aliens, 894 were nondetained. We examined a sample of 470 of the nondetained cases and found that the INS removed only 6 percent."

¹⁰¹ Mizanur Rahman, "ICE: We Are Not Engaged In A 'Backdoor' Amnesty," *Immigration Chronicles*, Chron.com, Aug. 26, 2011, blogs.chron.com/immigration/archives/2010/08/post_443.html.

¹⁰² *EOIR 2008 Year Book*, p. P2, Table 13, www.justice.gov/eoir/statpub/fy08syb.pdf. Decisions by judges in penal institutions in 2008 resulted in 95.7 percent of aliens ordered removed at completion of their sentences. States the annual report: "The goal of the IHP [Institutional Hearing Program] is to complete proceedings for incarcerated criminal aliens serving federal or state sentences prior to their release from prison or jail. This allows DHS to remove aliens with final removal orders expeditiously at the time of their release from incarceration." *Ibid.* p. P1.

¹⁰³ In summary, DHS apprehended more than 1,206,000 foreign nationals in 2006. Nearly 88 percent were natives of Mexico. There were 8,778 ICE Office of Investigations criminal arrests and 6,872 convictions for immigration-related crimes. ICE detained approximately 257,000 foreign nationals and removed 272,389 aliens from the

United States. The leading countries of origin of those removed were Mexico (67 percent), Honduras (10 percent), and Guatemala (7 percent). More than 1,043,000 other foreign nationals accepted an offer to return to their home countries without a removal order. Office of Immigration Statistics, Department of Homeland Security, “Immigration Enforcement Actions: 2006,” *Annual Report*, May 2008, p.1, www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_06.pdf.

¹⁰⁴ See Note 31.

¹⁰⁵ From 1996 through 2009, trial courts issued removal orders in 2,279,234 cases. Of this total, 1,287,685 were issued against aliens in detention facilities. The balance of removal orders — 991,549 — were issued against aliens free pending their court dates, 769,842 against aliens who failed to appear in court and 221,707 against those who kept their court dates but lost their trials. Put another way, 78 percent of all removal orders against those the U.S. allowed to remain come from those who failed to keep their court dates, while 22 percent of removal orders are issued against those who followed orders to appear in court but lost their trials. See *EOIR 2000 Year Book*, p. I3, Table 12, p. L1L2, Figures 15—17 and p. T1, Figure 23, www.justice.gov/eoir/statspub/fy00syb.pdf; *EOIR 2004 Year Book*, p. D2, Figure 5, p. H1H4, Figures 10—12 and p. O1, Figure 20, www.justice.gov/eoir/statspub/fy04syb.pdf; *EOIR 2008 Year Book*, p. D2, Figure 5, p. H1H4, Figures 1012, and p. O1, Figure 23, www.justice.gov/eoir/statspub/fy08syb.pdf; *EOIR 2009 Year Book*, p. D2, Figure 5, p. H1—H4, Figures 10—12, and p. O1, Figure 23, www.justice.gov/eoir/statspub/fy09syb.pdf.

¹⁰⁶ “ICE Total Removals,” December 7, 2010, www.ice.gov/doclib/about/offices/ero/pdf/ero-removals.pdf.

¹⁰⁷ Anna Gorman, “Immigration Official Says Agents Will No Longer Have To Meet Quotas,” *Los Angeles Times*, August 18, 2009, articles.latimes.com/2009/aug/18/local/me-immigration18. Said the story: “The head of Immigration and Customs

Enforcement announced Monday in Los Angeles that he has ended quotas on a controversial program designed to go after illegal immigrants with outstanding deportation orders. This announcement came when teams of Immigration and Customs Enforcement (ICE) agents were expected to increase the number of annual arrests in the controversial fugitive operations’ program, according to agency memos.”

¹⁰⁸ “ICE Total Removals,” December 7, 2010, www.ice.gov/doclib/about/offices/ero/pdf/ero-removals.pdf.

ICE noted that removals include those who voluntarily departed or who voluntarily returned.

¹⁰⁹ Statement of Chris Crane, President, American Federation of Government Employees Council 118, “Vote of No Confidence,” June 25, 2010, available at www.cis.org/articles/2010/259-259-vote-no-confidence.pdf.

¹¹⁰ Susan Carroll, “Feds Moving To Dismiss Some Deportation Cases,” *Houston Chronicle*, Aug. 24, 2010, www.chron.com/disp/story.mpl/special/immigration/7169978.html. States the article:

“The Department of Homeland Security is systematically reviewing thousands of pending immigration cases and moving to dismiss those filed against suspected illegal immigrants who have no serious criminal records, according to several sources familiar with the efforts. Culling the immigration court system dockets of non-criminals started in earnest in Houston about a month ago and has stunned local immigration attorneys, who have reported coming to court anticipating clients’ deportations only to learn that the government was dismissing their cases ... [Raed] Gonzalez said he went into immigration court downtown on Monday and was given a court date in October 2011 for one client. But, he said, the government’s attorney requested the dismissal of that case and those of two

more of his clients, and the cases were dispatched by the judge. The court ‘was terminating all of the cases that came up,’ Gonzalez said. ‘It was absolutely fantastic.’ ‘We’re all calling each other saying, “Can you believe this?”’ said John Nechman, another Houston immigration attorney, who had two cases dismissed. Attorney Elizabeth Mendoza Macias, who has practiced in Houston for 17 years, said she had cases for several clients dismissed during the past month and eventually called DHS to find out what was going on. She said she was told by a DHS trial attorney that 2,500 cases were under review in Houston. ‘I had five (dismissed) in one week, and two more that I just received,’ Mendoza said. ‘And I am expecting many more, many more, in the next month.’”

¹¹¹ Memorandum of Assistant Secretary for Immigration and Customs Enforcement John Morton to all ICE Employees, August 20, 2010, p.1, www.ilw.com/immigrationdaily/news/2010,0630-ice.pdf. States the memorandum: “ICE is charged with enforcing the nation’s civil immigration laws. This is a critical mission and one with direct significance for our national security, public safety, and the integrity of our border and immigration controls. ICE, however, only has resources to remove approximately 400,000 aliens per year, less than 4 percent of the estimated illegal alien population in the United States. In light of the large number of administrative violations the agency is charged with addressing and the limited enforcement resources the agency has available, ICE must prioritize the use of its enforcement personnel, detention space, and removal resources to ensure that the removals the agency does conduct promote the agency’s highest enforcement priorities, namely national security, public safety, and border security.”

¹¹² Susan Carroll, “Feds Moving To Dismiss Some Deportation Cases,” *Houston Chronicle*, August 24, 2010, www.chron.com/disp/story.mpl/special/immigration/7169978.html.

¹¹³ Testimony of Barbara Jordan, Chair, U.S. Commission on Immigration Reform, Before the U.S. House of Representatives Committee on the Judiciary, Subcommittee on Immigration and Claims, Feb. 24, 1995, available at www.utexas.edu/lbj/uscir/022495.html. The late Barbara Jordan was a democratic congresswoman from Texas.

¹¹⁴ The INS interior enforcement strategy, issued in 1999 and adopted by DHS, developed priorities for enforcement efforts. The first priority is the detention and removal of criminal aliens. The second is the dismantling and diminishing of alien smuggling and trafficking operations. The third addresses responding to community complaints about illegal immigration including those of law enforcement. The fourth priority regards investigating and prosecuting immigrant benefit and document fraud. The fifth involves deterrence of employers’ use of unauthorized aliens. Overall, the strategy aimed to deter illegal immigration, prevent immigration related crimes, and remove those illegally in the United States. See Congressional Research Service, “Immigration Enforcement Within the United States,” p.7, April 6, 2006, www.fas.org/sgp/crs/misc/RL33351.pdf. Nowhere in the “Interior Enforcement Strategy” are immigration courts or enforcement of removal orders mentioned.

¹¹⁵ *Ibid.*

¹¹⁶ “Play court” is a term used by some judges to express frustration with orders that are never enforced and with processes that mimic traditional courts, but lack judicial authority to give them effect.

¹¹⁷ See Office of Inspector General, Department of Homeland Security, “Detention and Removal of Illegal Aliens,” Audit Report OIG-06-33, p.2 April 2006, www.dhs.gov/xoig/assets/mgmt/rpts/OIG_06-33_Apr06.pdf.

¹¹⁸ *ICE Fiscal Year 2008 Annual Report*, U.S. Immigration and Customs Enforcement, p. 4, www.ice.gov/doclib/news/library/reports/annual-report/2008annual-report.pdf.

¹¹⁹ Statement of Chris Crane, President, American Federation of Government Employees Council 118, “Vote of No Confidence,” June 25, 2010, www.cis.org/articles/2010/259-259-vote-no-confidence.pdf. States Chris Crane: “[The political leadership of ICE] have abandoned the Agency’s core mission of enforcing ... immigration laws ... and have instead directed their attention to campaigning for programs and policies related to amnesty.”

¹²⁰ Katherine McIntire Peters, “Justice Overwhelmed,” *Government Executive*, July 15, 2006, <http://www.govexec.com/features/0706-15/0706-15s3.htm>. Reports *Government Executive*: “Of the 774,112 illegal aliens apprehended during the last three years, 36 percent were released due to a shortage of law enforcement personnel, lack of space in detention facilities, or inadequate funding necessary to detain them while their immigration status was determined.”

¹²¹ Susan Carroll, “A System’s Fatal Flaws,” *Houston Chronicle*, November 16, 2008, www.chron.com/dispatch/story.mpl/special/immigration/6115223.html. States the article: “A review of thousands of criminal and immigration records shows that Immigration and Customs Enforcement officials didn’t file the paperwork to detain roughly 75 percent of the more than 3,500 inmates who told jailers during the booking process that they were in the U.S. illegally ... [H]undreds of convicted felons — including child molesters, rapists and drug dealers — also managed to avoid deportation after serving time in Harris County’s jails, according to the Chronicle review, which was based on documents filed over a period of eight months starting in June 2007, the earliest immigration records available.”

¹²² Statement of Chris Crane, President, American Federation of Government Employees Council 118, “Vote of No Confidence,” June 25, 2010, www.cis.org/articles/2010/259-259-vote-no-confidence.pdf.

¹²³ *Ibid.*

¹²⁴ Katherine McIntire Peters, “Justice Overwhelmed,” *Government Executive*, July 15, 2006, <http://www.govexec.com/features/0706-15/0706-15s3.htm>. Wrote the author: “One Homeland Security official reported that intelligence assessments indicate terrorist organizations ‘believe illegal entry into the U.S. is more advantageous than legal entry for operations reasons.’”

¹²⁵ *The Worldwide Threat*: Hearing Before the Senate Select Comm. on Intelligence, 109th Cong., Feb. 16, 2005, (testimony of Admiral James C. Loy, Deputy Secretary of Homeland Security), http://www.fas.org/irp/congress/2005_hr/021605loy.pdf.

¹²⁶ *Ten Years After 9/11: A Report from the 9/11 Commission Chairmen*, Hearing before the Senate Committee on Homeland Security and Governmental Affairs, March 30, 2011 (Testimony of Gov. Tom Kean and Rep. Lee Hamilton), available at hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=759efc68-191f-4dfd-b362-c3197c6cb62.

¹²⁷ Surin & Griffin, P.C., “Deportation and Asylum Assistance in Immigration,” www.msgimmigration.com/deportation-asylum/. This law firm’s narrative provides a realistic assessment: “It is difficult to predict how long a contested removal case can take to resolve. However, removal cases for non-detained clients often take more than a year to conclude. If there is an appeal to the Board of Immigration Appeals, cases frequently take another year or two.” While on the Miami Immigration Court, the author encountered cases coming to court years after the summons (a document called a Notice to Appear) had been issued. One case the author resolved was 14 years old. Immigration judges from across the United States frequently have the same experience.

¹²⁸ TRAC Immigration, “Immigration Case Backlog Still Growing,” trac.syr.edu/immigration/reports/232/. The report finds that the average time that pending cases wait in the trial courts is now

443 days. Wait times continue to be longest in California, at 627 days.

¹²⁹ Lecturers at judicial training conferences frequently addressed time frames for considering cases. One-and-a-half-hour to three-hour hearings were suggested, but thoroughness was emphasized over time considerations. Most cases heard in the Miami court fit this model. Still, there were many exceptions.

¹³⁰ Surin & Griffin, P.C., “Deportation and Asylum Assistance in Immigration,” www.msgimmigration.com/deportation-asylum/. See also Ken Reitz, “Panel Discusses Challenges in Immigration Court System,” University of Virginia, March 28, 2008, www.law.virginia.edu/html/news/2008_spr/immigration_judges.htm. Judge Osuna of the Board of Immigration Appeals was quoted as saying that while it used to take four or five years for a case to be decided, it’s now usually eight to 18 months; TRAC Immigration, “Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow,” Figure 1, June 17, 2009, trac.syr.edu/immigration/reports/208/. TRAC noted that “EOIR did not dispute TRAC’s figures, nor challenge the fact that pending case backlogs were growing and wait times were increasing. Specifically, EOIR did not dispute an 11-year backlog.” If a case is appealed to a circuit court, concluding it will take at least another year. Altogether, five years from the time a case starts to the time it is finished is not unusual.

¹³¹ Board of Immigration Appeals. This panel is the appellate body that hears appeals from the immigration trial courts.

¹³² Office of Management and Budget, “Detailed Information on the Immigration Adjudication Assessment,” ExpectMore.gov, www.whitehouse.gov/omb/expectmore/detail/10003809.2006.html. This is an updated assessment from 2006 that reveals 161,112 cases were pending in 2003. It further shows that 92 percent of expedited asylum cases were processed within the 180-day deadline in 2005, 95 percent in 2006, 90 percent in 2007

and 80 percent in 2008. Congress was not provided this same information in EOIR’s *Statistical Year Book* in any of these years.

¹³³ Office of Management and Budget, the largest agency in the Executive Office of the President, helps sets management, planning and budgeting priorities for the federal government. See omb.gov.

¹³⁴ Office of Management and Budget, “Detailed Information on the Immigration Adjudication Assessment,” ExpectMore.gov, www.whitehouse.gov/omb/expectmore/detail/10003809.2006.html.

¹³⁵ TRAC Immigration, “Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow,” June 17, 2009, trac.syr.edu/immigration/reports/208/. TRAC revealed 201,212 cases were backlogged and the backlog was apparently never reported to the White House, the Department of Justice, Congress, or the public.

¹³⁶ *Ibid.* Stated the article: “A detailed study of the recent performance of the Immigration Courts — undertaken by the Transactional Records Access Clearinghouse (TRAC) — draws upon a variety of sources including hundreds of thousands of internal administrative records obtained from EOIR under the Freedom of Information Act. The key conclusion: the failure of the Justice Department even to fill existing judge vacancies, combined with growth in the number of matters the judges are handling each year, has exacted some very real costs ... The backlog of immigration cases awaiting disposal by judges is steadily increasing. Just since the end of FY 2006 this backlog has grown by 19 percent. And over the past decade, the backlog of cases has increased by 64 percent.” The backlog TRAC identifies stretched back to 1998 when unfinished cases then numbered 129,482. The 64 percent growth rate is the change from 129,482 to 201,212. How this number can be reconciled with OMB’s declaration that 3,965 cases remained backlogged in 2008 from a batch numbering 161,112 in 2003 is not clear without more information. Two things are certain, though. Neither Congress nor the public were informed of

the backlog prior to the TRAC study. Likewise, the backlog has a history indicating some cases were 11 years old when the study was published on June 19, 2009.

¹³⁷ *Ibid.* TRAC said, “EOIR did not dispute TRAC’s figures, nor challenge the fact that pending case backlogs were growing and wait times were increasing. Specifically, EOIR did not dispute the 11-year backlog.”

¹³⁸ TRAC Immigration, “As FY 2010 Ends, Immigration Case Backlog Still Growing,” October 2010, trac.syr.edu/immigration/reports/242/. States the article: “The number of cases awaiting resolution before the Immigration Courts reached a new all-time high of 261,083 by the end of September 2010, according to very timely government enforcement data obtained by the Transactional Records Access Clearinghouse (TRAC). The case backlog has continued to grow — up 5.3 percent — since TRAC’s last report three months ago, and more than a third higher (40 percent) than levels at the end of FY 2008.” See also Marcia Coyle, “Immigration Courts’ Backlog Hits New High,” *National Law Journal*, May 25, 2009. States the article: “The backlog of immigration cases facing the nation’s immigration courts reached a new high at the end of March — 242,776 cases — up 6.3 percent from four months ago, and 30.4 percent from 18 months ago. TRAC released the study which also shows that waiting times continue to lengthen. The average time that pending cases have been in the immigration courts is now 443 days. TRAC said the backlog of cases is driven by several factors. The main factor is the number of judges available overall and in particular localities. Other important factors include the complexity of the cases and changes in enforcement strategies at the DHS.” See also TRAC Immigration, “Immigration Case Backlog Still Growing,” May 2010, trac.syr.edu/immigration/reports/232/.

¹³⁹ See American Bar Association Appellate Standard 3.52. This rule requires 75 percent of all cases appealed to an intermediate appellate court to be determined within 290 days of the filing of

the Notice of Appeal, 95 percent should be determined within one year, and the remaining 5 percent are to be determined as soon as possible after one year. Well established precedent holds that failure to determine an appellate matter within years years from Notice of Appeal is a presumptive denial of due process. “[A]n appeal that is inordinately delayed is as much a ‘meaningless ritual’ as an appeal that is adjudicated without the benefit of effective counsel or a transcript of the trial court proceedings.” *United States v. Smith*, 94 F.3d 204 (6th Cir. 1996).

¹⁴⁰ Margaret Tebo, “Asylum Ordeals,” *ABA Journal*, November 2006, www.abajournal.com/magazine/article/asylum_ordeals/. States the article: “The number of immigration cases appealed to the BIA each year more than doubled during the ‘90s, resulting in a backlog of more than 60,000 cases by 2000.” See Dorsey & Whitney LLP, *Board of Immigration Appeals: Procedural Reforms to Improve Case Management*, Appendix 12, 2003, <http://www.dorsey.com/Resources/Detail.aspx?pub=144>. In 2003, the ABA commissioned Dorsey & Whitney to report on the continuing backlog in resolution of immigration cases. The report notes that in 1999 the BIA streamlined its review process, allowing single member review of some cases, instead of the traditional three member panel. Attorney General Ashcroft streamlined the appeals process even further and substantially reduced the backlog. In turn, the circuit courts of appeal saw immigration appeals increase more than 600 percent. Jonathan Cohn, DoJ’s Deputy Assistant Attorney General for the Civil Division, told lawmakers in April 2006 that the number of board decisions appealed to federal courts between 2001 and 2005 rose by 603 percent, from 1,757 cases to 12,349 cases. See also Katherine McIntire Peters, “Justice Overwhelmed”, *Government Executive*, July 15, 2006, <http://www.govexec.com/features/0706-15/0706-15s3.htm>.

¹⁴¹ Ken Reitz, “Panel Discusses Challenges in Immigration Court System,” University of Virginia, March 28, 2008, www.law.virginia.edu/html/news/2008_spr/immigration_judges.htm. Judge

Osuna of the Board of Immigration Appeals was quoted as saying that while it used to take four or five years for a case to be decided, it's now usually eight to 18 months. Federal circuit courts took notice. In *United States v. Lopez-Velasquez*, 568 F.3d 1139 (9th Cir. 2009), the Ninth Circuit observed the BIA appeal process took a long time and cases “routinely remained pending [before the BIA] for more than two years, and some [had] taken more than five years to resolve.” See also *Board of Immigration Appeals: Procedural Reforms to Improve Case Management*, 67 Fed. Reg. 54,878 - 54,905 (Aug. 26, 2002).

¹⁴² See *EOIR 2009 Year Book*, p. U1, Figure 28. The reported BIA backlog is 27,969 cases. www.justice.gov/eoir/statspub/fy09syb.pdf.

¹⁴³ Federal spending increased 276 percent between 1990 and 2010. In 1990 the spending of the U.S. government was \$1.253 trillion. The 2010 outlays totaled \$3.456 trillion. Office of Management and Budget, Historical Table 15.2, “Total Government Expenditures 1948 — 2010,” www.whitehouse.gov/omb/budget/Historicals.

¹⁴⁴ See “Inflation Rate Calculator,” InflationData.com, inflationdata.com/Inflation/Inflation_Calculators/Inflation_Rate_Calculator.asp. The inflation rate calculated from January 1990 to January 2010 is 70.08 percent.

¹⁴⁵ In FY 1990, the immigration courts received \$36.2 million. Department of Justice, “Budget Trend Data,” p. 33, Spring 2002, www.justice.gov/archive/jmd/1975_2002/btd02tocpg.htm. In 2010, courts received \$298 million. U.S. Department of Justice, “FY2011 Budget and Performance Summary,” Part 2, Executive Office of Immigration Review, www.justice.gov/jmd/2011summary/html/fy11-eoir-bud-summary.htm. This expansion in funding constitutes a growth rate of 823 percent.

¹⁴⁶ Between 2000 and 2007, EOIR spent just less than \$30 million to produce appellate transcripts for alien litigants. During this period, EOIR con-

tracted transcription services chiefly through three court reporting services, Free State Reporting, York Stenographic Services and Deposition Services. See www.fbodaily.com/archive/2006/10October/01Oct2006/FBO01158532.htm (Contract Award No. DJJ-07-C-1478/1479/1480 dated September 29, 2006). Between 2000 and 2008, EOIR spent \$33,844,717 to produce appellate transcripts for private litigants. The largest part of this amount — altogether \$29,176,481 — were tax dollars. From 2000 through 2008, EOIR paid Free State Reporting \$14,304,667. From 2000 through 2008, EOIR paid York Stenographic Services \$2,101,308. From 2000 through 2008, EOIR paid Deposition Services \$12,770,506. For a year by year breakdown visit www.usaspending.gov. Search under contracts, using names of the contractors. EOIR contracted through Department of Justice, Justice Management Division, Procurement Services Staff (PSS). The “identifier” or identifying number is 1501, the numeric code for “Offices, Boards and Divisions (includes Attorney General, etc.)” The contracts are 1478, 1479 and 1480 as of the last contract awarded on September 29, 2006. On average EOIR spent \$3,760,538 per year from taxes to pay for private litigation. When court personnel time is factored into total agency cost (a factor of 16 percent as provided in a 2000 court study), another \$4,668,369 was spent in processing appeals. A \$4 million transfer from DHS to DoJ placed in EOIR’s account since 2008 addresses tax dollars used to pay for alien appellate transcripts. The 2008 Budget Summary states “Fees collected for the processing of immigration appeal documents are deposited into the Immigration Examinations Fee Account, which is collected by the Department of Homeland Security. In FY 2008 [and 2009 and 2010], EOIR received \$4,000,000 [\$12 million altogether] as a transfer from the Immigration Examinations Fee Account.” Department of Justice 2008 Budget Summary, Administrative Review and Appeals, www.justice.gov/jmd/2008summary/pdf/061_ara.pdf; see also Department of Justice 2010 Budget Summary, Administrative Review and Appeals, p. 38, www.justice.gov/jmd/2010summary/pdf/eoir-bud-summary.pdf; and Department of Justice 2009 Budget

Summary, Administrative Review and Appeals, www.justice.gov/jmd/2009summary/pdf/ara-component-summary.pdf.

¹⁴⁷ Cancellation actions involving aliens who have committed crimes in the United States and cases in which a court determines that an alien's marriage to a U.S. citizen is fraudulent (an "adjustment" case) do not require the alien to pay court costs — the cost of the transcript — if the alien appeals an order of removal. Aliens in immigration courts are treated remarkably better than citizens and non-citizens in other state and federal courts through the country who in civil matters are required to pay their own court costs.

¹⁴⁸ Operations of the Executive Office for Immigration Review, Hearing before the Subcommittee On Immigration and Claims of the Committee on the Judiciary, H. of Rep., 107th Congress, Second Session, Feb. 6, 2002, p. 37, 45, (testimony of Hon. Michael Heilman), commdocs.house.gov/committees/judiciary/hju77558.000/hju77558_0f.htm.

¹⁴⁹ U.S. Department of Justice, "Professional Conduct for Immigration Practitioners — Rules and Procedures," August 19, 2004, www.justice.gov/eoir/press/00/profcondfaks.htm. States the fact sheet: "This professional conduct regulation applies to every private immigration practitioner authorized to practice before EOIR [*i.e.*, courts] and DHS (including attorneys, accredited representatives, and law students, among others)."

¹⁵⁰ *Ibid.* "This rule does not apply to ... DHS trial counsel, because they are subject to separate regulations and disciplinary procedures."

¹⁵¹ See 5 CFR § 9701.601—710 and 73 Fed. Reg. 76914, Thursday, December 18, 2008, www.justice.gov/eoir/vll/fedreg/2008_2009/fr18dec08c.pdf. States EOIR: "In fact, DHS has adopted a formal disciplinary process for its employees that provides similar hearing and appeal rights as EOIR's practitioner disciplinary process, including

removal or suspension from employment. See 5 CFR 9701.601—710." 73 Fed. Reg. at 76,917.

¹⁵² Barbara W. Tuchman, *The March of Folly*, New York: Alfred A. Knopf, Inc., 1984, p. 7.

¹⁵³ See, "Hearing on Criminal Aliens and Border Patrol Funding," Statement of Doris Meissner, Commissioner, Immigration and Naturalization Service, Department of Justice, before the Subcommittee on Immigration and Claims of the House Judiciary Committee, February 25, 1999, www.uscis.gov/files/testimony/990225.pdf; and compare with Joel Brinkley, "INS Offers Testimony That Sounds Familiar," *The New York Times*, October 6, 1994, <http://www.nytimes.com/1994/10/06/us/ins-offers-testimony-that-sounds-familiar.html>. Meissner was asked about a series of New York Times articles that "described an agency in disarray as a result of widespread management failures ... demoralized employees, commonplace corruption, aliens with criminal records who usually escape notice of the INS and ill treatment of legal immigrants by rude, insensitive staff."

¹⁵⁴ "Hearing on the Executive Office for Immigration Review," Statement of Juan P. Osuna, Associate Deputy Attorney General, U.S. Department of Justice, before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, June 17, 2010, judiciary.house.gov/hearings/pdf/Osuna100617.pdf. Said Mr. Osuna: "A major hiring initiative is underway this year which, by the time it is finished, will add 47 immigration judges and additional support staff in 2010 alone. The initiative involves the hiring of newly authorized immigration judges, which, when filled along with other vacancies, will bring the total immigration judge corps to 280 by the end of this year. This hiring initiative is one of the Department's high priority performance goals for FY 2010 and 2011. If Congress approves the Administration's request for 2011, this initiative will have the effect of increasing the size of the immigration judge corps to 301 by next year."

¹⁵⁵ Article I, Section 8, Clause 4 of the United States Constitution states that “[T]he Congress shall have Power To . . . establish a uniform Rule of Naturalization.”

¹⁵⁶ A legislative or Article I court is created in furtherance of the powers reserved to Congress by the Constitution. *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828).

¹⁵⁷ Approximately 65,033 immigrants serve in the armed forces. As of February 2008, there were 65,033 foreign-born individuals on active duty in the U.S. military, both naturalized citizens and noncitizens. This number includes both naturalized citizens and noncitizens. More than two-thirds of the foreign-born serving in the Armed Forces are naturalized citizens. The 44,705 members of the U.S. Armed Forces who were naturalized citizens in February 2008 represent 68.7 percent of the 65,033 foreign-born serving in the U.S. military. The 20,328 non-citizen members account for 31.3 percent of the total. The share of naturalized members on active duty has increased since May 2006, when it was 51.3 percent (or 35,262) of the 68,711 foreign-born military personnel. The foreign born represented 4.8 percent of the 1.36 million active-duty personnel in the Armed Forces as of February 2008. Jeanne Batalova, “Immigrants in the U.S. Armed Forces,” Migration Policy Institute, www.migrationinformation.org/USfocus/display.cfm?id=683#3.

¹⁵⁸ In fact, the first U.S. serviceman to die in Iraq was born in Guatemala. Marine Lance Corporal Jose Gutierrez died in combat at Umm Kasr on March 21, 2003. Gutiérrez came to the United States from Guatemala as a teenager. His parents died during the Guatemalan civil war. He lived on the streets and in a home for orphaned boys until he made his way to the United States where he attended high school and community college before he joined the Marines. He intended to earn enough money to further his education and support his sister in Guatemala. Immigrants have distinguished themselves in the United States military, receiving 716 of the 3,406 Congressional

Medals of Honor. National Immigration Law Center, “Facts About Immigrant Participation in the Military,” June 2004, www.nilc.org/immlawpolicy/DREAM/Facts_About_Immigrant_Participation_In_the_Military.pdf.

¹⁵⁹ Matthew Pinsker, *Lincoln’s Sanctuary: Abraham Lincoln and the Soldier’s Home*, New York: Oxford University Press 2003, p. 172. Writes Pinsker, “[A]bout 24 percent of the Union Army during this period was foreign-born.” Pinsker’s conclusions are drawn from the Quarterly Reports of Inmates [at the Soldier’s Home], Entry 18, Record Group 231, National Archives, Washington, DC. Other estimates say almost 25 percent of Union soldiers were foreign-born. See Union Army, Ethnic Groups, at www.absoluteastronomy.com/topics/Union_Army.

¹⁶⁰ See www.nilc.org/immlawpolicy/DREAM/Facts_About_Immigrant_Participation_In_the_Military.pdf. President Abraham Lincoln signed legislation approving the Congressional Medal of Honor on July 12, 1862.

¹⁶¹ John Reiniers, “La Reconquista—The Politics of Ethnic Conflict,” *Hernando Today*, May 23, 2010, www2.hernandotoday.com/content/2010/may/23/la-reconquista-politics-ethnic-conflict/. States the author: “Many Mexican immigrants, legal or otherwise, see themselves as part of a process of retaking the United States that once was a part of Mexico. Recent Mexican law permits dual citizenship which tacitly supports this notion.

¹⁶² Anti-Defamation League, “Immigrants Targeted: Extremist Rhetoric Moves into the Mainstream,” p.1, www.adl.org/civil_rights/anti_immigrant. States the article: “While there are valid and sincere arguments on both sides of the issue, the debate has also been framed, at times, by vitriolic anti-immigrant—and particularly anti-Hispanic—rhetoric and propaganda. Purveyors of this extremist rhetoric use stereotypes and outright bigotry to target immigrants and hold them responsible for numerous societal ills.”

¹⁶³ “Immigration Reform and the Reorganization of Homeland Defense”, testimony of Hon. Dana Marks Keener, hearing before the Subcommittee on Immigration of the Senate Committee on the Judiciary, 107th Congress, p. 15, 2002, frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_senate_hearings&docid=f:86931.pdf.

¹⁶⁴ Congressional Research Service, “Immigration Litigation Reform”, p. 11, May 8, 2006, www.ilw.com/immigdaily/news/2006,0516-crs.pdf. States the report: “Procedural guidelines for EOIR, including guidelines for the Board of Immigration Appeals (BIA) and the immigration courts, are currently not expressly set out in the INA; they are set out in the regulations at 8 C.F.R. part 1003, subparts A to C, and § 1103.3.”

¹⁶⁵ “Detailed Information on Immigration Adjudication Assessment”, ExpectMore.gov, www.whitehouse.gov/omb/expectmore/detail/10003809.2006.html. States OMB: “EOIR is unique in providing legal precedents for the guidance of the immigration bar that are binding on all DHS officers and in all immigration proceedings unless modified or overruled by the Attorney General or a federal court.”

¹⁶⁶ See Note 30.

¹⁶⁷ American Civil Liberties Union, “Naturalization Delays”, April 9, 2009, www.aclu.org/immigrants-rights/naturalization-delays. States the ACLU:

“Many immigrants who have satisfied the requirements to become U.S. citizens are left in limbo for months or years due to slow processing of a background check called the FBI name check. Since 2003, there have been systemic delays in naturalization because the government changed the FBI name check procedure so that applicants’ names are checked not only against the names of suspects and targets of investigations, but also innocent people who have been in contact with the FBI,

such as witnesses, victims, and people who have applied for security clearances. Tens of thousands of naturalization applicants have suffered from the delays ... [T]hese unreasonable delays violate the Administrative Procedure Act and Due Process Clause of the Fifth Amendment.”

See also *Tartakovsky v. Pierre*, No. 3:07-cv-01667 (S.D.Cal. March 11, 2008).

¹⁶⁸ Once an alien has been ordered removed by EOIR, DHS carries out the removal; EOIR does not maintain statistics on alien removals from the United States. *EOIR 2007 Year Book*, p. B1.

¹⁶⁹ The INS interior enforcement strategy, issued in 1999, developed priorities for enforcement efforts. The first priority is the detention and removal of criminal aliens. The second is the dismantling and diminishing of alien smuggling and trafficking operations. The third addresses responding to community complaints about illegal immigration, including those of law enforcement. The fourth priority regards investigating and prosecuting immigrant benefit and document fraud. The fifth involves deterrence of employers’ use of unauthorized aliens. Overall, the strategy aimed to deter illegal immigration, prevent immigration related crimes, and remove those illegally in the United States. “Immigration Enforcement Within the United States”, p.7, April 6, 2006, www.fas.org/sgp/crs/misc/RL33351.pdf.

¹⁷⁰ “Immigration Enforcement: Challenges to Implementing the INS Interior Enforcement Strategy”, statement by Richard Stana, Director, Justice Issues, U.S. General Accounting Office, hearing before the House Committee on the Judiciary Subcommittee of Immigration and Claims, p.6, 2002, GAO-02-861T, www.gao.gov/new.items/d02861t.pdf.

¹⁷¹ Congressional Research Service, “Immigration Enforcement Within the United States,” April 6, 2006, www.fas.org/sgp/crs/misc/RL33351.pdf.

¹⁷² *Ibid.* “A Government Accountability Study (GAO) report in October 2004 found that although ICE does not have a formal interior enforcement strategy, all the objectives contained in the INS interior enforcement strategy have been incorporated within a broader mission to strengthen homeland security.” p. CRS-6–7.

¹⁷³ U.S. Department of Justice, *FY 2002 Performance and Accountability Report*, Strategic Goal 5.2A, www.justice.gov/archive/ag/annualreports/ar2002/sg5finalacctpartone.html. OAs of September 30, 2002, there was a 406,000 case backlog of removable unexecuted final orders and a 196,000 case backlog of not readily removable unexecuted final orders of removal, for a total of 602,000 unexecuted orders. [NOTE: Aliens “not readily removable” include those who are incarcerated, officially designated as in a Temporary Protected Status, and those who are nationals of Laos, Vietnam or Cuba (countries with whom the United States does not have repatriation agreements).]”

¹⁷⁴ See U.S. Immigration and Customs Enforcement, *ICE Fiscal Year 2008 Annual Report*, p. 4, www.ice.gov/doclib/news/library/reports/annual-report/2008annual-report.pdf. This report states that in “2008 ICE arrested 34,155 fugitives, an increase of more than 12 percent over the previous year. This has led to a six percent reduction in the number of open fugitive alien cases from the beginning of the fiscal year with nearly 37,000 fugitive alien cases resolved. At the end of FY08, there were 557,762 such cases remaining.”

¹⁷⁵ A review of the courts’ history strongly suggests the number of unexecuted removal orders at the end of 2009 equaled 1,109,551 and that unexecuted removal orders are much greater than ICE admits. Adding together the number of removal orders from 2003 through 2009 — orders which the 2003 IG report and ICE’s own 2008 report suggests remain unenforced — shows the United States added 541,867 removal orders to the 602,000 which remained unexecuted as of 2002. From 2003 through 2009, non-detained aliens ordered removed each year respectively were

70,002 in 2003, 69,720 in 2004, 132,099 in 2005, 126,545 in 2006, 54,552 in 2007, 48,398 in 2008 and 40,551 in 2009. For verification see *EOIR 2004 Year Book*, p. D2, and *EOIR 2009 Year Book*, p. D2. See also Office of the Inspector General, U.S. Department of Justice, “The Immigration and Naturalization Service’s Removal of Aliens Issued Final Orders”, Report Number I-2003-004, February 2003, www.npr.org/documents/2005/mar/doj_alien_removal. The figure 1,109,551 assumes a 3 percent removal rate that the 2003 IG report calculated for non-detained asylum seekers. Without the 3 percent removal rate, the total, including the 602,000 unexecuted orders identified in 2002, was 1,143,867. The contradictory findings of DoJ’s unexecuted removal orders report in 2002 and ICE’s 2008 alien fugitive numbers cannot be reconciled. The higher figure is the more accurate because neither ICE (nor its predecessor INS), by its own admission, ever removed more than 34,155 aliens who were subject to final orders of removal in any year since 2003. In fact, more aliens outside detention were ordered removed each year after 2002 than ICE removed in any single year. This is not to say some did not return, adjust their presence in the United States to a legal status or, in some instances, die, but no numbers suggest that the huge backlog of unexecuted orders can be explained away solely by these factors. The figure of 1.1 million is also supported by ICE’s announcement on August 18, 2009, that it would not remove aliens who skipped court or disobeyed orders to depart the United States. This policy has caused an increase in unexecuted removal orders that builds on the 557,762 orders disclosed in 2008. See Anna Gorman, “Immigration Official Says Agents Will No Longer Have to Meet Quotas”, *Los Angeles Times*, August 18, 2009, articles.latimes.com/2009/aug/18/local/me-immigration18. Said the story: “The head of Immigration and Customs Enforcement announced Monday in Los Angeles that he has ended quotas on a controversial program designed to go after illegal immigrants with outstanding deportation orders. This announcement came when teams of Immigration and Customs Enforcement (ICE) agents were expected to increase the number of annual arrests

in the controversial fugitive operations' program, according to agency memos." Based on the courts' history and the new ICE policy advising that aliens subject to final orders of removal who have no criminal convictions will not be removed, unexecuted removal orders at the end of 2009 equaled 1,109,551.

¹⁷⁶ Office of Inspector General, Department of Homeland Security, "An Assessment of United States Immigration and Customs Enforcement's Fugitive Operation Teams", Rpt. OIG-07-34, March 2007. The report found that found that the Fugitive Operations Teams' "effectiveness was hampered by insufficient detention capacity, limitations of an immigration database and inadequate working space." See also Associated Press, "U.S. Can't Account for 600,000 Fugitives", *Newsmax.com*, March 26, 2007, archive.newsmax.com/archives/articles/2007/3/26/134242.shtml?s=us. ("Teams assigned to make sure foreigners ordered out of the United States actually have a backlog of more than 600,000 cases and can't accurately account for the fugitives' whereabouts.")

¹⁷⁷ Anna Gorman, "Immigration Official Says Agents Will No Longer Have to Meet Quotas", *Los Angeles Times*, August 18, 2009, articles.latimes.com/2009/aug/18/local/me-immigration18.

¹⁷⁸ Judges possess no contempt or injunctive authority, even though a nascent form was authorized by Congress in 1996. The Justice Department has never issued regulations authorizing its use. See § 240(b)(1) of the INA, as amended by § 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

¹⁷⁹ Press Release, "Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals", Department of Justice, August 9, 2006, www.justice.gov/opa/pr/2006/August/06_ag_520.html. The Attorney General's statement outlined the common violations to be addressed by regulations empowering judges to sanction litigants and attorneys

who offer contempt or abuse of process. Still, these regulations remain unissued.

¹⁸⁰ "Immigration Reform and the Reorganization of Homeland Defense," testimony of the Hon. Dana Marks Keener, hearing before the Subcommittee on Immigration, Border Security and Citizenship of the Senate Committee on the Judiciary, 107th Cong., p. 15, 2002, available at judiciary.senate.gov/hearings/testimony.cfm?id=295&wit_id=674. Judge Keener testified: "In 1996, contempt authority for Immigration Judges was mandated by Congress. However, actual implementation required the promulgation of regulations by the Attorney General ... [It later] was discovered that the Attorney General had failed to do so, in large part, because the INS objected to having its attorneys subjected to contempt provisions by other attorneys within the Department, even if they do serve as judges." Judge Keener described the authority of judges in some instances to be "toothless."

¹⁸¹ Detention of aliens during removal period.

- (a) *Assumption of custody*. Once the removal period defined in §241(a)(1) of the Act begins, an alien in the United States will be taken into custody pursuant to the warrant of removal;
- (b) *Cancellation of bond*. Any bond previously posted will be canceled unless it has been breached or is subject to being breached;
- (c) *Judicial stays*. The filing of (or intention to file) a petition or action in a Federal court seeking review of the issuance or execution of an order of removal shall not delay execution of the Warrant of Removal except upon an affirmative order of the court.

8 C.F.R. § 241.3

¹⁸² 8 C.F.R. § 241.1 provides for finality of decisions. A removal order made by the immigration judge at the conclusion of proceedings (under section 240 of the INA) becomes final:

- (a) Upon dismissal of an appeal by the Board of Immigration Appeals;
- (b) Upon waiver of appeal by the respondent;

(c) Upon expiration of the time allotted for an appeal if the respondent does not file an appeal within that time;

(d) If certified to the Board or Attorney General, upon the date of the subsequent decision ordering removal;

(e) If an immigration judge orders an alien removed in the alien's absence, immediately upon entry of such order; or

(f) If an immigration judge issues an alternate order of removal in connection with a grant of voluntary departure, upon overstay of the voluntary departure period except where the respondent has filed a timely appeal with the Board. In such a case, the order shall become final upon an order of removal by the Board or the Attorney General, or upon overstay of any voluntary departure period granted or reinstated by the Board or the Attorney General.

8 C.F.R. § 241.1.

Note that there are cases invalidating subsection (f) of the regulation.

8 C.F.R. § 1003.1(d)(7) addresses finality of a BIA decision. It provides:

“The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (h) of this section. The Board may return a case to the Service or an immigration judge for such further action as may be appropriate, without entering a final decision on the merits of the case.”

8 C.F.R. § 1003.39 also addresses the finality of a trial court decision. It reads:

“Except when certified to the Board, the decision of the Immigration Judge becomes final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken whichever occurs first.”

¹⁸³ “What experience and history teach is this — that people and governments never have learned

anything from history, or acted on principles deduced from it.” George Friedrich Hegel, *The Philosophy of History*, 1837.

¹⁸⁴ See *EOIR 2008 Year Book*, p. H1-H4, Figures 10-12 and p. O1; *EOIR 2007 Year Book*, Pages H1-H4, Figures 10-12 and p. O1.

¹⁸⁵ *EOIR 2009 Year Book*, p. H1-H4, Figures 10-12, and p. O1 (33,209 | 105,054 = 32 percent, excluding detained litigants); *EOIR 2008 Year Book*, p. H1-H4, Figures 10-12 and p. O1 (38,200 | 103,571 = 36.8 percent, excluding detained litigants); *EOIR 2007 Year Book*, p. H1-H4, Figures 10-12 and p. O1 (43,523 | 115,430 = 37.7 percent, excluding detained litigants).

¹⁸⁶ Of the 1,913,507 aliens the United States permitted to remain free pending trial, 40 percent of this number — 769,842 — never came to court. Composites for five year periods may be found in each yearbook. *EOIR 2000 Year Book*, p. L1-L2, Figures 15-17 and p. T1, Figure 23; *EOIR 2004 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 23; *EOIR 2008 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 23; *EOIR 2009 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 23.

¹⁸⁷ Judges do not have authority to order arrest, while some 48 different “immigration officials” — all non-judicial — from DHS possess that discretion. 8 C.F.R. § 287.5(e)(2).

¹⁸⁸ Once an alien has been ordered removed by EOIR, DHS (through ICE and its sub-agency DRO) executes removal. See *EOIR 2008 Year Book*, p. B1.

¹⁸⁹ The classes of persons who may order an alien into custody are wide. They include some forty-eight different DHS “immigration officials.” This class does not include judges of the immigration courts. Specifically, 8 C.F.R. § 236.1(d)(1) states that a warrant of arrest may be issued only by those immigration officers listed in 8 C.F.R. § 287.5(e)(2). Those persons who may order arrest fall into

a comprehensive listing of field-level to executive level government employees designated by 8 C.F.R. § 287.5(e)(2) and “who have been authorized or delegated such authority.”

The Enterprise of Illegal Immigration

¹⁹⁰ TRAC Immigration, “Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow,” June 17, 2009, trac.syr.edu/immigration/reports/208/. Stated the article:

“The background of the immigrants appearing before the court have [*sic*] also been undergoing change. A large proportion of the aliens in the hearings were not newcomers to the United States but rather had come to this country years before ending up in court. Last year the typical alien appearing in the Immigration Courts had entered this country more than six years prior to his or her hearing. Presumably in part because of changing charging patterns by DHS, this length of time has been on the rise: 3.3 years in FY 2006, 5.0 years in FY 2007, 6.4 years in FY 2008, and 7.2 years so far in FY 2009.”

¹⁹¹ Since 2000, grants in adjustment and cancellation cases alone have exceeded asylum grants. Asylum grants equaled 115,376. Adjustment and cancellation grants totaled 133,716. See *EOIR 2004 Year Book*, p. D1, Figure 4 and p. K4, Figure 19; *EOIR 2008 Year Book*, p. D1, Figure 4 and p. K4, Figure 19; *EOIR 2009 Year Book*, p. D1, Figure 4 and p. K4, Figure 19; see also *EOIR 2004 Year Book*, p. R3, Table 16; *EOIR 2008 Year Book*, p. R3, Table 15.

¹⁹² Press Release, “Household Income Rises, Poverty Rate Unchanged, Number of Uninsured Down”, U.S. Census Bureau, August 26, 2008, www.census.gov/newsroom/releases/archives/income_wealth/cb08-129.html. Median income in 2006 was \$50,946 for native born households — while households maintained by naturalized citizens had income of \$52,092. Fifty-seven percent

of all foreign-born households showed income between \$37,833 and \$93,577. This range accounted for more than 8.4 million from a total of 15 million foreign born households. For foreign-born households whose householder was not a U.S. citizen, median income was \$37,637. See generally, Carmen DeNavas-Walt, Bernadette D. Proctor, and Jessica C. Smith, *Income, Poverty And Health Insurance Coverage In The United States: 2007*, U.S. Census Bureau, August 2008, www.census.gov/prod/2008pubs/p60-235.pdf.

¹⁹³ Steven A. Camarota, “Immigrants in the United States, 2007: A Profile of America’s Foreign-Born Population”, Center for Immigration Studies, November 2007, www.cis.org/articles/2007/back1007.html. States the article:

“The nation’s immigrant population (legal and illegal) reached a record of 37.9 million in 2007. Immigrants account for one in eight U.S. residents, the highest level in 80 years. In 1970 it was one in 21; in 1980 it was one in 16; and in 1990 it was one in 13. Overall, nearly one in three immigrants is an illegal alien. Half of Mexican and Central American immigrants and one-third of South American immigrants are illegal. Since 2000, 10.3 million immigrants have arrived — the highest seven-year period of immigration in U.S. history. More than half of post-2000 arrivals (5.6 million) are estimated to be illegal aliens.”

¹⁹⁴ Congressional Research Service, “Immigration Enforcement Within the United States”, April 6, 2006, p. 1, www.fas.org/sgp/crs/misc/RL33351.pdf. The report states:

“It is estimated that there are more than 11 million unauthorized aliens currently living in the United States, and the resident unauthorized alien population is estimated to increase by 500,000 people per year. In addition, each year approximately 1 million aliens are apprehended while trying to illegally enter the United States. Although

most of these people enter the United States for economic opportunities or fleeing civil strife and political unrest, some are criminals, and some may be terrorists. All are in violation of federal law.”

¹⁹⁵ Steven A. Camarota, “100 Million More: Projecting the Impact of Immigration on the U.S. Population, 2007 to 2060”, p.6, Center for Immigration Studies, August 2007, www.cis.org/articles/2007/back707.pdf.

¹⁹⁶ *EOIR 2009 Year Book*, p. B7, Figure 3 and p. S1, Figure 25.

¹⁹⁷ Many “cases” considered by the court each year will have more than one claimant and many of the cases the courts rule on address immigrants who have fallen out of legal status, rather than those in the United States illegally from time of entry. A “case” as defined by EOIR, involves one alien. On appeal, “case” defines one lead alien and may include family members. *EOIR 2008 Year Book*, Appendix A, p. 5.

¹⁹⁸ Press Release, “Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals”, Department of Justice, August 9, 2006, www.justice.gov/opa/pr/2006/August/06_ag_520.html.

¹⁹⁹ *EOIR 2009 Year Book*, p. D1-D2, Figures 4-5 (21,544 | 232,212 = 9.27 percent).

²⁰⁰ From 2000 through 2009, total applications before U.S. immigration courts numbered 756,189, of which 554,498 were asylum petitions and 204,096 were applications for “other forms” of relief. *EOIR 2009 Year Book*, p. D1-D2, Figures 4-5.

²⁰¹ From 2000 through 2009, trial courts rendered decisions in 304,881 asylum applications out of a total of 486,032 decisions. Trial courts granted 137,322 of these asylum applications and denied 167,559. See *EOIR 2004 Year Book*, p. D1, Figure 4 and p. K4, Figure 19; *EOIR 2008 Year Book*, p.

D1, Figure 4 and p. K4, Figure 19; *EOIR 2009 Year Book*, p. D1, Figure 4 and p. K4, Figure 19; see also *EOIR 2004 Year Book*, p. R3, Table 16; *EOIR 2008 Year Book*, p. R3, Table 15; *EOIR 2009 Year Book*, p. R3, Table 15.

²⁰² The term used to describe a change from temporary to permanent status is adjustment of status. One form of adjustment of status is that which results from a marriage which was valid from inception. The term change of status refers to a change from one temporary classification to another. There are generally two alternative methods to obtain immigrant status for those who have been deemed eligible for permanent residence in the United States. The first is adjustment of status, if the alien is already in the United States and wants to remain in the United States during the processing period. The second is consular processing, if the alien will obtain an immigrant visa at a U.S. consulate. See www.uscis.gov/portal/site/uscis/menuitem.

²⁰³ Cancellation of removal for lawful permanent residents under § 240A(a) of the Immigration and Naturalization Act is available to an alien who is inadmissible or deportable from the United States if the alien: (1) has been an alien lawfully admitted for permanent residence for not less than five years, (2) has resided in the United States continuously for seven years after having been admitted in any status, and (3) has not been convicted of any aggravated felony. 8 U.S.C. § 1229b(a). Cancellation of removal and adjustment of status for nonpermanent residents, previously known as suspension of deportation, through § 240A(b) is available to an alien who is inadmissible or deportable from the United States if the alien: (1) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application; (2) has been a person of good moral character during such period; (3) has not been convicted of a criminal offense or security or terrorist related crime; and (4) establishes that removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent

residence. 8 U.S.C. § 1229b(b).

²⁰⁴ From 2000 through 2009, asylum grants equaled 137,322, while denials came to 167,559. Adjustment and cancellation grants totaled 153,057, and denials equaled 51,030. See *EOIR 2004 Year Book*, p. D1, Figure 4 and p. K4, Figure 19; *EOIR 2008 Year Book*, p. D1, Figure 4 and p. K4, Figure 19; *EOIR 2009 Year Book*, p. D1, Figure 4 and p. K4, Figure 19; see also *EOIR 2004 Year Book*, p. R3, Table 16; *EOIR 2008 Year Book*, p. R3, Table 15; *EOIR 2009 Year Book*, p. R3, Table 15.

²⁰⁵ From 2000 through 2009, 204,096 applications for adjustment or cancellation were filed by aliens. Trial courts granted 153,057 of these applications and denied 51,030 of them. Grant rates for these forms of relief equal 74.9 percent since 2000 ($51,030 \div 153,057 = 74.9$ percent). For verification see *EOIR 2004 Year Book*, p. N1, Figure 22 and p. I2, Figure 14, and p. R3, Table 15; *EOIR 2008 Year Book*, p. N1, Figure 22, p. I2, Figure 14, and p. R3, Table 15; *EOIR 2009 Year Book*, p. N1, Figure 22, p. I2, Table 14, and p. R3, Table 15.

²⁰⁶ See Janice L. Kephart, “Immigration and Terrorism: Moving Beyond The 9/11 Staff Report On Terrorist Travel”, pp.8-9, Center for Immigration Studies, 2005, www.cis.org/articles/2005/kephart.pdf.

²⁰⁷ A visa is a permit to apply to enter the United States. A visa, however, does not guarantee entry into the United States. Most visas are issued by a Department of State Bureau of Consular Affairs official located abroad in an embassy or consulate. A separate United States agency, the United States Citizenship and Immigration Services (USCIS; an agency of the Department of the Homeland Security), has authority to deny admission at port of entry. The period for which a person is authorized to remain in the United States is determined by USCIS, not the Department of State. At port of entry, a USCIS official must authorize admission to the United States. There are two major types of visas: immigrant visas and non-immigrant (visitor) visas. Generally, an immigrant visa is issued to a

person who intends to live and work permanently in the United States. In these cases, a relative or employer sends an application to USCIS requesting a visa be granted to the person intending to immigrate. Some applicants, such as workers with extraordinary ability and certain special immigrants, can apply on their own behalf. A non-immigrant visa is issued to a person who wishes to come to the United States for a specific purpose. Such non-immigrant visas are given to people such as tourists, business people, students, temporary workers, and diplomats. See generally U.S. Citizenship and Immigration Services, www.uscis.gov/portal/site/uscis.

²⁰⁸ Kephart, *Immigration and Terrorism*, p. 11.

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.* p. 9.

²¹¹ *Ibid.* p. 10.

²¹² “Border Security and Enforcement: The 9/11 Commission Staff Report on Training for Border Inspectors, Document Integrity, and Defects in the U.S. Visa Program”, testimony of Janice L. Kephart, Senior Consultant, the Investigative Project on Terrorism hearing before the Subcommittee on Terrorism, Technology, and Homeland Security and the Subcommittee on Immigration, Border Security and Citizenship of the Senate Committee on the Judiciary, 109th Congress, 2005, www.numbersusa.com/PDFs/KephartTestimony.pdf. Said Ms. Kephart:

“The hijackers acquired a total of thirty-four identifications: thirteen driver’s licenses, two of which were duplicates, and twenty-one USA or state issued identification cards, usually used for showing residence in the United States or a state. Seven hijackers used fraudulent means to acquire legitimate identifications in Virginia, through fake residency certificates provided by bribed Virginia residents. If a birth certificate or social security card had been

required (whose verification was also required) the hijackers would have been hard pressed to obtain validly issued state/U.S. identifications. We do not know how the other identifications were obtained; except for recent information that one hijacker's California license was apparently acquired through a loophole in identification requirements under California law."

Ibid. p. 15 (footnotes omitted).

²¹³ John Fund, *Stealing Elections: How Voter Fraud Threatens Our Democracy*, Encounter Books: San Francisco, 2004 p. 1.

²¹⁴ *Ibid.* p. 10-11.

²¹⁵ Lupe S. Salinas, "Deportations, Removals and the 1996 Immigration Acts: A Modern Look at The Ex Post Facto Clause", *Boston University International Law Journal*, vol. 22, p. 245, Fall 2004, www.bu.edu/law/central/jd/organizations/journals/international/volume22n2/documents/245-308.pdf. Judge Salinas observes the inability of courts to fashion judgments cognizant of the alien's history beyond the relevancy of criminal conduct. The author's experience on the Miami bench also coincides with statements of Judge Salinas.

²¹⁶ *Ibid.* Specific incidents of injustice might assist the reader in understanding the 1996 Immigration Act's potentially horrific impact. One involves a woman who lived in the United States for 28 years. In 1989 she was convicted of writing a forged check for under \$20. The conviction qualified her, with the passage of the 1996 Immigration Act and the retroactive application of the law, to banishment from the United States and from her mother to a country she would not likely recall because she immigrated at the age of four. The writer further recalls the news story of a decorated Vietnam veteran in South Texas who received his notice from the INS to appear and show cause why he should not be deported. It seems this war hero had a drinking problem that resulted in a felony driving while intoxicated conviction. He also had

been sober for several years when he faced deportation. The federal appellate court for Texas later concluded that felony drunk driving does not meet the "aggravated felony" definition.

²¹⁷ A legislative or Article I court is created in furtherance of the powers reserved to Congress by the Constitution. *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828). Among their purposes is swift resolution of cases in which the government is always a party. These are better known as public rights cases. See also "Legislative Court — Further Readings", law.jrank.org/pages/8203/Legislative-Court; "Necessary and Proper Clause – Further Reading," law.jrank.org/pages/8775/Necessary-Proper-Clause.

²¹⁸ Department of Justice, *FY 2009 Congressional Budget Submission*, Overview for Administrative Review and Appeals, p1, 4, www.justice.gov/jmd/2009justification/pdf/fy09-ara.pdf. See also Marisa Silenzi Cianciarulo, "Terrorism and Asylum Seekers: Why the Real ID Act Is A False Promise", *Harvard Journal on Legislation*, vol. 43, p. 101 (2006). Even opponents of the present immigration court system conclude that "the U.S. asylum system has emerged as a new battleground in the 'War on Terror.'"

²¹⁹ Department of Justice, *FY 2009 Congressional Budget Submission*, p. 1, 4.

²²⁰ Of the 1,913,507 aliens the United States permitted to remain free pending trial. 40 percent of this number — 769,842 — never came to court. Composites for five-year periods may be found in each yearbook. *EOIR 2000 Year Book*, p. L1-L2, Figures 15-17 and p. T1, Figure 23; *EOIR 2004 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 23; *EOIR 2008 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 23; *EOIR 2009 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 23.

A Court of Law and Consequence

²²¹ The United States Tax Court is a court of record established by Congress under Article I of the U.S. Constitution. When the Commissioner of Internal Revenue determines there is a tax deficiency, the taxpayer may dispute the deficiency in the Tax Court before paying any disputed amount. The Tax Court's jurisdiction also includes the authority to redetermine liability, make certain types of declaratory judgments, adjust partnership items, order abatement of interest, award administrative and litigation costs, redetermine worker classification, determine relief from joint and several liability on a joint return, review certain collection actions, and review awards to whistleblowers who provide information to the Commissioner of Internal Revenue on or after December 20, 2006. United States Tax Court, "About the Court", www.ustaxcourt.gov/about.htm.

²²² Dubroff, Harold, *The United States Tax Courts: An Historical Analysis*, Commerce Clearing House: Chicago, 1979, pp. 1-13.

²²³ *Ibid.* pp. 1, 12.

²²⁴ *Ibid.* pp. 1-13, 105-107, and 162-163.

²²⁵ *Ibid.* pp. 13-28.

²²⁶ With regard to a history of backlogs see, *e.g.*, David A. Martin, "Reforming Asylum Adjudication: On Navigating the Coast of Bohemia", *University of Pennsylvania Law Review*, vol. 138, pp. 1247, 1324-25 (1990); Maurice A. Roberts, "The Board of Immigration Appeals: A Critical Appraisal", *San Diego Law Review*, vol. 15, p. 29, 39-41 (1977).

²²⁷ Thomas R. Eldridge, et al., "9/11 and Terrorist Travel", Staff Report to the National Commission on Terrorist Attacks Upon the United States, August 21, 2004, p. 143; govinfo.library.unt.edu/911/staff_statements/911_TerrTrav_Monograph.pdf.

²²⁸ Dubroff, *The United States Tax Courts*, pp.161-163. See also 26 U.S.C. § 7482 (2006).

²²⁹ Dubroff, *The United States Tax Courts*, pp. 112 and 164-165. A legislative or Article I court is created in furtherance of the powers reserved to Congress by the Constitution. *Palmore v. United States*, 411 U.S. 389 (1973); *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828).

²³⁰ Expectmore.gov, "Detailed Information on the Immigration Adjudication Assessment, Section 4 Program Results/Accountability", Question 4.4, www.whitehouse.gov/omb/expectmore/detail/10003809.2006.html.

²³¹ *Ibid.* Question 1.5.

²³² *Ibid.* Summary Box.

²³³ *Ibid.* Program Performance Measures.

²³⁴ "Promises Not Kept: Failure In Implementing Key Immigration Court Reforms", Statement of Susan B. Long, Hearing before the House Committee on the Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, Sept. 23, 2008, http://trac.syr.edu/immigration/reports/199/23Sep08Statement_TRAC_Susan_B_Long.pdf. Writes Professor Long: "Moreover, it must be acknowledged that altering the operation of complex agencies like the EOIR in a constructive way is by its very nature a genuine challenge. The challenge is compounded by the fact that the EOIR functions within a much larger and older institution — the Department of Justice — and seeks to serve the needs of agencies like Customs and Border Protection and Immigration and Customs Enforcement that operate under an entirely different unit, the Department of Homeland Security."

²³⁵ Department of Justice, *FY 2008 Budget Fact Sheets*, "Enforcing Federal Laws in the Courts," p.1, www.justice.gov/jmd/2008factsheets/pdf/0806_enforcing_federal_laws.pdf.

²³⁶ Such courts include the U.S. Tax Court, U.S. Court of Claims, U.S. Court of Appeals for the Armed Forces, the District of Columbia Courts and U.S. Magistrate Judges. Other tribunals include territorial courts.

²³⁷ Dubroff, *The United States Tax Courts*, p.162.

²³⁸ Immigration courts report only appellate decisions. The BIA reports through its reporter “Immigration and Naturalization Decisions” or “I&N Dec.”

²³⁹ Expectmore.gov, “Detailed Information on the Immigration Adjudication Assessment,” Program Performance Measures, <http://www.whitehouse.gov/omb/expectmore/detail/10003809.2006.html>.

²⁴⁰ *Ibid.*

²⁴¹ The INS interior enforcement strategy, issued in 1999, developed priorities for enforcement efforts. The first priority is the detention and removal of criminal aliens. The second is the dismantling and diminishing of alien smuggling and trafficking operations. The third addresses responding to community complaints about illegal immigration including those of law enforcement. The fourth priority regards investigating and prosecuting immigrant benefit and document fraud. The fifth involves deterrence of employers’ use of unauthorized aliens. Overall, the strategy aimed to deter illegal immigration, prevent immigration related crimes, and remove those illegally in the United States. “Immigration Enforcement Within the United States,” p.7, April 6, 2006, www.fas.org/sgp/crs/misc/RL33351.pdf.

The Productive Courts

²⁴² “Asylum is ... granted by federal law to qualified applicants who are unable or unwilling to return to their country of nationality because of persecution or a well-founded fear of persecution. Claims of persecution must be based on at least one of five internationally recognized grounds: race, religion, nationality, membership in a par-

ticular social group, or political opinion.” U.S. Department of Justice, “Fact Sheet U.S. Asylum and Refugee Policy”, October 29, 1998, available at www.ailec.com/publicaffairs/factsheets/asylum.htm. An alien may be eligible for asylum if he or she can show that he or she is a “refugee.”

²⁴³ Adjustment is a type of relief from deportation, removal, or exclusion for an alien who is eligible for Lawful Permanent Resident status based on a visa petition approved by the Department of Homeland Security. The status of an alien may be adjusted by the Attorney General, in his discretion, to that of a lawful permanent resident if a visa petition on behalf of the alien has been approved, an immigrant visa is immediately available at the time of the alien’s application for adjustment of status, and the alien is not otherwise inadmissible to the U.S. *EOIR 2007 Year Book*, Appendix A, p. 2. One form of adjustment of status is that which results from a marriage which was valid from inception.

²⁴⁴ Cancellation of removal for lawful permanent residents under § 240A(a) of the Immigration and Naturalization Act, is available to an alien who is inadmissible or deportable from the United States if the alien: (1) has been an alien lawfully admitted for permanent residence for not less than five years, (2) has resided in the United States continuously for seven years after having been admitted in any status, and (3) has not been convicted of any aggravated felony. 8 U.S.C. § 1229b(a). Cancellation of removal and adjustment of status for nonpermanent residents, previously known as suspension of deportation, per § 240A(b), is available to an alien who is inadmissible or deportable from the United States if the alien: (1) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application; (2) has been a person of good moral character during such period; (3) has not been convicted of a criminal offense or security or terrorist related crime; and (4) establishes that removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an

alien lawfully admitted for permanent residence. 8 U.S.C. § 1229b(b).

²⁴⁵ Most trials before the Miami immigration court took one and a half to three hours to try. This time frame is consistent with other courts across the nation. The TRAC report of June 17, 2009 lends weight to the call for more judges. TRAC Immigration, “Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow,” June 17, 2009, trac.syr.edu/immigration/reports/208/.

²⁴⁶ *EOIR 2000 Year Book*, p. D2, Table 4 and p. E1, Table 5; *EOIR 2004 Year Book*, p. B2, Figure 1 and p. S2, Figure 25; *EOIR 2008 Year Book*, p. B2, Figure 1 and p. S1, Figure 25; *EOIR 2009 Year Book*, p. B2, Figure 1 and p. S1, Figure 25.

²⁴⁷ *EOIR 2000 Year Book*, p. I2, Table 12; *EOIR 2004 Year Book*, p. D1, Figures 4; *EOIR 2008 Year Book*, p. D1, Figure 4; *EOIR 2009 Year Book*, p. D1, Figure 4.

²⁴⁸ *EOIR 2009 Year Book*, p. B1, Figure 1.

²⁴⁹ *EOIR 2009 Year Book*, p. D1, Figure 4.

²⁵⁰ *EOIR 2007 Year Book*, Table 2, p. B4; *EOIR 2007 Year Book*, Table 2, p. B4.

²⁵¹ *EOIR 2008 Year Book*, p. B2, Figure 1. Completed cases also include terminations and *in absentia* removals. A termination is the closure of a removal proceeding without resolution of the issues that originally started the case. It essentially ends the case. Closure is usually without prejudice. The government can move to reinstate proceedings by filing a “Notice to Appear” with the court. See 8 C.F.R. § 208.24(f). *In Absentia* removals are entered pursuant to 8 C.F.R. § 1229a(B)(5)(A) (“Any alien who ... after written notice ... does not attend a proceeding under this section, shall be ordered removed *in absentia*”). DHS must establish by clear and convincing evidence that notice was provided and that the alien was removable as charged.

²⁵² *EOIR 2007 Year Book*, Figure 25, p. S1.

²⁵³ *EOIR 2000 Year Book*, p. C2, Table 2; *EOIR 2004 Year Book*, p. S2, Figure 27; *EOIR 2008 Year Book*, p. S2, Figure 27; *EOIR 2009 Year Book*, p. S2, Figure 27. Administrative appeals from DHS include review of family-based visa adjudications, waivers of inadmissibility for non-immigrants pursuant to § 212(d)(3) and fines imposed on airlines for immigration travel regulations. Of the 493,666 alien appeals, 448,549 appeals came from trial court rulings and 45,657 came from DHS rulings. See *EOIR 2000 Year Book*, p. C2, Table 2; *EOIR 2004 Year Book*, p. S2, Figure 27; *EOIR 2008 Year Book*, p. S2, Figure 27; *EOIR 2009 Year Book*, p. S2, Figure 27. See also *EOIR 2000 Year Book*, p. C2, Table 2; *EOIR 2004 Year Book*, p. S2, Figure 27; *EOIR 2008 Year Book*, p. S2, Figure 27; *EOIR 2009 Year Book*, p. S2, Figure 27.

²⁵⁴ *EOIR 2009 Year Book*, p. S2, Figures 26-27.

²⁵⁵ *EOIR 2009 Year Book*, p. S2, Figures 26-27 and p. U1, Figure 28. The exact BIA backlog for 2009 is 27,969 cases.

²⁵⁶ *Ibid.*

²⁵⁷ All figures are taken from *U.S. Department of Justice FY2008 Congressional Budget Submission*. Totals for all matters handled by the Criminal Division in 2006, including prosecutions (trial and appeal), advisory work and program assistance came to 75,671. *FY 2008 Congressional Budget Submission, Criminal Division*, www.justice.gov/jmd/2008justification/pdf/14_crm.pdf. Civil Division caseload, including both matters brought or for which a response was filed for the United States, for the same period equaled approximately 53,821. *FY 2008 Congressional Budget Submission, Civil Division*, www.justice.gov/jmd/2008justification/pdf/15_civ.pdf. Civil Rights Division actions totaled 10,029. This figure includes cases and matters opened, closed and pending during the same period. See *FY 2008 Congressional Budget Submission, Civil Rights Division*, www.justice.gov/jmd/2008justification/pdf/18_crt.pdf.

pdf. Tax Division actions, civil and criminal, including trials, appeals and investigations came to 7,424. (Civil actions by the Tax Division, it should be noted, are approximated by the author in terms of average numbers of trials and appeals multiplied by the number of attorneys in the civil section of the Division). *FY 2008 Congressional Budget Submission, Tax Division*, www.justice.gov/jmd/2008justification/pdf/13_tax.pdf. The sum of National Security Division work equaled 534 cases opened or closed with 2,074 FISA applications (this is a 2005 statistic) submitted to the FISA Court by the Division; total output for 2006 was 2,608 cases. *FY 2008 Congressional Budget Submission, National Security Division*, www.justice.gov/jmd/2008justification/pdf/10_nsd.pdf. Productivity of the Anti-Trust Division measured by both criminal and civil proceedings was 3,543, which includes investigations open and still pending. *FY 2008 Congressional Budget Submission, Antitrust Division*, www.justice.gov/jmd/2008justification/pdf/21_atr.pdf. Output from the Environment and Natural Resources Division came to 6,746 cases. This sum embraces all cases and matters, civil and criminal, opened, closed and pending in 2006. *FY 2008 Congressional Budget Submission, Environment and Natural Resources Division*, www.justice.gov/jmd/2008justification/pdf/16_enrd.pdf. The sum of all casework completed by the U.S. Attorneys came to 58,072 criminal cases and 71,402 civil cases, for a total of 129,474 matters either opened or closed in 2006. *FY 2008 Congressional Budget Submission, United States Attorneys*, www.justice.gov/jmd/2008justification/pdf/22_usa.pdf.

²⁵⁸ *Judicial Business of the United States Courts 2006*, U.S. Court of Appeals, Appendix Table B, www.uscourts.gov/uscourts/Statistics/Judicial-Business/2006/appendices/b0.pdf; U.S. District Courts – Civil, Appendix Table C, www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2006/appendices/c0.pdf; U.S. District Courts – Criminal, Appendix Table D, www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2006/appendices/d0c.pdf. U.S. Courts of Appeal heard 66,618 appeals. U.S. District Courts received 259,541 civil cases and 88,216 criminal cases.

²⁵⁹ Since 1869, Congress has authorized 9 positions for the Supreme Court. It currently authorizes 179 court of appeals judgeships and 678 district court judgeships. (In 1950, there were only 65 court of appeals judgeships and 212 district court judgeships.) There are currently 352 bankruptcy judgeships and 551 full-time and part-time magistrate judgeships. It is rare that all judgeships are filled at any one time; judges die or retire, for example, causing vacancies until judges are appointed to replace them. In addition to judges occupying these judgeships, retired judges often continue to perform judicial work. There are about 165 active and 103 senior court of appeals judges, and 645 active and 311 senior district court judges. The Federal Judicial Center, “How the Federal Courts are Organized,” www.fjc.gov/federal/courts.nsf/autoframe; See United States Courts, “Statistics: Judicial Facts and Figures,” www.uscourts.gov/Statistics/JudicialFactsAndFigures/JudicialFactsAndFigures2006.aspx. Approximately 230 judges presently occupy seats on the immigration trial courts. The Board of Immigration Appeals has 15 authorized members. “Board of Immigration Appeals,” www.justice.gov/eoir/biainfo.htm; and see TRAC Immigration, “Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow,” June 17, 2009, trac.syr.edu/immigration/reports/208/. The numbers above are approximations.

²⁶⁰ United States Courts, “Statistics: Judicial Facts and Figures”, www.uscourts.gov/Statistics/JudicialFactsAndFigures/JudicialFactsAndFigures2006.aspx.

²⁶¹ TRAC Immigration, “As FY 2010 Ends, Immigration Case Backlog Still Growing”, October 2010, trac.syr.edu/immigration/reports/242/. States the article:

“The number of cases awaiting resolution before the Immigration Courts reached a new all-time high of 261,083 by the end of September 2010, according to very timely government enforcement data obtained by the Transactional Records Access Clear-

Center for Immigration Studies

inghouse (TRAC). The case backlog has continued to grow – up 5.3 percent – since TRAC’s last report three months ago, and more than a third higher (40 percent) than levels at the end of FY 2008.”

See also Marcia Coyle, “Immigration Courts’ Backlog Hits New High”, *National Law Journal*, May 25, 2009. States the article:

“The backlog of immigration cases facing the nation’s immigration courts reached a new high at the end of March – 242,776 cases – up 6.3 percent from four months ago, and 30.4 percent from 18 months ago. The Transactional Records Access Clearinghouse (TRAC) at Syracuse University released the study which also shows that waiting times continue to lengthen. The average time that pending cases have been in the immigration courts is now 443 days. TRAC said the backlog of cases is driven by several factors. The main factor is the number of judges available overall and in particular localities. Other important factors include the complexity of the cases and changes in enforcement strategies at the Department of Homeland Security.”

See also TRAC Immigration, “Immigration Case Backlog Still Growing”, May 2010, trac.syr.edu/immigration/reports/232.

²⁶² TRAC Immigration, “Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow”, June 17, 2009, trac.syr.edu/immigration/reports/208/. Stated the article:

“Another overall indicator of the mounting stresses afflicting the courts is seen in the slowly eroding amounts of time that the judges have to deal with each immigration matter received by the courts. Since TRAC first reported this finding last year the erosion has continued: 74 minutes per matter received (FY 2007), 73 minutes per matter (FY 2008), and at the current pace during

the first seven months of FY 2009 only 72 minutes.”

²⁶³ *Ibid.* Stated the article:

“Almost three years ago, in August of 2006, then Attorney General Alberto Gonzales announced a series of changes he said were necessary “to improve the performance and quality” of the nation’s Immigration Courts. He said an essential element of this overall effort was an increased number of judges. Six months later Kevin D. Rooney, then the director of the Executive Office for Immigration Review (EOIR), issued a follow up statement saying that the Bush Administration had asked Congress for funds to add 40 new judges. Subsequent to these announcements, however, the number of Immigration Judges steadily fell rather than grew. And it was not until just a few weeks ago on April 24, 2009, with the swearing in of 10 new judges, that the number of Immigration Judges finally inched up to and slightly surpassed (238 versus 230) the number of judges who were working at the time Gonzales and Rooney had announced a critical need for more resources.”

²⁶⁴ “Hearing on the Executive Office for Immigration Review”, Statement of Juan P. Osuna, Associate Deputy Attorney General, U.S. Department of Justice, before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, June 17, 2010, judiciary.house.gov/hearings/pdf/Osuna100617.pdf. Said Mr. Osuna:

“A major hiring initiative is underway this year which, by the time it is finished, will add 47 immigration judges and additional support staff in 2010 alone. The initiative involves the hiring of newly authorized immigration judges, which, when filled along with other vacancies, will bring the

total immigration judge corps to 280 by the end of this year. This hiring initiative is one of the Department's high priority performance goals for FY 2010 and 2011. If Congress approves the Administration's request for 2011, this initiative will have the effect of increasing the size of the immigration judge corps to 301 by next year."

²⁶⁵ TRAC Immigration, "Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow," June 17, 2009, trac.syr.edu/immigration/reports/208. "Because of the growing number of backlogged cases, the length of time each one has to wait to be resolved – many of them involving aliens who are being held in detention facilities – is also increasing... [T]he age of pending cases increased by 23 percent over the last two and a half years, and is up by nearly a third over the past decade." For reporting data, see *EOIR 2000 Year Book*, p. I1, Figure 11 and p. O2, Table 15; *EOIR 2004 Year Book*, p. D1, Figures 4 and p. K2, Figure 16; *EOIR 2008 Year Book*, p. D1, Figure 4 and p. K2, Figure 16; and *EOIR 2004 Year Book*, p. L2, Figure 21, Table 9.

²⁶⁶ Julia Preston, "Immigration Judges Found Under Strain". *The New York Times*, July 10, 2009, www.nytimes.com/2009/07/11/us/11immig.html?_r=1&hpw.

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²⁶⁷ These other cases are adjustments of status and cancellations of removal for lawful permanent residents and non-permanent residents. They compose the main sources of "other forms of relief" provided by the INA.

²⁶⁸ Across 14 years, 395,609 cases were decided in asylum out of 2,857,390 total court decisions. Asylum decisions over this period make up 13.9 percent of all court decisions. This look at the courts' business indicates larger trends that typify caseloads. Grants of asylum equaled 142,753. Denials numbered 252,851. See *EOIR 2000 Year Book*, p. I1, Figure 11 and p. O2, Table 15; *EOIR*

2004 Year Book, p. D1, Figure 4 and p. K2, Figure 16; *EOIR 2008 Year Book*, p. D1, Figure 4 and p. K2, Figure 16; *EOIR 2009 Year Book*, p. D1, Figure 4 and p. K2, Figure 16.

²⁶⁹ *EOIR 2000 Year Book*, p. O2, Table 15; *EOIR 2004 Year Book*, p. K4, Figure 19; *EOIR 2008 Year Book*, p. K4, Figure 19; *EOIR 2008 Year Book*, p. K4, Figure 19; *EOIR 2009 Year Book*, p. K4, Figure 19. These transfers, withdrawals and abandonments compose 16 percent of all case completions.

²⁷⁰ Memorandum from Chief Judge Michael Creppy, "Operating Policy and Procedure Memorandum 97-10, Changes of Venue", (undated), www.vkblaw.com/oppm97/97_10.pdf. States the memorandum: "Consideration of precedent regarding changes of venue is also used to prevent delay, harassment, inconsistency, and in some instances judge shopping." (quotation marks and citations removed).

²⁷¹ See Note 263. Out of 874,149 asylum claims, 259,359 were transferred, 30 percent of all cases filed.

²⁷² From 2005 through 2009, the courts considered 265,198 asylum cases. Expedited asylum cases numbered 170,300. *EOIR 2009 Year Book*, p. I2, Figure 14 and p. L2, Figure 21.

²⁷³ In the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, must be completed within 180 days after the date the application is filed. See *EOIR 2008 Year Book*, Appendix. A, p. 3. See also 8 U.S.C. § 1158(d)(4)(A)(iii).

²⁷⁴ *EOIR 2000 Year Book*, P. I1, Figure 11 and p. O2, Table 15; *EOIR 2004 Year Book*, p. D1, Figures 4 and p. K2, Figure 16; *EOIR 2008 Year Book*, p. L1; *EOIR 2009 Year Book*, p. L1.

²⁷⁵ Expedited asylum is found in § 240 of the INA. It was part of the 1996 reforms contained in

The Illegal Immigration Reform and Immigrant Responsibility Act, better known as IRRIRA.

²⁷⁶ See INA § 235(b)(1)(B)(v) and 8 U.S.C. §1225. See also INA § 240. The INA defines the term “credible fear of persecution” to mean there is a “significant possibility ... that the alien could establish eligibility for asylum.” Those who pass the credible fear hearing are placed into formal removal proceedings under the INA. Aliens who receive negative “credible fear” determinations may request that an immigration judge review the case. Consequently, expedited asylum claims occur in two ways.

²⁷⁷ *Report on the Activities of the Committee on the Judiciary of the House of Representatives During the One Hundred Fourth Congress*, H. Rep. 104-879, p. 107, January 2, 1997. In the “Summary,” justification for the bill is outlined:

“The first aspect of the reforms in Title III concerned the legal status of aliens entering or attempting to enter the U.S. One urgent problem in recent years has been the arrival at U.S. airports of smuggled aliens who possess fraudulent or otherwise invalid travel documents, or who have destroyed their documents en route, and who make claim to asylum in order to be able to remain in the U.S. Because of delays in the asylum system, hearings were often scheduled for months later. If not detained, the aliens would most often disappear and become long-term illegal residents. Title III addressed this problem by establishing a system of “expedited removal”: aliens arriving with fraudulent or no documents would not be eligible for a hearing before an immigration judge, or for any rights of appeal, because they clearly had no right to enter the U.S. As such, these aliens could be returned immediately to their point of departure. If an alien claimed asylum, an expedited procedure would be provided, including an interview by a trained asylum officer, to determine if the alien had

a “credible fear” of persecution. This standard, lower than the “well-founded fear” standard needed to receive asylum, was intended to separate meritorious claims from clearly non-meritorious claims. It was also intended to make this determination in a prompt but fair manner, so that aliens in need of protection could remain in the U.S., while those making frivolous claims would be removed.”

²⁷⁸ Alison Siskon and Ruth Wasem, “Immigration Policy on Expedited Removal of Aliens”, Congressional Research Service, p.1, Sept.30, 2005, www.au.af.mil/au/awc/awcgate/crs/rl33109.pdf.

²⁷⁹ *EOIR 2008 Year Book*, p. D1, Figures 4 and p. K2, Figure 16.

²⁸⁰ *EOIR 2004 Year Book*, p. L2, Figure 21, Table 9.

²⁸¹ *Ibid.*

²⁸² *EOIR 2008 Year Book*, p. L1. “Asylum regulations implemented in 1995 called for asylum applications to be processed within 180 days after filing. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 reiterated that time frame and calls for the adjudication of an asylum application within 180 days of the filing date, absent exceptional circumstances. This process is time sensitive because the asylum applicant may not apply for employment authorization until 150 days after filing, and DHS then has 30 days to grant or deny employment authorization. The applicant can only be granted employment authorization if the asylum application is not decided within 180 days of filing, provided delays are not caused by the alien. Consequently, expedited asylum applications occur when (1) an alien files “affirmatively” at a DHS Asylum Office and the application is referred to EOIR within 75 days of filing or (2) an alien files

an asylum application “defensively” with the EOIR.”

²⁸³ See *EOIR 2004 Year Book*, p. L2, Figure 21, Table 9; *EOIR 2005 Year Book*, p. L2, Figure 21, Table 9; *EOIR 2006 Year Book*, p. L2, Figure 21, Table 9; *EOIR 2007 Year Book*, p. L2, Figure 21, Table 9; *EOIR 2008 Year Book*, p. L2, Figure 21, Table 9. In contrast, see Office of Management and Budget, “Detailed Information on the Immigration Adjudication Assessment,” Expect-More.gov, www.whitehouse.gov/omb/expectmore/detail/10003809.2006.html. OMB apparently had numbers on expedited asylum completions for the same years EOIR did not report to Congress. OMB analysis shows that 92 percent of expedited asylum cases were processed within the 180-day deadline in 2005, 95 percent in 2006, 90 percent in 2007 and 80 percent in 2008. Congress was not provided this same information in EOIR’s *Statistical Year Book* in any of these years.

²⁸⁴ *EOIR 2008 Year Book*, p. L1-L2, Figures 20-21.

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.*

²⁸⁷ Surin & Griffin, P.C., “Deportation and Asylum Assistance in Immigration,” www.msgimmigration.com/deportation-asylum/. This law firm provides realistic assessment: “It is difficult to predict how long a contested removal case can take to resolve. However, removal cases for non-detained clients often take more than a year to conclude. If there is an appeal to the Board of Immigration Appeals, cases frequently take another year or two.”

²⁸⁸ Often, aliens who are seeking asylum entered as refugees. The INA defines a refugee as any person who is outside his or her country of nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country, because of persecution or a well-founded fear of

future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Aliens generally must apply for asylum within one year of arrival in the United States. In the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, must be completed within 180 days after the date the application is filed. *EOIR 2008 Year Book*, Appendix A, p. 3.

²⁸⁹ Ken Reitz, “Panel Discusses Challenges in Immigration Court System,” University of Virginia, March 28, 2008, www.law.virginia.edu/html/news/2008_spr/immigration_judges.htm; Surin & Griffin, P.C., “Deportation and Asylum Assistance in Immigration,” www.msgimmigration.com/deportation-asylum/. Discussions with court personnel, attorneys in Miami and judges in the Sixth Circuit Court of Appeals confirm this observation.

²⁹⁰ Lecturers at judicial training conferences frequently address time frames for considering cases. One and half hour to three hour hearings are suggested, but thoroughness is emphasized. Most cases heard in the Miami court fit this model. Still, there were many exceptions.

²⁹¹ TRAC Immigration, “Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow,” June 17, 2009, trac.syr.edu/immigration/reports/208. The eleven year backlog was not denied by court officials and their explanations for its causes were disputed by TRAC.

²⁹² Final administrative adjudication of the asylum application, not including administrative appeal, must be completed within 180 days after the date the application is filed. See *EOIR 2008 Year Book*, Appendix A, p. 3. See also 8 U.S.C. § 1158(d)(4)(A)(iii).

²⁹³ TRAC Immigration, “Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow,” June 17, 2009, trac.syr.edu/immigration/reports/208.

²⁹⁴ “Promises Not Kept: Failure In Implementing Key Immigration Court Reforms”, Statement of Susan B. Long, Hearing before the House Committee on the Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, Sept. 23, 2008, trac.syr.edu/immigration/reports/199/23Sep08Statement_TRAC_Susan_B_Long.pdf.

²⁹⁵ *EOIR 2004 Year Book*, p. L2, Figure 21, Table 9. Table 9 discloses expedited asylum cases heard before passage of the 180-day deadline. It is absent in subsequent years’ reports.

²⁹⁶ Composites for five-year periods may be found in each yearbook. *EOIR 2000 Year Book*, p. L1-L2, Figures 15-17 and p. T1, Figure 23; *EOIR 2004 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 23; *EOIR 2008 Year Book*, p. H1- H4, Figures 10-12, and p. O1, Figure 23; *EOIR 2009 Year Book*, p. H1- H4, Figures 10-12, and p. O1, Figure 23.

²⁹⁷ Removal is governed by 8 U.S.C. § 1229, which provides:

“Initiation of removal proceedings. (a) Notice to appear: (1) In general. In removal proceedings under §1229a of this title, written notice (in this section referred to as a “notice to appear”) shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the alien’s counsel of record, if any) specifying the following: (A) The nature of the proceedings against the alien. (B) The legal authority under which the proceedings are conducted. (C) The acts or conduct alleged to be in violation of law. (D) The charges against the alien and the statutory provisions alleged to have been violated. (E) The alien may be represented by counsel and the alien will be provided (i) a period of time to secure counsel ... and (F)(i) The requirement that the alien must immediately provide (or have pro-

vided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under §1229a of this title. (ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the alien’s address or telephone number. (iii) The consequences under §1229a(b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph. (G)(i) The time and place at which the proceedings will be held. (ii) The consequences under §1229a(b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.”

This information is also provided by DHS when directing appearance in immigration courts. If the alien does not understand English, an interpreter is provided by both the courts and DHS.

²⁹⁸ See Office of Inspector General, Department of Homeland Security, “Detention and Removal of Illegal Aliens”, Audit Report OIG-06-33, p. 9-10 April 2006, www.dhs.gov/xoig/assets/mgmtrpts/OIG_06-33_Apr06.pdf.

“A significant number of OTMs [Other Than Mexican] that are apprehended and released each year originate from SIC [“special interest countries” because of their association with individuals or nations that abet terrorism] and SST [state sponsors of terrorism]. From FY 2001 through the first half of FY 2005, 91,516 SIC and SST aliens were apprehended of which 45,000 (49 percent) were later released. It is not known exactly how many of these SIC and SST aliens were ultimately issued final orders of removal and were actually removed since such data is not tracked by DRO. Assuming SIC and SST aliens are being removed at the same rate as other apprehended and released aliens, 85 percent of the SIC and SST aliens released who

eventually receive final orders of removal will abscond. Table 6 provides a breakdown of OTMs from SIC and SST countries that were apprehended and released from FY 2001 through the first 6 months of FY 2005. Immigration officials run background checks on each apprehended alien, including SIC and SST aliens, to determine whether they have a criminal record in the U.S. or are listed in various terrorist watch lists. The effectiveness of these background checks is uncertain due to the difficulty that CBP and ICE have in verifying the identity, country-of-origin, terrorist or criminal affiliation of aliens in general. Therefore the release of these OTMs poses particular risks. U.S. intelligence assessments indicate terrorist organizations, including those operating within SIC and SST countries, believe illegal entry into the U.S. is more advantageous than legal entry for operations reasons.”

²⁹⁹ Office of Detention and Removal, Immigration and Customs Enforcement, “National Fugitive Operations Program”, August 19, 2009, www.ice.gov/news/library/factsheets/fugops.htm. “ICE established the Fugitive Operations Support Center (FOSC) in June 2006 in South Burlington, Vermont. ... The FOSC is a key element in the strategy to address the burgeoning fugitive alien problem in the U.S.”

³⁰⁰ See Office of Inspector General, Department of Homeland Security, “Detention and Removal of Illegal Aliens,” Audit Report OIG-06-33, p. 2, April 2006, www.dhs.gov/xoig/assets/mgmttrpts/OIG_06-33_Apr06.pdf.

³⁰¹ EOIR’s annual reports identify two non-detained groups. One is those litigants who were arrested then released to appear in court. The second is those who were summoned to court, but never detained. These groups are described from 1996 through 2000 on pages L1-L2, Figures 15-17 of the *Year Books*. From 2001 forward, these groups are described on pages H1-H4, Figures 10-12.

Annual reports also describe the detained population. In EOIR’s reports the detained population is merged with the non-detained population to produce an “overall” failure to appear rate. This detained population is described on page T1, Figure 23 from 1996 through 2000. From 2001 forward, it is found on page O1, Figure 20.

³⁰² Composites for five-year periods may be found in each *Year Book*, which shows that 1,291,725 aliens held in detention during their trial were ordered removed. DHS statements indicate 94 percent were, in fact, deported. See *EOIR 2000 Year Book*, p. L1-L2, Figures 15-17 and p. T1, Figure 23; *EOIR 2004 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 23; *EOIR 2008 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 23; *EOIR 2009 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 23.

³⁰³ See *EOIR 2007 Year Book*, p. H2, Figures 10-12.

³⁰⁴ See *EOIR 2001 Year Book*, p. L1, Figures 15.

³⁰⁵ *EOIR 2007 Year Book*, p. H2, Figures 10-12. In 2007, EOIR stated “Failures to appear for detained cases occur infrequently, generally only because of illness or transportation problems, and are not broken out in the following figures.”

³⁰⁶ *EOIR 2007 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 20. For 2005, 106,791 | 179,382 = 59.5 percent and for 2006, 109,741 | 185,107 = 59.2 percent.

³⁰⁷ *EOIR 2008 Year Book*, p. H1-H4, Figures 10-12, and p. O1, Figure 20.

³⁰⁸ *EOIR 2006 Year Book*, p. H2.

³⁰⁹ *EOIR 2008 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 20.

³¹⁰ *EOIR 2008 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 20.

³¹¹ *EOIR 2008 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 20.

³¹² See *EOIR 2007 Year Book*, p. H1-H4, Figures 10-12, and p. O1, Figure 20 (43,523 | 115,430 = 37.7 percent).

³¹³ EOIR's calculations compare court decisions and administrative closures completed each year (in FY 2008, 237,688) versus those proceedings completed in which aliens failed to appear in court (in 2008 38,200). Its equation works this way: $38,200 / 237,688 = 16$ percent. This 16 percent presents a failure to appear rate as a function of court decisions and case closures. This is an inexact measure. The reason is this. The total of 237,688 includes detained litigants. In other words, it includes those aliens detained during proceedings, some 134,117. EOIR used the same method in all reporting years, 1996 through 2008. EOIR always combines detained and non-detained populations to determine "overall" failure to appear rates. As a result, its calculations of failures to appear are, compared to the methods of Bureau of Justice Statistics, untruthful.

³¹⁴ Margaret E. Martin, Miron L Straf, and Constance F. Citro, ed., *Principles and Practices for A Federal Statistical Agency*, 3rd ed., National Academies Press, 2005, p.3, available at, books.nap.edu/openbook/0309095999/html/index.html. States the book: "An agency should make every effort to provide accurate and credible statistics that will permit policy debates to be concerned about policy, not about the credibility of the data." Principle 2 is, "A federal statistical agency must have credibility with those who use its data and information."

³¹⁵ *EOIR 2000 Year Book*, L1-L2, Figures 15-17 and T1, Figure 23.

³¹⁶ *Ibid.* (251,309 | 726,164 = 35 percent, excluding detained litigants).

³¹⁷ Non-detained litigants who came to court over the same period equaled 353,775. During this

five-year period, trial courts decided or administratively closed 713,974 cases involving non-detained aliens, and 360,199 failed to show, equaling 50.4 percent. See *EOIR 2006 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 20.

³¹⁸ *EOIR 2008 Year Book*, p. H1.

"When an alien fails to appear for a hearing, the immigration judge may conduct an *in absentia* (in absence of) hearing and order the alien removed from the United States. Before the immigration judge orders the alien removed *in absentia*, the DHS Assistant Chief Counsel must establish by clear, unequivocal, and convincing evidence that the alien is removable. Further, the immigration judge must be satisfied that notice of time and place of the hearing were provided to the alien or the alien's representative. A failure to appear does not always result in an *in absentia* order. In some instances, the immigration judge may administratively close the case without ordering the alien removed *in absentia*. Since most administrative closures relate to failures to appear, we have included those figures in calculating the failure to appear rates on the following page."

³¹⁹ *Ibid.* p. H2. "The following figures show EOIR data on failures to appear by detention status: non-detained aliens and aliens released on bond or recognizance. Failures to appear for detained cases occur infrequently, generally only because of illness or transportation problems, and are not broken out in the following figures."

³²⁰ Department of Justice, *FY 2009 Congressional Budget Submission*, Overview for Administrative Review and Appeals, www.justice.gov/jmd/2009justification. States the submission:

"The fight against terrorism is the first and overriding priority of the Department of Justice and the Administration. A key component of this effort is the securing of

our Nation's borders and the repair of the immigration system as a whole. More than ever, protecting America requires a multifaceted strategy which must include the effective coordination of investigative, enforcement, legal and adjudicative resources, both within the Department and in concert with other agencies. The application and enforcement of our immigration laws remains a critical element of this national effort.

...

While it is recognized that EOIR's primary mission is not counterterrorism, the immigration enforcement programs of DHS, the source of EOIR's caseload, represent a critical component of counterterrorism initiatives. Further, the Attorney General's authorities with respect to the application and interpretation of immigration laws clearly impact government-wide enforcement strategies. As such, EOIR remains an important function vis-à-vis DHS/DOJ enforcement efforts."

³²¹ Margaret E. Martin, Miron L. Straf, and Constance F. Citro, ed., *Principles and Practices for A Federal Statistical Agency*, 3rd ed., National Academies Press, 2005, p.3, available at books.nap.edu/openbook/0309095999/html/index.html. States the article:

"Statistics that are publicly available from government agencies are essential for a nation to advance the economic well-being and quality of life of its people. Its public policy makers are best served by statistics that are accurate, timely, relevant for policy decisions, and credible. Individuals and organizations rely on high-quality, publicly available data as the basis for informed decisions on a wide variety of issues. Even more, the operation of a democratic system of government depends on the unhindered flow of statistical information that citizens

can use to assess government actions and for other purposes."

³²² *EOIR 2009 Year Book*, p. H1-H4, Figure 10. Stated EOIR: "FY 2009 has the lowest failure to appear rate of the five years that are represented (2005-2009)."

³²³ In its annual year book EOIR features a highlights page – page A1 – with each report to Congress. With regard to failures to appear, the 2009 *Year Book* states: "The failure to appear rate decreased to 11 percent in FY 2009." See p. H1-H4, Figure 10.

³²⁴ *EOIR 2009 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 20. The figure of 32 percent is calculated in this manner. EOIR reported 25,330 litigants free pending trial evaded court in 2009. EOIR excluded from its calculations cases administratively closed in 2009, essentially saying administrative closures – after 14 years – were no longer relevant. EOIR's stated: "In previous years, administrative closures were included to calculate the failure to appear rate. However, due to a larger percentage of administrative closures not relating directly to failure to appear, the failure to appear rate is calculated using immigration judge decisions and in absentia orders only." *EOIR 2009 Year Book*, p. H1, note to Figure 10. Rather than separate those cases not directly relating to failures to appear from those which directly related to failures to appear, EOIR chose the overbroad exclusion of *all* cases administratively closed. Therefore, administrative closures for 2009 are included by adding the 7,879 administrative closures obtained from TRAC Immigration at Syracuse University, which received these numbers through a Freedom of Information Act request. Failures to appear in 2009 thus equaled 33,209. The next step is to determine how many litigants were actually free pending trial. EOIR does not disclose this number. This number can be obtained, though, by taking the total number of non-detained aliens (76,492, see p. H2) and adding to it the total number of released aliens (20,683, see p. H3) and adding 7,879, the number of those free pending trial whose cases were admin-

istratively closed. The total sum of these numbers is 105,054. Dividing this total by those who failed to appear (33,482) shows that 32 percent of aliens failed to appear in court in 2009.

³²⁵ EOIR defines administrative closures as: “Administrative closure of a case is used to temporarily remove the case from an immigration judge’s calendar or from the Board of Immigration Appeals’ docket. Administrative closure of a case does not result in a final order. It is merely an administrative convenience which allows the removal of cases from the calendar in appropriate situations. A case may not be administratively closed if opposed by either of the parties. *EOIR 2009 Year Book*, “Appendix A - Glossary of Terms,” p. 2.

³²⁶ Compare *EOIR 2009 Year Book*, p. H1-H4, Figure 10 with *EOIR 2008 Year Book*, p. H2, Figure 10. Administrative closing of cases relating to failures to appear are excluded from prior years’ reports without EOIR explicitly advising readers of the exclusion. Only “In Absentia Orders” are included in calculations of the “Failure to Appear Rate” for 2009.

³²⁷ See *EOIR 2009 Year Book*, p. H1-H4, Figure 10. In a note to Figure 10, EOIR states: “In previous years, administrative closures were included to calculate the failure to appear rate. However, due to a larger percentage of administrative closures not relating directly to failure to appear, the failure to appear rate is calculated using immigration judge decisions and in absentia orders only.” EOIR’s note lacks transparency. It does not tell Congress what number or “percentage of administrative closures” did not directly relate to failures to appear nor did it use the more selective means of including in the failure to appear rate those “closures” which directly related to failures to appear while excluding those that did not. Instead, EOIR once again grouped dissimilar populations — those administrative closures directly relating to failures to appear with those not directly related to failures to appear — and then excluded the entire group from calculations. In doing so, EOIR produced a lower number for failures to appear.

Aggravating EOIR’s methodology is its neglect of a time frame. Admitting that in “previous years administrative closures were included to calculate the failure to appear rate,” EOIR does not advise Congress when administrative closings no longer bore a more direct relationship with failures to appear. EOIR simply rewrote failures to appear for the previous four reporting periods (2005 through 2008) without offering evidence for its exclusion of administrative closures.

³²⁸ See *EOIR 2009 Year Book*, p. H1, note to Figure 10.

³²⁹ *Ibid.*

³³⁰ Compare *EOIR 2009 Year Book*, p. H1, Figure 10 with *EOIR 2008 Year Book*, p. H1-H2, Figure 10. Administrative closures rose in 2006 through 2008.

³³¹ TRAC Immigration, “Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow”, June 17, 2009, trac.syr.edu/immigration/reports/208. The National Research Council — an agency of the National Academy of Science — generates standards applicable to EOIR and its statistics gathering methodology. States the article: “Congress ... ordered the Justice Department to develop a method to create what it called ‘defensible fiscal linkages’ between two agencies, the EOIR and the Border Patrol. To do this, the Department was instructed to spend up to \$1 million for ‘a contract with the National Academy of Science to develop, test and select a budget model that accurately captures the fiscal linkages and leverages them into an estimate of DOJ’s immigration-related costs.’”

³³² Margaret E. Martin, Miron L Straf, and Constance F. Citro, Ed., *Principles and Practices for A Federal Statistical Agency*, 3rd ed., National Academies Press, 2005, p.3, *available at*, books.nap.edu/openbook/0309095999/html/index.html. The mission of the NRC (National Research Council) is to improve government decision making and public policy, increase public education and

understanding, and promote the acquisition and dissemination of knowledge in matters involving science, engineering, technology, and health. The institution takes this charge seriously and works to inform policies and actions that have the power to improve the lives of people in the U.S. and around the world. See The National Research Council, “Welcome to the National Research Council,” sites.nationalacademies.org/NRC/index.htm.

³³³ Thomas H. Cohen, and Brian A. Reaves, “Pretrial Release of Felony Defendants in State Courts”, BJS Special Report, Department of Justice, Office of Justice Programs, November 2007, p.1, 8, 10, bjs.ojp.usdoj.gov/content/pub/pdf/prfdsc.pdf. Write the authors: “For failure to appear, the range was from 21 percent to 24 percent [of accused felons who were released pending trial] ... Overall rearrest rates ranged from 13 percent to 21 percent;” and “[b]etween 1990 and 2004, 62 percent of felony defendants in State courts in the 75 largest counties were released prior to the disposition of their case.” When determining failure to appear rates, the authors compared those accused felons released prior to trial who failed to appear in court out of the total population of accused felons who were released pending trial.

³³⁴ *Ibid.* p. 2, Figure 5 and p. 8.

³³⁵ *Ibid.*

³³⁶ Department of Homeland Security, “Budget-In-Brief Fiscal Year 2010”, U.S. Immigration and Customs Enforcement, www.dhs.gov/xlibrary/assets/budget_bib_fy2010.pdf. Regarding its 2008 efforts ICE reported “Increased Fugitive Operations Team Arrests: Fugitive Operation Teams (FOTs). The FOTs affected over 34,155 total arrests, including over 28,000 ICE fugitives and criminal aliens. Criminal fugitive arrests increased by 111 percent (from 2,677 to 5,652). ICE processed and eliminated more than 95,000 fugitive alien cases and reduced the backlog from 594,756 cases at the end of FY 2007 to 557,762 cases at the end of FY 2008. This reduction of approximately 6 percent, is the second consecutive year in which

the backlog has decreased.”

³³⁷ Office of Inspector General, Department of Homeland Security, “Detention and Removal of Illegal Aliens”, Audit Report OIG-06-33, p. 3, April 2006, www.dhs.gov/woig/assets/mgmtrpts/OIG_06-33_Apr06.pdf.

“[H]istorical trends indicate that 62 percent of the aliens released [from detention] will eventually be issued final orders of removal by the U.S. Department of Justice Executive Office of Immigration Review (EOIR) and later fail to surrender for removal or abscond. Although DRO (Office of Detention and Removal of DHS) has received additional funding to enhance its Fugitive Operations Program, it is unlikely that many of the released aliens will ever be removed. As of December 30, 2005, there were more than 544,000 released aliens with final orders of removal who have absconded.”

³³⁸ *Ibid.* States the report: “Each year more than one million aliens attempt to illegally enter the U.S. without proper documentation – or enter legally but overstay or violate their visas.”

³³⁹ Of the 1,913,507 aliens the U.S. permitted to remain free pending trial, 40 percent of this number — 769,842 — never came to court. Composites for five-year periods may be found in each year book. See *EOIR 2000 Year Book*, p. L1-L2, Figures 15-17 and p. T1, Figure 23; *EOIR 2004 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 23; *EOIR 2008 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 23; *EOIR 2009 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 23.

³⁴⁰ Once an alien has been ordered removed by EOIR, DHS (through ICE and its sub-agency DRO) executes removal. *EOIR 2008 Year Book*, p. B1.

³⁴¹ Immigration judges in detention facilities have authority to maintain detention or end it and they

possess authority to establish bond, subject, of course, to appeal. However, they have no authority to establish other terms of release (*e.g.*, electronic monitoring or reporting requirements). Outside detention facilities judges have no authority to establish terms which affect appearance. Such terms are established by DHS.

³⁴² Dora Schriro, *Immigrant Detention Overview and Recommendations*, U.S. Immigration and Customs Enforcement, October 6, 2009, p. 20. www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf. According to the report:

“Today, ICE operates three ATD [Alternatives to Detention] programs. Two ATD programs, Intensive Supervision Appearance Program (ISAP) and Enhanced Supervision Reporting (ESR), are provided by vendors on contract with ICE. The third ATD program, Electronic Monitoring (EM), is operated by ICE, and about 250 ICE employees are assigned to the program. ISAP, which has a capacity for 6,000 aliens daily, is the most restrictive and costly of the three strategies using telephonic reporting, radio frequency, and global positioning tracking in addition to unannounced home visits, curfew checks, and employment verification. ESR, which has a capacity for 7,000 aliens daily, is less restrictive and less costly, featuring telephonic reporting, radio frequency, and global positioning tracking and unannounced home visits by contract staff. EM, which has a capacity for 5,000 aliens daily, is the least restrictive and costly, relying upon telephonic reporting, radio frequency, and/or global positioning tracking.”

³⁴³ INS’ interior enforcement strategy, issued in 1999, developed priorities for enforcement efforts. The first priority is the detention and removal of criminal aliens. The second is the dismantling and diminishing of alien smuggling and trafficking operations. The third addresses responding to community complaints about illegal immigration

including those of law enforcement. The fourth priority regards investigating and prosecuting immigrant benefit and document fraud. The fifth involves deterrence of employers’ use of unauthorized aliens. Overall, the strategy aimed to deter illegal immigration, prevent immigration related crimes, and remove those illegally in the United States. Congressional Research Service, “Immigration Enforcement Within the United States,” p.7, April 6, 2006, www.fas.org/sgp/crs/misc/RL33351.pdf.

³⁴⁴ Office of Inspector General, Department of Homeland Security, “Detention and Removal of Illegal Aliens,” Audit Report OIG-06-33, p. 2, April 2006, www.dhs.gov/xoig/assets/mgmtrpts/OIG_06-33_Apr06.pdf. States the report: “DRO’s (Office of Detention and Removal) ability to detain and remove illegal aliens with final orders of removal is impacted by (1) the propensity of illegal aliens to disobey orders to appear in immigration court [and] (2) the penchant of released illegal aliens with final orders to abscond.”

³⁴⁵ Daniel Gonzalez, “U.S. Not Cracking Down On Immigrants With Expired Visas,” *Arizona Republic*, May 10, 2010, www.azcentral.com/news/articles/2010/05/10/20100510illegal-immigrants-overstay.html. States the article:

“Not every illegal immigrant in the United States snuck across the border. A very large number, perhaps as many as 5.5 million, entered legally with visas and then never left. But unlike the hundreds of thousands of illegal immigrants apprehended at the border every year, very few visa violators are ever caught. The Border Patrol’s Tucson sector, the busiest in the nation, logged 241,673 apprehensions last fiscal year. In comparison, federal agents in Arizona tracked down and arrested 27 people who had overstayed their visas. Visa violators represent nearly half of the 11 million illegal immigrants in the country. But they have been largely ignored ... The Pew Hispanic Center estimates that 40 to 50

percent of the nation's 11 million illegal immigrants entered the country legally. As of May 2006, the most current data available, 4 million to 5.5 million people had entered the U.S. legally and then remained after their visas had expired. An additional 250,000 to 500,000 people entered legally with temporary border-crossing cards and then stayed ... On average, the 272 investigators assigned to the [visa overstays] unit arrest 1,400 visa violators a year, Morton said. ICE officials said the number of overstayers arrested each year has steadily risen, though they could not provide details."

³⁴⁶ Office of Inspector General, Department of Homeland Security, "Detention and Removal of Illegal Aliens", Audit Report OIG-06-33, p. 2, April 2006, www.dhs.gov/xoig/assets/mgmt/rpts/OIG_06-33_Apr06.pdf. States the report: "As early as 1996, a DOJ [Inspector General] report concluded that the legacy INS program for deporting illegal aliens had been largely ineffective, finding that 89 percent of the non-detained aliens released into the U.S. who were subsequently issued final orders of removal were not removed ... [Instead, they had absconded.]"

³⁴⁷ Congressional Research Service, "Immigration Enforcement Within the United States," p.13, April 6, 2006, www.fas.org/sgp/crs/misc/RL33351.pdf.

³⁴⁸ Barbara Tuchman, *The March of Folly: From Troy to Vietnam*, New York: Alfred Knopf, 1984, p. 1-8. The author defines folly as the pursuit of policies by governments which are contrary to their own interests, despite the availability of feasible alternatives and, as a further requirement, that the policies are perceived as counter-productive in their own time. She further argues that folly includes repetition of the same course of action expecting different outcomes despite unchanged circumstances.

³⁴⁹ "Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency,

and Professionalism in the Adjudication of Removal Cases," American Bar Association Commission on Immigration, February 2010, www.americanbar.org/content/dam/aba/administrative/immigration/coi_executive_summary.authcheckdam.pdf.

³⁵⁰ "Strengthening Enforcement and Border Security: The 9/11 Commission Staff Report on Terrorist Travel", testimony of Janice Kephart, Senior Consultant, The Investigative Project on Terrorism, hearing before the Senate Committee on the Judiciary, March 14, 2000.

"[I]mmigration services have been treated poorly in the hierarchy of government bureaucracies. Although the nation's growth depended on successive waves of immigrants, the Bureau of Immigration never seemed quite important enough to become its own department, with its own secretary reporting directly to the President of the United States. In fact, the bureau was something of an administrative orphan. Over the century its name and bureaucratic home changed repeatedly and increasing numbers of confusing statutes created conflicting jurisdictions in both immigration services and enforcement. In 1895, the Bureau of Immigration was created and placed under the Secretary of the Treasury. In 1903, the bureau moved to the newly created Department of Commerce and Labor, taking the name the Bureau of Immigration and Naturalization in 1906. When the Department of Labor was created in 1913, the bureau moved with it. In 1933, these functions were consolidated to form the Immigration and Naturalization Service under a commissioner. In 1940, the Service was transferred to the Department of Justice where it remained until March 2003. (See "History of Immigration and Naturalization Agencies," 8 U.S.C. §1551.) In addition, there are at least 150 statutes providing the legislative history of immigration."

³⁵¹ From 1820 through 2006 (187 years), the United States admitted 72,066,514 legal immigrants. FAIR, “History of Immigration Laws, Historical Immigrant Admission Data: 1820 to 2006,” www.fairus.org/site/PageServer?pagename=research_us_laws#data.

³⁵² Marjorie Connelly, “In Polls, Illegal Immigrants Are Called Burden”, *The New York Times*, April 14, 2006, www.nytimes.com/2006/04/14/us/14polls.html. States the article:

“Americans see illegal immigrants as using more public services than they pay for and want the government to do a better job of controlling the borders, but they favor legal status for current illegal immigrants under specific conditions, according to national polls released this week. Those polled say President Bush is handling immigration matters poorly, and they are more likely to trust the Democrats to do a better job than the Republicans. About 6 in 10 Americans surveyed by CBS News described the problem of illegal immigration as very serious. Illegal immigration was characterized as “out of control” by 81 percent in a USA Today/Gallup poll. And three-quarters of those questioned in an ABC News/Washington Post poll said the United States was not doing enough to keep illegal immigrants from entering the country.”

³⁵³ George M. Kraw, “Court Upholds Government’s Illegal Alien Detention Authority”, Washington Legal Foundation, August 18, 2006, www.wlf.org/upload/081806kraw.pdf. “Porous borders, a vibrant economy and an open society have drawn a large population of illegal aliens to the United States. In addition to social and economic issues, these illegal aliens also create a national security challenge by making it easier for terrorists to enter and then operate domestically. The challenge is complicated by local jurisdictions that declare they are ‘sanctuary’ cities and discourage officials from cooperating in the enforcement of immigration laws.”

³⁵⁴ Through the last 14 years, trial courts made decisions in 2,857,390 cases, and issued 2,279,234 removal orders, composing 79.7 percent of all decisions. See *EOIR 2000 Year Book*, p. I2, Table 12; *EOIR 2004 Year Book*, p. D1, Figure 4; *EOIR 2008 Year Book*, p. D1, Figure 4; *EOIR 2009 Year Book*, p. D1, Figure 4. These reports affirm a fairly consistent pattern of courts ordering removal approximately 80 percent of the time. Across the last 14 years removal orders maintain this average. In 1996, 82 percent of aliens appearing in immigration courts were ordered deported and 83 percent were ordered deported in 1997. In 2000, 79 percent were ordered removed and in 2001 the number dropped only slightly to 78 percent. Trial courts granted relief – in other words permission to remain in the U.S. – in 13 percent of all decisions. These grants totaled 378,112 decisions (378,112 out of 2,857,390). *EOIR 2000 Year Book*, p. I2, Table 12; *EOIR 2004 Year Book*, p. D2, Figure 5; *EOIR 2008 Year Book*, p. D2, Figure 5; *EOIR 2009 Year Book*, p. D2, Figure 5. The rest of the courts’ work – 201,173 cases, or 7 percent – involved what are called “termination orders” and unspecified “others.” See *EOIR 2000 Year Book*, p. I3, Table 12; *EOIR 2004 Year Book*, p. D2, Figure 5; *EOIR 2008 Year Book*, p. D2, Figure 5. A termination is a type of completion in which a case is closed by a trial judge or the BIA without a final order of removal or deportation. A case is terminated when the respondent is found not removable as DHS originally charged. The alien can always be charged again.

³⁵⁵ Over this 14-year period 1,287,685 aliens in detention were ordered removed out of 2,279,234 removal orders. See *EOIR 2000 Year Book*, L1-L2, Figures 15-17 and T1, Figure 23; *EOIR 2004 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 20; *EOIR 2008 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 23; *EOIR 2009 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 23; See also *EOIR 2000 Year Book*, p. I3, Table 12; *EOIR 2004 Year Book*, p. D2, Figure 5; *EOIR 2008 Year Book*, p. D2, Figure 5; *EOIR 2009 Year Book*, p. D2, Figure 5.

³⁵⁶ *EOIR 2008 Year Book*, p. P2, Table 13. Decisions by judges in penal institutions in 2008 resulted in 95.7 percent (5372 out of 5613) of aliens ordered removed at completion of their sentences. States the annual report: “The goal of the IHP (Institutional Hearing Program) is to complete proceedings for incarcerated criminal aliens serving federal or state sentences prior to their release from prison or jail. This allows DHS to remove aliens with final removal orders expeditiously at the time of their release from incarceration.”

³⁵⁷ Office of the Inspector General, U.S. Department of Justice, “The Immigration and Naturalization Service’s Removal of Aliens Issued Final Orders”, Report Number I-2003-004, February 2003, www.npr.org/documents/2005/mar/doj_alien_removal.

³⁵⁸ From 1996 through 2009, trial courts issued removal orders in 2,279,234 cases. Of this total, 1,287,685 were issued against aliens in detention facilities. The balance of removal orders – 991,531 – were issued against aliens free pending their court dates. Courts issued 769,842 removal orders against aliens who failed to appear in court and 221,707 against those who kept their court dates, but did not prevail at trial. Put another way 78 percent of all removal orders against those the U.S. allowed to remain free pending trial come from those who failed to keep their court dates, while 22 percent are issued against those who followed orders to appear in court. *EOIR 2000 Year Book*, L1-L2, Figures 15-17 and T1, Figure 23; *EOIR 2004 Year Book*, H1-H4, Figures 10-12 and p. O1, Figure 20; *EOIR 2008 Year Book*, H1- H4, Figures 10-12, and p. O1, Figure 23; *EOIR 2009 Year Book*, H1- H4, Figures 10-12, and p. O1, Figure 23. See also *EOIR 2000 Year Book*, p. I3, Table 12; *EOIR 2004 Year Book*, p. D2, Figure 5; *EOIR 2008 Year Book*, p. D2, Figure 5; *EOIR 2009 Year Book*, p. D2, Figure 5.

³⁵⁹ Between 1996 and 2009, 1,765,922 aliens were permitted to remain free prior to trial, and 991,549 of these aliens – 56 percent of the total — were ordered removed, and then 769,842 of the 991,549

aliens — 78 percent — failed to appear in court. Only 221,707 out of 991,549 — 22 percent — made their court dates. See *EOIR 2000 Year Book*, L1-L2, Figures 15-17 and T1, Figure 23; *EOIR 2004 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 20; *EOIR 2008 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 23; *EOIR 2009 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 23; See also *EOIR 2000 Year Book*, p. I3, Table 12; *EOIR 2004 Year Book*, p. D2, Figure 5; *EOIR 2008 Year Book*, p. D2, Figure 5; *EOIR 2009 Year Book*, p. D2, Figure 5.

³⁶⁰ U.S. Department of Justice, *FY 2002 Performance and Accountability Report*, Strategic Goal 5.2A, www.justice.gov/archive/ag/annualreports/ar2002/sg5finalacctpartone.html. “As of September 30, 2002, there was a 406,000 case backlog of removable unexecuted final orders and a 196,000 case backlog of not readily removable unexecuted final orders of removal, for a total of 602,000 unexecuted orders.” See also U.S. Immigration and Customs Enforcement, *ICE Fiscal Year 2008 Annual Report*, p. 4, www.ice.gov/doclib/news/library/reports/annual-report/2008annual-report.pdf. This report states that in 2008 “ICE arrested 34,155 fugitives, which is an increase of more than 12 percent over the previous year. This has led to a six percent reduction in the number of open fugitive alien cases from the beginning of the fiscal year with nearly 37,000 fugitive alien cases resolved. At the end of FY08, there were 557,762 such cases remaining.”

A review of the courts’ history strongly suggests the number of unexecuted removal orders at the end of 2009 equaled 1,109,551 and that unexecuted removal orders are much greater than ICE admits. Adding together the number of removal orders from 2003 through 2009 — orders which the 2003 IG report (Office of the Inspector General, U.S. Department of Justice, “The Immigration and Naturalization Service’s Removal of Aliens Issued Final Orders,” Report Number I-2003-004, February 2003) and ICE’s own 2008 *Annual Report* suggests remain unenforced — shows the U.S. added 541,867 removal orders to the 602,000 which

remained unexecuted as of 2002. From 2003 through 2009, non-detained aliens ordered removed each year respectively were 70,002 in 2003, 69,720 in 2004, 132,099 in 2005, 126,545 in 2006, 54,552 in 2007, 48,398 in 2008 and 40,551 in 2009. For verification see *EOIR 2004 Year Book*, p. D2 and *EOIR 2009 Year Book*, p. D2. The figure 1,109,551 assumes a 3 percent removal rate that the 2003 IG report calculated for non-detained asylum seekers. Without the 3 percent removal rate, the total, including the 602,000 unexecuted orders identified in 2002, was 1,143,867. The contradictory findings of DoJ's unexecuted removal orders report in 2002 and ICE's 2008 alien fugitive numbers cannot be reconciled. The higher figure is the more accurate because neither ICE (nor its predecessor INS), by its own admission, ever removed more than 34,155 aliens who were subject to final orders of removal in any year since 2003. In fact, more aliens outside detention were ordered removed each year after 2002 than ICE removed in any single year. This is not to say some did not return, adjust their presence in the US to a legal status or, in some instances, die, but no numbers suggest that the huge backlog of unexecuted orders can be explained away solely by these factors. The figure of 1.1 million is also supported by ICE's announcement on August 18, 2009 that it would not remove aliens who skipped court or disobeyed orders to depart the U.S. This policy has caused an increase in unexecuted removal orders that builds on the 557,762 orders disclosed in 2008. See Anna Gorman, "Immigration Official Says Agents Will No Longer Have to Meet Quotas," *Los Angeles Times*, August 18, 2009, articles.latimes.com/2009/aug/18/local/me-immigration18. Said the story: "The head of Immigration and Customs Enforcement announced Monday in Los Angeles that he has ended quotas on a controversial program designed to go after illegal immigrants with outstanding deportation orders. This announcement came when teams of Immigration and Customs Enforcement (ICE) agents were expected to increase the number of annual arrests in the controversial fugitive operations' program, according to agency memos." Based on the courts' history and the new ICE policy advising that aliens subject to final or-

ders of removal who have no criminal convictions will not be removed, unexecuted removal orders at the end of 2009 equaled 1,109,551.

³⁶¹ Office of Inspector General, Department of Homeland Security, "Detention and Removal of Illegal Aliens", Audit Report OIG-06-33, p. 9, April 2006, www.dhs.gov/xoig/assets/mgmtrpts/OIG_06-33_Apr06.pdf. States the report:

"From FY 2001 through the first half of FY 2005, 91,516 SIC (special interest countries regarding terrorism) and SST (state sponsors of terrorism) aliens were apprehended of which 45,000 (49 percent) were later released. It is not known exactly how many of these SIC and SST aliens were ultimately issued final orders of removal and were actually removed since such data is not tracked by DRO. However, assuming SIC and SST aliens are being removed at the same rate as other apprehended and released aliens, 85 percent of the SIC and SST aliens released who eventually receive final orders of removal will abscond."

The same report later says: "[H]istorical trends indicate that 62 percent of the aliens released [from detention] will eventually be issued final orders of removal by ... EOIR and later fail to surrender for removal or abscond. Although DRO has received additional funding to enhance its Fugitive Operations Program, it is unlikely that many of the released aliens will ever be removed. As of December 30, 2005, there were more than 544,000 released aliens with final orders of removal who have absconded."

³⁶² *Ibid.* See also Lornet Turnbull, "Raids Target Immigrants Ordered to Leave U.S.", *Seattle Times*, July 3, 2007, seattletimes.nwsourc.com/html/localnews/2003772316_iceraid03m.html. States the article:

"When she first came to Washington [state] 17 years ago, Reyes-Velasquez lived in Yakima and worked as a cherry picker,

she said. Court records show that in 1997 she violated a no-contact order and in 2000 was convicted of fourth-degree assault in a domestic dispute, a gross misdemeanor. It was the 1997 violation that brought her to the attention of immigration authorities. In 2003 an immigration judge told her to leave the country, but in doing so opened a window that allowed her to appeal. She did, but lost — both at the Board of Immigration Appeals and the Ninth Circuit Court of Appeals, which in October allowed the original deportation ruling to stand. She never left. She kept hoping, she said, that changes to immigration law might create a legal path for her and her two oldest children. “I’ve waited for 17 years. It was my last hope.”

³⁶³ The author received answers to questions regarding enforcement through a trusted intermediary. The author does not know the identity of the CBP officer.

³⁶⁴ Statement of Chris Crane, President, American Federation of Government Employees Council 118, “Vote of No Confidence”, June 25, 2010, www.cis.org/articles/2010/259-259-vote-no-confidence.pdf.

³⁶⁵ Office of Inspector General, Department of Homeland Security, “Detention and Removal of Illegal Aliens”, Audit Report OIG-06-33, p. 2, April 2006, www.dhs.gov/xoig/assets/mgmttrpts/OIG_06-33_Apr06.pdf.

³⁶⁶ Eugene Moscoso, “Countries Refuse to Take Back Thousands of Illegal Immigrants”, Cox News Service, April 27, 2008.

³⁶⁷ U.S. Department of Justice, *FY 2002 Performance and Accountability Report*, Strategic Goal 5.2A, www.justice.gov/archive/ag/annualreports/ar2002/sg5finalacctpartone.html.

³⁶⁸ *ICE Fiscal Year 2008 Annual Report*, U.S. Immigration and Customs Enforcement, www.ice.gov/doclib/news/library/reports/annual-report/2008annual-report.pdf.

³⁶⁹ *Ibid.*

³⁷⁰ *Ibid.* Figure 5 on p. 4 shows removals by fiscal year. Nowhere in this report does ICE distinguish between criminal aliens and aliens ordered removed because their applications for relief failed.

³⁷¹ Office of Inspector General, Department of Homeland Security, “Detention and Removal of Illegal Aliens,” Audit Report OIG-06-33, p. 3, April 2006, www.dhs.gov/xoig/assets/mgmttrpts/OIG_06-33_Apr06.pdf. “[H]istorical trends indicate that 62 percent of the aliens released [from detention] will eventually be issued final orders of removal by ... EOIR and later fail to surrender for removal or abscond. Although DRO has received additional funding to enhance its Fugitive Operations Program, it is unlikely that many of the released aliens will ever be removed. As of December 30, 2005, there were more than 544,000 released aliens with final orders of removal who have absconded.”

³⁷² Department of Homeland Security, “Budget-In-Brief Fiscal Year 2010”, U.S. Immigration and Customs Enforcement, www.dhs.gov/xlibrary/assets/budget_bib_fy2010.pdf. Regarding its 2008 efforts ICE reported “Increased Fugitive Operations Team Arrests: Fugitive Operation Teams (FOTs). The FOTs made over 34,155 total arrests, including over 28,000 ICE fugitives and criminal aliens. Criminal fugitive arrests increased by 111 percent (from 2,677 to 5,652). ICE processed and eliminated more than 95,000 fugitive alien cases and reduced the backlog from 594,756 cases at the end of FY 2007 to 557,762 cases at the end of FY 2008. This reduction of approximately 6 percent, is the second consecutive year in which the backlog has decreased.”

³⁷³ *ICE Fiscal Year 2008 Annual Report*, U.S. Immigration and Customs Enforcement, p. 4,

www.ice.gov/doclib/news/library/reports/annual-report/2008annual-report.pdf.

³⁷⁴ *Ibid.*

³⁷⁵ The author does not know the identity of the CBP officer. The author submitted questions through an intermediary trusted by both the author and the CBP officer.

³⁷⁶ Office of the Inspector General, U.S. Department of Justice, “The Immigration and Naturalization Service’s Removal of Aliens Issued Final Orders”, Report Number I-2003-004, February 2003, www.npr.org/documents/2005/mar/doj_alien_removal.

³⁷⁷ *Ibid.* p. ii. Stated the report: “We found that the INS is even less successful at removing non-detained aliens from countries identified by the U.S. Department of State as state sponsors of terrorism. In 2001, seven countries received this designation: Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria. During the period we reviewed, 2,334 aliens from these countries were ordered removed. Of those aliens, 894 were non-detained. We examined a sample of 470 of the non-detained cases and found that the INS removed only 6 percent.”

³⁷⁸ *Ibid.* p. iii. Stated the report: “We found that although the INS established the removal of criminal aliens as its first priority, it removed only 35 percent of the nondetained criminals in our sample. The INS removed 7 of the 20 criminals in our sample of 308 non-detained aliens.”

³⁷⁹ While a judge in Miami, the author observed applicants, sometimes entire families, unable to obtain relief or, at the very least, enduring avoidable delay because federal officers they had allegedly assisted in narcotics stings or other enforcement activities were either unavailable to provide evidence concerning these allegations or had promised to assist applicants but had failed to do so while asylum applications (or S-Visa requests) were being reviewed by DHS. Such scenarios are not indicative of a cavalier attitude by federal law

enforcement. Instead, these situations speak to officers literally overwhelmed by volume and responsibility. Sometimes they are separated from courts by significant distance. Such problems are not unusual and give further weight to the argument of Judge Dana Marks Keener that the mild contempt and injunctive authority mandated by Congress in 1996 be enabled. Compelling witnesses, even federal officers, to assist courts is routine in other state and federal venues. The same should be true in immigration courts.

³⁸⁰ Jay Weaver, “Federal Judge Troubled By Wrongful Deportation”, *Miami Herald*, November 15, 2005. “U.S. District Judge Adalberto Jordan said Monday he did not believe Immigration and Customs Enforcement officials deliberately violated his order to keep Moreno in South Florida until Oct. 16 for a hearing on his fate. But the judge said he would still consider holding immigration authorities in contempt of court if Homeland Security concludes there was official misconduct in the high-profile case.”

³⁸¹ Beth Duff-Brown, “Deported Man Gets Apology: Canadian Tortured in Syria Compensated \$8.9 million,” Associated Press, January 27, 2007, www.seattlepi.com/default/article/Deported-man-gets-apology-1226599.php. States the article: “Prime Minister Stephen Harper apologized Friday to a Syrian-born Canadian and said he would be compensated \$8.9 million for Ottawa’s role in his deportation by U.S. authorities to Damascus, where he was tortured and imprisoned for nearly a year.”

³⁸² Peter Prengaman, “Wrongfully Deported Southern California Man Found”, *San Francisco Chronicle*, August 7, 2008. States the article:

“Pedro Guzman, 29, a wrongly deported U.S. citizen who was missing for nearly three months in Mexico ate out of garbage cans, bathed in rivers and was repeatedly turned away by U.S. border agents when he tried to return to California, his family said Tuesday ... The family said Guzman

had previously done jail time for drug possession, so he had a record that could have been cross-checked before a deportation decision was made. Immigration and sheriff's officials said they followed all the necessary protocols and have done nothing wrong."

See also Lurdes da Silva, "Deportation of U.S. Citizens: 'It's just the tip of the Iceberg'", *O Jornal*, March 14, 2008, www.ojournal.com/site/news.cfm?newsid=19393115&BRD=2677&PAG=461&dept_i. Aggravating factors include language barriers and mental illness.

³⁸³ See Note 377.

³⁸⁴ "Problems with ICE Interrogation, Detention, and Removal Procedures", testimony of Rachel Rosenbloom, hearing before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, House Committee on the Judiciary Feb. 13, 2008, judiciary.house.gov/hearings/pdf/Rosenbloom080213.pdf. States Ms. Rosenbloom: "In the realm of deportation, our current policies seem designed to err in the opposite direction: to ensure that deportation laws are applied as broadly as possible to those who are removable, even at the cost of ensnaring U.S. citizens and others with the right to remain in this country in a vast net of enforcement."

³⁸⁵ Marisa Taylor, "Zeal to Deport Sometimes Catches U.S. Citizens in its Net", *News & Observer* (Raleigh, NC), January 25, 2008, p. A3. This article refers to an unpublished 2006 study by Vera Institute for Justice documenting 125 such cases in twelve detention sites. See also Nina Siulc et al., "Legal Orientation Program: Evaluation and Performance and Outcome Measurement Reports, Phase II", Vera Institute of Justice, p. 73, www.vera.org/lopevaluation. The report indicates 322 people were identified as having potential claims to U.S. citizenship. It does not state how many were determined to have U.S. citizenship.

³⁸⁶ Suzanne Gamboa, "Deportation Mill Fails to Protect Latino Citizens", *Plain Dealer*, Apr. 13, 2009, www.cleveland.com/nation/index.ssf/2009/04/deportation_mill_fails_to_prot.html.

³⁸⁷ See Office of Inspector General, Department of Homeland Security, "Detention and Removal of Illegal Aliens," Audit Report OIG-06-33, p. 23, April 2006, www.dhs.gov/xoig/assets/mgmtrpts/OIG_06-33_Apr06.pdf. "DRO has developed a comprehensive plan to detain and remove illegal aliens, but its success depends on sufficient resources and other factors beyond its control. Congress has appropriated funds to advance the plan, but those funds still fall far short of the amount needed to detain and remove all high-risk aliens. Further, DRO lacks the analytical capability to manage the program effectively. Additional actions are needed to mitigate the risks created by these circumstances."

³⁸⁸ Suzanne Gamboa, "Hundreds of U.S. Citizens Wrongfully Deported, Stuck in Detention", *Quad City Times*, April 12, 2009, www.qctimes.com/news/national/article_70831bc2-27db-11de-93ae-001cc4c002e0.html. States the article:

"Yet citizens still end up in detention because the system is overwhelmed, acknowledged Victor Cerda, who left Immigration and Customs Enforcement in 2005 after overseeing the system. The number of detentions overall is expected to rise by about 17 percent this year to more than 400,000, putting a severe strain on the enforcement network and legal system. The result is the detention of citizens with the fewest resources: the mentally ill, minorities, the poor, children and those with outstanding criminal warrants, ranging from unpaid traffic tickets to failure to show up for probation hearings. Most at risk are Hispanics, who made up the majority of the cases the AP found. 'The more the system becomes confused, the more U.S. citizens will be wrongfully detained and wrongfully removed,' said Bruce Einhorn, a re-

tired immigration judge who now teaches at Pepperdine Law School. “They are the symptom of a larger problem in the detention system. ... Nothing could be more regrettable than the removal of our fellow citizens.”

³⁸⁹ “Asylum decisions may require the most difficult adjudication known to administrative law, owing both to the high stakes involved and the unique elusiveness of the facts. The risks for the individual are potentially higher than anything known in other U.S. adjudications, including most criminal trials. An erroneous denial could send the applicant back to torture, death, or slow starvation in a filthy cell.” David A. Martin, “The 1995 Asylum Reforms: A Historic and Global Perspective”, Center for Immigration Studies, May 2000; www.cis.org/articles/2000/back500.html. Asylum decisions *are* among the most difficult decisions in *any* body of law — administrative or legal.

³⁹⁰ *Ibid.*

³⁹¹ Peter Reed Hill, “I Want To Live ... In America!”, *Immigration Daily*, March 11, 2005, www.ilw.com/articles/2005,0311-hill.shtm.

Unconstitutionally Separate, Inherently Unequal

³⁹² See 5 C.F.R. § 9701.601—710 and 73 Fed. Reg. 76,914, 76917 (Dec. 18, 2008), www.justice.gov/eoir/vll/fedreg/2008_2009/fr18dec08c.pdf.

³⁹³ In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Supreme Court ruled that building and zoning ordinances that discriminated against Chinese laundry owners — even though race neutral on their face — were unconstitutional. Cosmetic equality in language was defeated by the facts of the case, chiefly that “there were about 320 laundries in the city and county of San Francisco, of which about 240 were owned and conducted by subjects of China, and of the whole number, viz., 320, about 310 were constructed of wood, the same material that constitutes nine-tenths of the

houses in the city of San Francisco.” *Ibid.* at 358—359. The High Court further found “more than one hundred and fifty [Chinese aliens] have been arrested upon the charge of carrying on business without having [the San Francisco Board of Supervisors] consent, while those who are not subjects of China, and who are conducting eighty odd laundries under similar conditions, are left unmolested and free to enjoy the enhanced trade and profits arising from this hurtful and unfair discrimination.” *Ibid.* at 359.

³⁹⁴ Press Release, “Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals”, Department of Justice, August 9, 2006, www.justice.gov/opa/pr/2006/August/06_ag_520.html. The Attorney General’s statement outlined common violations to be addressed by regulations empowering judges to sanction litigants and attorneys who offer contempt or abuse of process. These regulations remain unissued.

³⁹⁵ U.S. Department of Justice, “Professional Conduct for Immigration Practitioners — Rules and Procedures”, August 19, 2004, www.justice.gov/eoir/press/00/profcondfaks.htm.

³⁹⁶ See 5 C.F.R. § 9701.601—710 and 73 Fed. Reg. 76,914, 76917 (Dec. 18, 2008). States the rule: “Under current regulations, which have been in place since [2000], immigration judges have no authority to initiate disciplinary proceedings against a particular attorney. Immigration judges can file complaints about attorneys with EOIR’s disciplinary counsel, just as aliens, attorneys, or others involved in an immigration proceeding may file such complaints.” 73 Fed. Reg. at 76916.

³⁹⁷ EOIR has the authority to impose disciplinary sanctions on attorneys or accredited representatives who violate rules of professional conduct in practice before immigration courts, the BIA, and DHS. See 8 C.F.R. §§ 1003.1(d)(2)(iii), 1003.1(d)(5), 1003.101-.106, and 1292.3, and EOIR, *Immigration Court Practice Manual*, Chapter 10, www.justice.gov/eoir/vll/OCIJPracManual/Chap%20

10.pdf. DHS attorneys are governed by DHS rules and regulations. Concerns or complaints about the conduct of DHS attorneys may be raised in writing with the DHS Office of the Chief Counsel where the Immigration Court is located.

³⁹⁸ It is clear that inhibiting the exercise of one constitutional protection may impair another. Thus, the denial of an effective advocate would preempt the alien litigant’s right to a due process hearing. In this regard, see *Guerrero-Santana v. Gonzales*, 499 F.3d 90, 93 (1st Cir. 2007). Here the First Circuit held: “[I]neffective assistance of counsel in a removal proceeding may constitute a denial of due process if, and to the extent that, the proceeding is thereby rendered fundamentally unfair.” The Second Circuit ruled in a similar case, *Aris v. Mukasey*, 517 F.3d 595, 600-601 (2nd Cir. 2008), that “the Fifth Amendment requires that deportation proceedings comport with due process; due process concerns may arise when retained counsel provides immigration representation that falls so short of professional duties as to impinge upon the fundamental fairness of the hearing.” A fundamental right is a right that is expressly or implicitly enumerated in the U.S. Constitution, such as freedom of speech, faith or assembly.

³⁹⁹ U.S. Department of Justice, EOIR, “Fact Sheet: Professional Conduct for Immigration Practitioners — Rules and Procedures”, August 19, 2004, p. 1, www.justice.gov/eoir/press/00/profcondfaks.pdf. States the fact sheet: “This professional conduct regulation applies to every private immigration practitioner authorized to practice before EOIR [*i.e.*, courts] and DHS (including attorneys, accredited representatives, and law students, among others).”

⁴⁰⁰ *Ibid.* p. 1. (“This rule does not apply to ... DHS trial counsel, because they are subject to separate regulations and disciplinary procedures.”)

⁴⁰¹ *Ibid.* p. 2. (“When a practitioner requests a hearing, the Chief Immigration Judge will appoint an Immigration Judge as the adjudicating official who will conduct a hearing and render a decision

in the case. The adjudicating official shall *not* be an Immigration Judge before whom the practitioner regularly appears or who has intervened as a complainant or witness in the matter. The disciplinary hearing generally is open to the public.”)

⁴⁰² See 5 C.F.R. § 9701.601—710 and 73 Fed. Reg. 76,914 (Dec. 18, 2008). At no point are DHS proceedings public regarding employee matters. DHS employees, like other federal career employees, can appeal agency decisions within their agency and, if dissatisfied with agency justice, may appeal to the MSPB (Merit System Protection Board). Agency and employees have available Alternative Dispute Resolution (ADR). No such privileges and protections are present for private counsel submitting to EOIR’s disciplinary scheme.

⁴⁰³ *Ibid.*

⁴⁰⁴ 73 Fed. Reg. at 76,917.

⁴⁰⁵ See Immigration Court Practice Manual, Chapter 10, www.justice.gov/eoir/vll/OCIJPracManual/Chap%2010.pdf.

⁴⁰⁶ “EOIR Immigration Court Listing”, <http://www.justice.gov/eoir/sibpages/ICadr.htm>.

⁴⁰⁷ “DHS’s Office of the Inspector General and Office of Professional Responsibility for Immigration and Customs Enforcement investigate DHS attorneys. Further, DHS attorneys are also required to comply with the Standards of Ethical Conduct for Employees of the Executive Branch, found at 5 CFR part 2635, and other standards applicable to government employees. According to EOIR, DHS has adopted a formal disciplinary process for its employees that provides similar hearing and appeal rights as EOIR’s practitioner disciplinary process, including removal or suspension from employment.” 73 Fed. Reg. at 76,917. Close examination reveals that DHS employees receive considerably more protection than private practitioners.

⁴⁰⁸ 73 Fed. Reg. at 76,915. “This rule seeks to preserve the fairness and integrity of immigration

proceedings, and increase the level of protection afforded to aliens in those proceedings by defining additional categories of behavior that constitute misconduct.”

⁴⁰⁹ *Ibid.*

⁴¹⁰ See Letter from American Immigration Law Foundation to Attorney General Eric Holder, Feb. 6, 2009, available at www.aclu.org/files/pdfs/immigrants/aifl_letterinsupportofreconsideration.pdf. States the letter: “[C]ourts of appeals continue to affirm that noncitizens have a constitutional right under the Fifth Amendment Due Process Clause to fundamentally fair removal proceedings, and that incompetent counsel may deprive people of that right. *Guerrero-Santana v. Gonzales*, 499 F.3d 90, 93 (1st Cir. 2007) (“ineffective assistance of counsel in a removal proceeding may constitute a denial of due process if, and to the extent that, the proceeding is thereby rendered fundamentally unfair.”); *Aris v. Mukasey*, 517 F.3d 595, 600-601 (2nd Cir. 2008) (“the Fifth Amendment requires that deportation proceedings comport with due process; due process concerns may arise when retained counsel provides immigration representation that falls so short of professional duties as to impinge upon the fundamental fairness of the hearing”); *Fadiga v. Att’y Gen.*, 488 F.3d 142, 155 (3rd Cir. 2007) (“a claim of ineffective assistance of counsel in removal proceedings is cognizable under the Fifth Amendment as a violation of the guarantee of due process”); *Sako v. Gonzales*, 434 F.3d 857, 863-64 (6th Cir. 2006) (“to prove he has suffered a violation of due process, the petitioner needs to establish that ineffective assistance of counsel prejudiced him or denied him fundamental fairness”); *Jeziarski v. Mukasey*, 543 F.3d 886, 890 (7th Cir. 2008), *petition for cert. filed*, 08-656 (Nov. 17, 2008) (“the complexity of the issues, or perhaps other conditions, in a particular removal proceeding might be so great that forcing the [noncitizen] to proceed without the assistance of a competent lawyer would deny him due process of law.”)”

⁴¹¹ In *Plyler v. Doe*, 457 U.S. 202 (1982), the Supreme Court struck down a Texas law prohibiting enrollment of illegal aliens in public school. In its ruling, the Court said: “The undocumented status of these children *vel non* does not establish a sufficient rational basis for denying them benefits that the State affords other residents.” The same is true here of aliens and their counsel. Alienage does not establish a rational basis for exposing aliens’ attorneys to one disciplinary process and government attorneys to another.

⁴¹² The Supreme Court has developed a three-tiered approach to examine all such legislative classifications. Under the first tier of scrutiny, known as strict scrutiny, the Court will strike down any legislative classification that is not necessary to fulfill a compelling or overriding government objective. Strict scrutiny is applied to legislation involving suspect classifications and fundamental rights. A suspect classification is directed at the type of “discrete and insular minorities” referred to in *Carolene Products Co. v. United States*, 323 U.S. 18 (1944). A fundamental right is a right that is expressly or implicitly enumerated in the U.S. Constitution, such as freedom of speech or assembly. Most legislation reviewed by the Supreme Court under the strict scrutiny standard has been invalidated, because very few classifications are necessary to support a compelling government objective. The second tier of scrutiny used by the Court to review legislative classifications is known as heightened, or intermediate, scrutiny. Legislation will not survive heightened scrutiny unless the government can demonstrate that the classification is substantially related to an important societal interest. Gender classifications are examined under this middle level of review, as are classifications that burden extramarital children. The third tier of scrutiny involves the least amount of judicial scrutiny and is known as the rational relationship test. The Supreme Court will approve legislation under this standard so long as the classification is reasonably related to a legitimate government interest. The rational relationship test permits the legislature to employ any classification that is conceivably or arguably related to a government interest that does

not infringe upon a specific constitutional right. An overwhelming majority of social and economic laws are reviewed and upheld by courts using this minimal level of scrutiny. For a more thorough discussion see Ronald D. Rotunda, *et al.*, *Treatise on Constitutional Law: Substance and Procedure*, vol. 3, St. Paul, Minn.: West 1986.

⁴¹³ Press Release, U.S. Department of Justice, Executive Office for Immigration Review, “EOIR Implements Regulation To Enhance Attorney Discipline Program,” Jan. 6, 2009, www.justice.gov/eoir/press/09/AttyDiscReg010609.pdf. EOIR added further areas to its jurisdiction, including “lack of candor toward the tribunal” — in many states the first rule of conduct governing litigators — but its application and enforcement involves only private counsel. Lack of candor toward the tribunal implicates criminal conduct when intentional deception is committed.

⁴¹⁴ A review of EOIR’s disciplinary procedures reflects a bifurcated process. First a confidential investigation ensues and then a public hearing if the confidential investigation offers reasonable belief that a violation has occurred. This process (or those similar to it) is used broadly throughout state bar associations.

⁴¹⁵ 425 U.S. 319 (1976). The test balances (1) the importance of the interest at stake; (2) the risk of an erroneous deprivation of the interest because of the procedures used, and the probable value of additional procedural safeguards; and (3) the government’s interest.

⁴¹⁶ *Ibid.*

⁴¹⁷ 118 U.S. 356, 368—369 (1886).

⁴¹⁸ Kyle C. Barry, “Protecting the Fifth Amendment: *Maryland v. Shatzer* and Prophylactic Rule-Making in the Supreme Court’s *Miranda* Jurisprudence”, *Vermont Bar Journal*, Winter/Summer 2010, www.vtbar.org/images/journal/journalarticles/summer2010/FifthAmendment.pdf. States the article: “Judicially crafted prophylactic

rules in the *Miranda* context are created and function differently. They are justified not by the Fifth Amendment itself, but only by their ‘prophylactic purpose’ of protecting Fifth Amendment rights.”

⁴¹⁹ Melissa Fruge, “Recent Decision: Criminal Procedure, Fifth Amendment Right To Counsel Does Not Terminate Upon Consultation With Counsel”, *Mississippi Law Journal*, vol. 61 p. 477, Fall 1991. States the article: “[The] law surrounding admissibility of confessions originated out of the English common law doctrine of trustworthiness ...

[E]arly U.S. Supreme Court cases reviewing federal criminal convictions utilized the doctrine of trustworthiness, they found confessions inadmissible on the ground that they were involuntary.”

⁴²⁰ *U.S. v. Patane*, 542 U.S. 630 (2004). Commenting on Fifth Amendment protections, Justice Thomas wrote for the majority. “[A]s the Self-Incrimination Clause primarily focuses on the criminal trial, so too does the *Miranda* rule.”

⁴²¹ Press Release, “Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals,” Department of Justice, August 9, 2006, www.justice.gov/opa/pr/2006/August/06_ag_520.html.

⁴²² See “AILA-EOIR Agenda Questions and Answers”, October 18, 2006, www.justice.gov/eoir/statpub/eoiraila101806.pdf.

⁴²³ See § 240(b)(1) of the INA, as amended by § 304 of the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, 110 Stat. 3009—589 (1996). Specifically, the *Act* provides that “The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge’s proper exercise of authority under this Act.” 8 U.S.C. § 1229a.

⁴²⁴ “Role of Immigration in the Department of Homeland Security Pursuant to H.R. 5005, The

Homeland Security Act of 2002,” Hearing Before the Subcommittee On Immigration, Border Security and Claims of the House Committee on the Judiciary, 107th Congress, June 27, 2002 (testimony of Honorable Bill McCollum and of Honorable Dana Marks Keener), available at commdocs.house.gov/committees/judiciary/hju80455.000/hju80455_of.htm.

⁴²⁵ Press Release, “Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals.” The press release stated:

“To ensure that immigration judges have the tools they need to control their courtrooms and to protect the adjudicatory system from fraud and abuse, EOIR will consider and, where appropriate, draft proposed revisions to the existing rules that provide sanction authority for false statements, frivolous behavior, and other gross misconduct. EOIR will also draft a new proposed rule that creates a strictly defined and clearly delineated authority to sanction by civil money penalty an action (or inaction) in contempt of an immigration judge’s proper exercise of authority ... By better enabling judges to address frivolous submissions and to maintain an appropriate atmosphere in their courtrooms, we will reduce the pressures that may have contributed to intemperate conduct in the past. Likewise the Board of Immigration Appeals should have the ability to sanction effectively litigants and counsel for strictly defined categories of gross misconduct.”

The proposed revisions enabling contempt authority, as of date of publication, remain unissued.

⁴²⁶ The Deputy Attorney General is the official responsible for operational management of the Department of Justice. Reporting to the “DAG” are all litigating and management divisions of the Department. Agencies related to law enforcement report to the DAG. These include the Executive

Office for U.S. Attorneys, FBI and DEA. The DAG reports to the Attorney General. Immigration courts are a small — but very busy — piece of this flagship department. See Department of Justice, 2007 Performance and Accountability Report, p. 13, www.justice.gov/ag/annualreports/pr2007/sect1/p3-4.pdf; see also Thomas R. Eldridge, et al, “9/11 and Terrorist Travel, Staff Report of the National Commission on Terrorist Attacks Upon the United States,” August 21, 2004, p. 86, govinfo.library.unt.edu/911/staff_statements/911_TerrTrav_Monograph.pdf.

⁴²⁷ “Professional Conduct for Practitioner — Rules and Procedures,” 65 Fed. Reg. 39513, 39,514 (June 27, 2000). www.justice.gov/eoir/vll/fedreg/2000_2001/fr27jn00R.pdf.

⁴²⁸ Press Release, “Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals.”

⁴²⁹ See “AILA-EOIR Agenda Questions and Answers,” October.18, 2006, www.justice.gov/eoir/statpub/eoiraila101806.pdf.

⁴³⁰ *Ibid.* p. 3. “‘The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge’s proper exercise of authority under this Act.’ The language of the statute itself is not limited to a single party, but rather focuses on the action or inaction that is in contempt of the immigration judge’s authority regardless of who is responsible. Clearly, there are significant differences between the situations of private and government counsel, and these will need to be carefully considered in drafting the regulation. At this time, we do know that there will be high-level EOIR oversight of the program, and that it will be used only in very limited circumstances where the conduct is clearly in contempt of the immigration judge’s proper exercise of authority. EOIR cannot comment on what mechanisms may or may not be in place to discipline Department of Homeland Security (“DHS”) counsel. As noted above, there is much work to

be done in developing the proposed regulation. As specific measures become clearer, there will be further opportunities for the private bar to raise issues of concern both at similar liaison meetings and during the regulatory process.” Department employees advise the author that attorneys in the Office of Legal Counsel expressed doubt that DoJ attorneys (immigration judges) could impose contempt sanctions against other government attorneys. In fact, judges are frequently reminded that they are “DoJ attorneys” — nothing more — and can be assigned to other jobs whenever Department needs justify a transfer.

⁴³¹ Press Release, “Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals.”

⁴³² “Immigration Reform and the Reorganization of Homeland Defense”, testimony of Hon. Dana Marks Keener, hearing before the Subcommittee on Immigration of the Senate Committee on the Judiciary, 107th Cong., p. 15 (2002), available at judiciary.senate.gov/hearings/testimony.cfm?id=295&wit_id=674.

⁴³³ U.S. Department of Justice, “U.S. Asylum and Refugee Policy,” October 29, 1998, available at www.ailec.com/publicaffairs/factsheets/asylum.htm. States the policy: “The United States offers asylum and refugee protection based on an inherent belief in human rights and in ending or preventing the persecution of individuals. Asylum is a precious and important protection granted by federal law to qualified applicants.”

Blueprint: An Article I Immigration Court

⁴³⁴ Heather MacDonald, “The Illegal Alien Crime Wave”, *City Journal*, Winter 2004, www.city-journal.org/html/14_1_the_illegal_alien.html. Writes Ms. McDonald:

“Resource starvation is not the only reason for federal inaction. The INS was a creature of immigration politics, and [in the 1980’s and 1990’s] INS district directors came

under great pressure from local politicians to divert scarce resources into distribution of such ‘benefits’ as permanent residency, citizenship, and work permits, and away from criminal or other investigations. The ... Citizenship USA project of 1996 was a ... case of politics driving the INS to sacrifice enforcement to ‘benefits ...’ [and] the naturalization process radically expedited. [As a result] ... processing errors in 1996 were 99 percent in New York and 90 percent in Los Angeles, and tens of thousands of aliens with criminal records, including for murder and armed robbery, were naturalized.”

Ms. McDonald found both major political parties, presidential administrations and Congresses equally responsible over these periods. In many cases, state and local officials were impediments to criminal and civil law enforcement. As her article explains, both major political parties at all levels of government have failed to dignify rule of law.

⁴³⁵ Article I, Section 8, Clause 9 of the U.S. Constitution confers on Congress the power to “constitute Tribunals inferior to the Supreme Court.” Under this provision Congress can create Article I judgeships that do not have lifetime tenure, and Congress may, among other actions, reduce their salaries. Article I courts are called legislative courts. The U.S. Supreme Court has held that Article I gives Congress authority to create special forums to hear matters concerning congressional powers. The U.S. Supreme Court has identified three situations in which Congress may create legislative courts. First, Congress may create legislative courts in U.S. territories. Legislative courts exist in Guam, the U.S. Virgin Islands, and the Northern Mariana Islands, and the local courts of the District of Columbia are also considered legislative courts. Second, Congress may create legislative courts to hear military cases. Congress has traditionally maintained extraordinary control over military matters. The U.S. Court of Appeals for the Armed

Forces is such a legislative court. Third, Congress may create legislative courts to hear cases involving public rights. Generally, these are rights that have historically been determined exclusively by the legislative or executive branch. The government is always a party in such cases, and such cases generally involve matters of government administration. The U.S. Tax Court is, for example, a “public rights” Article I court. The U.S. Court of Claims is another. A U.S. Immigration Court would determine “public rights,” since the government is always a party. Timely resolution of immigration cases conforms to U.S. Supreme Court holdings that Article I courts are intended to impose swift resolution of their “public rights” caseloads.

The Necessary and Proper Clause of the U.S. Constitution, Article I, Section 8, Clause 18, allows Congress “To make all Laws which shall be necessary and proper for carrying into Execution the [enumerated] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” Its affirmation in *McCulloch v. Maryland*, 17 U.S. 316 (1819), is considered a major cornerstone for federal authority under the implied powers doctrine. An immigration court would be a necessary and proper exercise of congressional authority. See “Legislative Court — Further Readings”, law.jrank.org/pages/8203/Legislative-Court.html; “Necessary and Proper Clause,” law.jrank.org/pages/8775/Necessary-Proper-Clause.html.

⁴³⁶ U.S. Attorney’s Manual, “Special Assistants,” Ch. 3-2.300, available at www.justice.gov/usao/eousa/foia_reading_room/usam/title3/2musa.htm.

“Section 543 of Title 28 authorizes the Attorney General to appoint Special Assistants to assist the United States Attorney when the public interest so requires, and to fix their salaries. These assistants are designated as Special Assistants to the United States Attorney and are appointed for the purpose of assisting in the preparation and presentation of special cases. Attorneys em-

ployed in other departments or agencies of the federal government may be appointed as Special Assistants to United States Attorneys, without compensation other than that paid by their own agency, to assist in the trial or presentation or cases when their services and assistance are needed. Such appointments, and appointments of Assistant United States Attorneys from one United States Attorney’s office to another, may be made by the United States Attorney requiring their services.”

⁴³⁷ USImmigrationLawyers.com, “Immigration Marriage Fraud: A Real Problem?” (2011), www.usimmigrationlawyers.com/resources/immigration-law/criminal-charges/immigration-marriage-fraud-a-real-problem. States the article:

“In 2009 more than 415,000 marriage based green cards were issued in the United States. Over the last couple of years this number has grown by more than 50 percent. Despite the legitimacy of some of these marriages, there is a great deal of fraud perpetrated as well, and almost no prosecution of it when it happens. Because prosecution for marriage fraud is rare, it has become an extremely popular way for an illegal alien to change his/her status ... There are legitimate national security issues where marriage fraud is concerned. Several terrorist have acquired green cards and later U.S. citizenship by marrying a citizen. For example, the Times Square bomber, Faisal Shahzad had no trouble getting a green card, despite that fact that law enforcement agencies suspected he was a terrorist. Despite incidents like these, the truth of the matter is that very few marriage applicants are ever refused. According to David North’s Observations from a leaked memo, since the Obama administration took over, the United States Citizenship and Immigration Services (USCIS) has gone from an agency that impartially adjudicated requests to one that promotes and facilitates

immigration regardless of the form it takes. Essentially the staff of this agency has been discouraged from denying applicants. Therefore, most fraudulent applicants are no longer being detected, and even if they were, most fraud cases are not prosecuted.”

⁴³⁸ TRAC Immigration, “FY 2009 Federal Prosecutions Sharply Higher: Surge Driven by Steep Jump in Immigration Filings,” December 21, 2009, trac.syr.edu/tracreports/crim/223/. States the article: “[I]mmigration prosecutions now make up well over half — 54 percent — of all federal filings. The next largest FY 2009 Justice Department category was drugs, currently representing only 16 percent of the total. This was down from a high point reached during the 1997 war on drugs when such cases made up 37 percent. Looked at over the 24 years since these records began, no other category has ever so dominated the basic work of federal prosecutors.”

⁴³⁹ “Immigration Crisis Tests Federal Courts on Southwest Border”, *The Third Branch*, June 2006, www.uscourts.gov/News/TheThirdBranch/06-06-01/Immigration_Crisis_Tests_Federal_Courts_on_Southwest_Border.aspx. States the article:

“One fact should not be overlooked: only a tiny percentage of the illegal aliens apprehended each year (more than 1 million in 2005) along the 1,989 miles of border the United States shares with Mexico ever face prosecution in federal courts. The overwhelming majority are handled administratively by Border Patrol agents and other law enforcement agencies — those apprehended are escorted to the border and told to go home. A person who enters the United States illegally to look for work and has no other criminal charge pending typically may be ‘voluntarily returned’ to Mexico more than a dozen times before facing the charge of illegal entry. Some did not get into federal court until they amassed 60 voluntary returns ... Rob Johnson, an

assistant U.S. attorney in Laredo, cited prosecutorial discretion in acknowledging a startling irony. “As Congress ratchets up the number of agents they have down here creating cases, we increase the number of cases that we dismiss.” Noting that unfilled prosecutor jobs exist because of budget constraints, he added, “We can’t prosecute any more cases than we already are prosecuting. So, if they increase the number of cases, we’re just going to have to dismiss more cases, or not take more cases.” In Las Cruces, federal prosecutor Clint Johnson voiced another frustration — the inability to more aggressively prosecute the criminal organizations behind the illegal drug and illegal immigration trafficking. ‘Because of the caseload, we can’t always be as proactive as we’d like to be because we’re so busy being reactive,’ he said. ‘Those cases do exist, we do work them up the ladder. To be very honest, would I like to spend a lot more time trying to work up the ladder to some of these organizations? Most definitely.’”

⁴⁴⁰ “Federal Courts Hit Hard by Increased Law Enforcement on Border”, *The Third Branch*, July 2008, www.uscourts.gov/News/TheThirdBranch/08-07-01/Federal_Courts_Hit_Hard_by_Increased_Law_Enforcement_on_Border.aspx.

“[F]ederal courts have very limited control over the nature and the volume of their caseloads,” the [Administrative Office] report noted. “When the Department of Justice files a criminal case, it gives rise to a series of court proceedings and events in the courts that require both the attention of judicial personnel — judges, district clerk’s office personnel, pretrial services and probation officers, court reporters, court interpreters, and federal defenders — and the expenditure of funds.” The report added: “The Judiciary is responding broadly and promptly to the needs of the courts flowing from Operation Streamline II and other recent prosecution initiatives. Short-

term caseload surges can and are being addressed effectively by redeploying existing judges and court staff on a temporary basis, borrowing judges from other districts, or recalling retired magistrate judges. But as stepped-up law enforcement and caseload increases continue, more permanent measures need to be taken.”

⁴⁴¹ *Ibid.*

⁴⁴² *Ibid.*

⁴⁴³ Spencer H. Hsu, “Immigration Prosecutions Hit New High”, *The Washington Post*, June 2, 2008, www.washingtonpost.com/wp-dyn/content/story/2008/06/01/ST2008060102603.html. Apprehensions dropped to 859,000 in 2007 along the U.S.-Mexico border.

⁴⁴⁴ Faye Bowers, “Border Crackdown Jams US Federal Courts”, *Christian Science Monitor*, May 7, 2007, www.csmonitor.com/2007/0507/p01s04-ussc.html.

⁴⁴⁵ *Ibid.* The Department of Justice requested \$7.4 million for fiscal year 2008 to address steadily increasing caseloads generated by aggressive enforcement of immigration statutes, including aliens who after deportation attempted to reenter or are found in the United States illegally, and those involved in terrorism and violent crime. See Department of Justice, *FY2008 Budget and Performance Summary*, Strategic Goal 2, Immigration Litigation, justice.gov/jmd/2008summary/html/004_budget_highlights.htm.

⁴⁴⁶ “Federal Courts Hit Hard by Increased Law Enforcement on Border”, *The Third Branch*, July 2008.

⁴⁴⁷ See 8 U.S.C. § 1326.

⁴⁴⁸ Press Release, “Caseload of Federal Courts Remains Steady Overall,” United States Courts, March 11, 2008, http://www.uscourts.gov/News/NewsView/08-03-11/Caseload_of_Federal_Courts_Remains_Steady_Overall.aspx

This equals 11,486 cases.

⁴⁴⁹ *Ibid.*

⁴⁵⁰ “Federal Courts Hit Hard by Increased Law Enforcement on Border”, *The Third Branch*, July 2008.

⁴⁵¹ TRAC Immigration, “FY 2009 Federal Prosecutions Sharply Higher: Surge Driven by Steep Jump in Immigration Filings,” December 21, 2009, trac.syr.edu/tracreports/crim/223/. States the article: “[I]mmigration prosecutions now make up well over half — 54 percent — of all federal filings. The next largest FY 2009 Justice Department category was drugs, currently representing only 16 percent of the total. This was down from a high point reached during the 1997 war on drugs when such cases made up 37 percent. Looked at over the 24 years since these records began, no other category has ever so dominated the basic work of federal prosecutors.”

⁴⁵² Press Release, “National Gang Threat Assessment Issued”, Federal Bureau of Investigation, Feb. 2, 2009, www.fbi.gov/news/pressrel/press-releases/national-gang-threat-assessment-issued. “Street gangs and outlaw motorcycle gangs pose a growing threat to law enforcement along the U.S.-Canada border. They frequently associate with Canada-based gangs and criminal organizations to facilitate various criminal activities, including drug smuggling into the United States.”

⁴⁵³ National Gang Intelligence Center, “National Gang Threat Assessment 2009”, p. iii, www.fbi.gov/stats-services/publications/national-gang-threat-assessment-2009-pdf.

⁴⁵⁴ In summary, DHS apprehended more than 1,206,000 foreign nationals in 2006. Nearly 88 percent were natives of Mexico. There were 8,778 ICE Office of Investigations criminal arrests and 6,872 convictions for immigration-related crimes. ICE detained approximately 257,000 foreign nationals, and 272,389 aliens were removed from the

United States. The leading countries of origin of those removed were Mexico (67 percent), Honduras (10 percent) and Guatemala (7 percent). More than 1,043,000 other foreign nationals accepted an offer to return to their home countries without a removal order. Office of Immigration Statistics, Department of Homeland Security, “Immigration Enforcement Actions: 2006”, *Annual Report*, May 2008, p. 1, www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_06.pdf.

⁴⁵⁵ “Immigration Crisis Tests Federal Courts on Southwest Border”, *The Third Branch*, June 2006, www.uscourts.gov/News/TheThirdBranch/06-06-01/Immigration_Crisis_Tests_Federal_Courts_on_Southwest_Border.aspx.

⁴⁵⁶ *EOIR 2007 Year Book*, p. H1.

“The immigration court workload is dependent on actions taken by DHS. The longstanding DHS policy known as “catch and release” was designed to release, on their own recognizance, non-Mexican aliens apprehended at entry. This policy resulted from DHS’ insufficient capacity to detain all aliens apprehended at entry. In recent years the failure to appear rate increased dramatically at immigration courts. This caused a subsequent increase in *in absentia* removal orders being issued by immigration judges. As part of the Secure Border Initiative, DHS replaced the “catch and release” policy with the “catch and return” policy. In August 2006, DHS was detaining 100 percent of non-Mexican aliens apprehended along the border. As a result, EOIR experienced an increase in the number of detained cases and a decrease in the number of failures to appear.”

⁴⁵⁷ U.S. Courts, Federal Court Management Statistics, 2007, District Courts, www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsd2007.pl.

⁴⁵⁸ U.S. Courts, Federal Judicial Caseload Statistics, Judicial Business, p. 10—11, March 31, 2008,

www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2007/front/MarJudBus2007.pdf.

⁴⁵⁹ Solomon Moore, “Push on Immigration Crimes Is Said to Shift Focus”, *The New York Times*, January 11, 2009, www.nytimes.com/2009/01/12/us/12prosecute.html?_r=1&emc=eta1. States the article:

“Peter Carr, a spokesman for the Justice Department, said that felony prosecutions of immigration crimes had increased 40 percent from 2000 through 2007 but that most other prosecutions had remained steady. But Justice Department statistics Mr. Carr provided to The New York Times did not include tens of thousands of misdemeanor charges and prosecutions conducted before magistrate judges. Data from the Syracuse group, known as the Transactional Records Access Clearinghouse, or TRAC, included those cases, which are driving the sharp growth in immigration cases.”

⁴⁶⁰ *EOIR 2007 Year Book*, p. B2, Figure 1, and p. S1, Figure 25.

⁴⁶¹ Wayne Cornelius, “Controlling Immigration: What Oaxacan Migrants Can Tell Us,” Center for Comparative Immigration Studies, University of California-San Diego, March 2008, p.65, available at www.justicejournalism.org/documents/media/WayneCornelius20080317.pdf. States the article: “The cost of inmate stays in detention facilities in 2008 was \$90 per day.”

⁴⁶² Susan Carroll, “A System’s Fatal Flaws,” *Houston Chronicle*, November 16, 2008, www.chron.com/dispatch/story.mpl/metropolitan/6115223.html. States the article:

“A review of thousands of criminal and immigration records shows that Immigration and Customs Enforcement officials didn’t file the paperwork to detain roughly 75

percent of the more than 3,500 inmates who told jailers during the booking process that they were in the U.S. illegally.

“Although most of the inmates released from custody were accused of minor crimes, hundreds of convicted felons — including child molesters, rapists and drug dealers — also managed to avoid deportation after serving time in Harris County’s jails, according to the Chronicle review, which was based on documents filed over a period of eight months starting in June 2007, the earliest immigration records available.

...

“The investigation found that the federal government’s system to identify and deport illegal immigrants in Harris County Jail is overwhelmed and understaffed. Gaps in the system have allowed some convicted criminals to avoid detection by immigration officials despite being previously deported. The problems are national in scope, fueled by a shortage of money and manpower.”

⁴⁶³ Article I, Section 8, Clause 9 of the U.S. Constitution confers on Congress the power to “constitute Tribunals inferior to the Supreme Court.” Under this provision Congress can create Article I judgeships that do not have lifetime tenure, and Congress may, among other actions, reduce their salaries. In contrast, Article III judges have lifetime tenure on good behavior and their compensation cannot be reduced. See “Legislative Court — Further Readings”, law.jrank.org/pages/8203/Legislative-Court.html; “Necessary and Proper Clause,” law.jrank.org/pages/8775/Necessary-Proper-Clause.html.

⁴⁶⁴ The Tax Court is composed of 19 presidentially appointed members. Trial sessions are conducted and other work of the Court is performed by those

judges, by senior judges serving on recall, and by special trial judges. All of the judges have expertise in tax law and apply that expertise in a manner to ensure that taxpayers are assessed only what they owe, and no more. Although the Court is physically located in Washington, D.C., the judges travel nationwide to conduct trials in various designated cities. United States Tax Court, “About the Court,” www.ustaxcourt.gov/about.htm.

⁴⁶⁵ Cancellation of removal is a form of relief provided by The Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

⁴⁶⁶ See § 244 of the INA and 8 U.S.C. § 1254a for statutory provisions of Temporary Protected Status.

⁴⁶⁷ Two IIRIRA provisions address cancellation of removal. One addresses relief for those who have been granted permanent residence. The other addresses relief for nonpermanent residents:

“Permanent Residents. Here a lawful permanent resident facing removal for criminal convictions who has been lawfully admitted for permanent residence for at least five years, and who has resided continuously in the United States for seven years after a lawful admission may request cancellation, provided he or she has no aggravated felony convictions.

“Nonpermanent Residents. Under the second provision, applicants physically present in the United States for a continuous period of 10 years who have not been convicted of a criminal offense may seek cancellation of removal and adjustment of status to permanent resident alien. The applicant must demonstrate exceptional and extremely unusual hardship to a citizen or lawful permanent resident alien spouse, parent, or child if the applicant is removed. IIRIRA limits to 4,000 annually the total number of adjustments to lawful permanent resident status under suspension of

deportation or cancellation of removal.

Applicants for cancellation of removal who meet certain conditions are not subject to the cap.”

EOIR 2007 Year Book, p. R1. See also INA §§ 240A(a) and 240A(b) and 8 U.S.C. §§ 1229b(a) and 1229b(b).

⁴⁶⁸ Experiences on the bench inform this observation. Prosecutors in Miami explained their latitude in cancellation actions was so limited (removal versus relief) that trials were often the only means by which to “get the attention” of a person who likely did not merit removal, but also did not merit being ignored for conduct which was inconsistent with lawful presence in the United States. At the conclusion of such hearings, these seasoned prosecutors often recommended relief. The intermediate remedies that work to preempt this conduct sacrifice no enforcement goals and give defense counsel and prosecutors discretion to fashion remedies the INA presently lacks.

⁴⁶⁹ See §§ 240A(a) and 240A(b) and 8 U.S.C. §§ 1229b(a) and 1229b(b).

⁴⁷⁰ Temporary Protected Status (TPS) is the statutory embodiment of safe haven for those aliens who may not meet the legal definition of refugee but are nonetheless fleeing — or reluctant to return to — potentially dangerous situations. TPS is blanket relief that may be granted where there is ongoing armed conflict posing serious threat to personal safety. It may also be requested by a foreign state because it temporarily cannot handle the return of nationals due to environmental disaster. Likewise, TPS grants are made where there are extraordinary and temporary conditions in a foreign state that prevent aliens from returning. Granting TPS must be consistent with U.S. national interests. See § 244 of INA (8 U.S.C. § 1254a). This program is now administered by the USCIS. Aliens who receive TPS are not on an immigration track that leads to permanent residence or citizenship. The “temporary” nature of TPS is apparent in the regulation.

USCIS has made clear that information it collects when an alien registers for TPS may be used to institute exclusion or deportation proceedings upon the denial, withdrawal or expiration of TPS. Moreover, the TPS provision in the INA states that a bill that provides for the adjustment to lawful temporary or legal permanent resident (LPR) status for any alien receiving TPS requires a supermajority vote in the Senate (i.e., three-fifths of all Senators) voting affirmatively. TPS may be withdrawn or renewal denied if an alien receives two or more misdemeanor convictions. Ruth Ellen Wasem and Karma Ester, “Temporary Protected Status: Current Immigration Policy and Issues,” Congressional Research Service, Sept. 18, 2008, p. CRS-3, www.au.af.mil/AU/AWC/awcgate/crs/rs20844.pdf.

⁴⁷¹ See 8 C.F.R. § 244.4. An alien is ineligible for Temporary Protected Status if the alien has been convicted of any felony or two or more misdemeanors, as defined in § 244.1, committed in the United States.

⁴⁷² See 8 C.F.R. § 244.3. The government may waive any other provision of section 212(a) of the Act in the case of individual aliens for humanitarian purposes, to assure family unity, or when the granting of such a waiver is in the public interest.

⁴⁷³ A selection panel composed of retired judges (not serving active commissions and not on recall), immigration practitioners and private citizens would recommend nominees to the President. Qualified candidates would demonstrate expertise across a variety of credentials, including immigration practice experience, judicial experience on other courts, significant private practice, prosecution and defense experience in both state and federal courts, teaching and legal scholarship. The President would not be limited by the panel’s recommendations. The selection panel would be compensated and reimbursed on a *per diem* basis as other non-full time commissions and panels of the United States. Members would serve staggered terms of 6 years. Office and conference space would be provided in the Office of the Chief Judge

of the U.S. Immigration Court of Appeals. Court staff would provide administrative assistance to the panel.

⁴⁷⁴ This authority is exercised by the Chief Judge of the U.S. Tax Court. See “A Court of Law and Consequence” above.

⁴⁷⁵ *Board of Immigration Appeals: Procedural Reforms to Improve Case Management*, 67 Fed. Reg. 54,878 - 54,905 (Aug. 26, 2002).

“[U]nder the current process, the Board has been unable to adjudicate immigration appeals in removal proceedings effectively and efficiently. In 1992, the Board received 12,823 cases and decided 11,720 cases, including appeals from the immigration judges or the Service, and motions to reopen proceedings. At the end of FY1992, the Board had 18,054 pending cases. By 1997, the number of new cases rose to 29,913, dispositions rose to 23,099, and the pending caseload had grown to 47,295 cases. Most recently, in FY2001, the Board received 27,505 cases and decided 31,789 cases. The pending caseload on September 30, 2001, totaled 57,597 cases. To meet this demand, the number of Board members was increased from 5 positions to 12 positions in 1995, with further incremental increases in subsequent years to a total of 23 authorized Board member positions (with 19 members and four vacancies at present). It is now apparent that this substantial enlargement — more than quadrupling the size of the Board in less than seven years — has not succeeded in addressing the problem of effective and efficient administrative adjudication, and the Department declines to continue committing more resources to support the existing process.”

Ibid. pp. 54,878-879.

⁴⁷⁶ Board of Immigration Appeals, “Questions and Answers Regarding Oral Argument Before the Board”, Executive Office for Immigration Review, Nov. 1, 1999, p. 1, www.justice.gov/eoir/vll/qa-pracmanual/qaoral.pdf. EOIR’s website states:

“Oral argument, if desired, must be requested on the Notice of Appeal (Form EOIR-26). Otherwise, it may be deemed waived. In either the Notice of Appeal or a brief, the party should explain the reason for requesting oral argument and articulate how oral argument would supplement any written submissions. ... A case may be selected for oral argument at the discretion of the Board because it presents an issue of first impression, concerns changes in or clarification of existing law, or involves conflicting authorities, or for other reasons. ... Only parties, their representatives, or amicus curiae invited by the Board may present oral argument before the Board. A representative may present oral argument to the Board only if he or she has filed a Notice of Appearance (Form EOIR-27) prior to the time of oral argument. *See generally* 8 C.F.R. part 292.”

See also Immigration Equality, “LGBT/HIV Asylum Manual,” section 28.2, www.immigrationequality.org/manual_template.php?id=1132 (“BIA appeals are almost always done entirely on paper. While it is possible to request oral argument, the BIA almost never grants it.”); Lawyers.com, “U.S. Board of Immigration Appeals”, immigration.lawyers.com/deportation/U.S.-Board-of-Immigration-Appeals.html. (“At the BIA, most of these appeals involve a review of the paperwork — including the original application or petition, briefs, motions and the decision — associated with the case. Unlike an appeal heard in a traditional courtroom, oral arguments are seldom permitted, and the parties to a case are notified of the BIA’s decision via mail.”)

⁴⁷⁷ BIA, “Questions and Answers Regarding Oral Argument Before the Board,” p. 2. EOIR’s website states:

“Oral arguments are generally held in the Oral Argument Room at the Board of Immigration Appeals, 5107 Leesburg Pike, Suite 2400, Falls Church, Virginia. The Board occasionally hears oral argument at other locations in the United States, at its discretion. . . . You may make a request in your brief, setting forth the rationale for conducting oral argument at the proposed location. You should also state whether you would be willing to attend oral argument in Falls Church, Virginia, if your request for off-site argument is not granted.”

⁴⁷⁸ Margaret Tebo, “Asylum Ordeals”, *ABA Journal*, November 2006, www.abajournal.com/magazine/article/asylum_ordeals/. States the article: “The number of immigration cases appealed to the BIA each year more than doubled during the ’90s, resulting in a backlog of [63,763] cases by 2000. In 2003, the ABA commissioned Dorsey & Whitney to report on the continuing backlog in resolution of immigration cases. The report notes that in 1999 the BIA streamlined its review process, allowing single member review of some cases, instead of the traditional three member panel.” See Dorsey & Whitney LLP, *Board of Immigration Appeals: Procedural Reforms to Improve Case Management*, Appendix 12, 2003, www.dorsey.com/Resources/Detail.aspx?pub=144. Attorney General Ashcroft streamlined the appeals process even further and substantially reduced the backlog. In turn, the circuit courts of appeal saw immigration appeals increase more than 600 percent. Jonathan Cohn, DoJ’s Deputy Assistant Attorney General for the Civil Division, told lawmakers in April 2006 that the number of board decisions appealed to federal courts between 2001 and 2005 rose by 603 percent, from 1,757 cases to 12,349 cases. Katherine McIntire Peters, “Justice Overwhelmed”, *Government Executive*, July 15, 2006, www.govexec.com/features/0706-15/0706-15s3.htm.

⁴⁷⁹ *Board of Immigration Appeals: Procedural Reforms to Improve Case Management*, 67 Fed. Reg. 54,878 - 54,905 (Aug. 26, 2002). States the AG Order: “The pending caseload on September 30, 2001, totaled 57,597 cases.”

⁴⁸⁰ *Ibid.*

⁴⁸¹ U.S. Department of Justice, “Fact Sheet, Board of Immigration Appeals: Final Rule”, p.2, www.justice.gov/opa/biafinalrule.pdf; *Board of Immigration Appeals: Procedural Reforms to Improve Case Management*, 67 Fed. Reg. at 54,878.

⁴⁸² Attorney General Ashcroft adopted streamlining to adjudicate cases more efficiently.

“The term “streamlining” refers to the ability to convert certain types of cases to single Board member review, as opposed to the previous requirement that all cases be reviewed by three Board member panels. The success of the streamlining panel that was created at the Board of Immigration Appeals (BIA) in 1999 led to further streamlining efforts such as the implementation of criteria for single Board member and three-Board member panel adjudication. Evaluation reports of these streamlining initiatives, such as those conducted by Andersen [the consultant] in 2001, gave positive feedback and led to a regulatory change and restructuring of the Board to take advantage of the efficiencies of streamlining. EOIR took Andersen’s recommendations, as well as those proposed by the Administration, and implemented these additional streamlining measures, thereby increasing the BIA’s efficiency. In addition, the streamlining of the asylum program by EOIR and the former INS was so successful that Congress wrote such changes into law.”

Office of Management and Budget, “Detailed Information on the Immigration Adjudication Assessment”, Section 1.4, Expectmore.

gov, www.whitehouse.gov/omb/expectmore/detail/10003809.2006.html.

⁴⁸³ An American Bar Association study took issue with these reforms, asserting that by (1) nearly eliminating three-judge appeal panels; (2) encouraging routine “affirmances without opinion” of Immigration Judge orders; (3) forbidding de novo review on appeal of factual findings; and (4) eliminating half of the BIA member positions, that progress was illusory. See ABA Commission on Immigration Policy, Practice & Pro Bono, “Seeking Meaningful Review: Findings and Recommendations in Response to Dorsey & Whitney Study of Board of Immigration Appeals Procedural Reforms,” October 2003, www.americanbar.org/content/dam/aba/migrated/publicserv/immigration/bia.authcheckdam.pdf.

⁴⁸⁴ According to the U.S. Supreme Court, under Article I, the Framers of the Constitution intended to give Congress authority to create special forums to hear matters concerning congressional powers. This authority allowed the government to create special courts that can quickly resolve cases that concern the government. “Legislative Court — Further Readings,” law.jrank.org/pages/8203/Legislative-Court.html.

⁴⁸⁵ “Immigration Removal Procedures Implemented In The Aftermath of September 11, 2001 Attacks”, testimony of Lily Swenson, Deputy Associate Attorney General, hearing before the Subcommittee on Immigration, Border Security, and Claims of the House Committee on the Judiciary, 109th Cong., p. 24, June 30, 2005, commdocs.house.gov/committees/judiciary/hju22188.000/hju22188_of.htm. Stated Ms. Swenson:

“The Creppy Memorandum [an instruction by then-Chief Judge Michael Creppy to close sensitive hearings to the public] was applied for approximately 15 months and discontinued in December of 2002. Looking back at the Department’s decision to limit public access to these cases following 9/11, we should be reminded of three

things. First, the hearings closed under the Creppy memorandum were not secret. Although the executive branch could not disclose information in those cases to the public, nothing prevented the aliens or their counsel from doing so to friends, to family or, for that matter, to the press. As it turned out, they overwhelmingly didn’t. We can only presume that they chose not to for their own privacy or safety interests.

“Second, closure affected only public access to special interest cases. It did not affect an alien’s due process protections. Aliens were given a full and fair opportunity to litigate their claims and to be represented by counsel. In fact, about 75 percent of the 600-odd aliens in special interest cases had their own lawyers.

“Third, as I said earlier, the Department has not closed any immigration proceeding pursuant to the Creppy memorandum for over 2.5 years. Looking to the future, although the Department has not done so since the Creppy memorandum, it is imperative that it retain the ability to close a category of special interest cases to the public if circumstances warrant.”

⁴⁸⁶ Generally removal hearings are open to the public and exclusion hearings are not. Specifically, 8 C.F.R. § 3.27 provides all hearings, other than exclusion hearings, shall be open to the public. Depending upon physical facilities, the Immigration Judge may place reasonable limitations upon the number in attendance at any one time with priority being given to the press over the general public. See 8 C.F.R. § 3.279(a). For the purpose of protecting witnesses, parties, or the public interest, the Immigration Judge may limit attendance or hold a closed hearing. See 8 C.F.R. § 3.279(b). Additionally, 8 C.F.R. § 240.10(b) provides that “[r]emoval hearings shall be open to the public, except that the immigration judge may, in his or her discretion, close proceedings as provided in §3.27 of this chapter.” Soon after September 11, 2001, as part of

its investigation into the terrorist attacks, the U.S. government began to conduct removal proceedings against certain non-citizens, altogether about 600. Immigration judges were directed to close to the public proceedings against individuals with suspected ties to or information about terrorist activities. See *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 202 (3d Cir. 2002) and *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 682 (6th Cir. 2002). Each circuit made opposite findings regarding the openness of hearings. The Supreme Court later declined to resolve this conflict between the circuits.

⁴⁸⁷ Office of Inspector General, Department of Homeland Security, “Detention and Removal of Illegal Aliens,” Audit Report OIG-06-33, p. 2, April 2006, www.dhs.gov/xoig/assets/mgmt/rpts/OIG_06-33_Apr06.pdf. States the article: “DHS reports its ability ‘to detain and remove illegal aliens with final orders of removal’ is influenced by ‘the propensity of illegal aliens to disobey orders to appear in immigration court, the penchant of released illegal aliens with final orders to abscond and the practice of some countries to block or inhibit the repatriation of its citizens.’”

⁴⁸⁸ “Immigration Control: Deporting and Excluding Aliens from the United States”, p. 22, U.S. General Accounting Office, GAO/GGD-90-18, October 1989, archive.gao.gov/f0302/140072.pdf. States the article: “Although the purpose of surety bonds is to ensure that the aliens appear at meetings and hearings, our analysis of cases in New York and Los Angeles indicates that the bond, in itself, had little to do with ensuring that aliens appeared as required ... [I]n New York, an estimated 62 percent of the aliens who failed to appear had been released on bond, while in Los Angeles, an estimated 72 percent had been released, on bond. The fact that there was a bond evidently did not deter these aliens from failing to appear for their deportation hearings.”

⁴⁸⁹ Margaret Mikyung Lee, “Immigration Litigation Reform”, Congressional Research Service, May 8, 2006, p.4, www.ilw.com/immigrationdaily/

news/2006,0516-crs.pdf.

⁴⁹⁰ U.S. Courts, Judicial Facts and Figures 2009, Table 3.1 “U.S. Court of Appeals for the Federal Circuit. Appeals Filed, Terminated and Pending”, www.uscourts.gov/Statistics/JudicialFactsAndFigures/JudicialFactsAndFigures2009.aspx.

⁴⁹¹ “Understanding The Federal Courts”, Lectric Law Library, www.lectlaw.com/files/jud21.htm; Arnold H. Lubaisch, “Visiting Judges To Ease Backlog In Federal Court,” *New York Times*, Sept. 25, 1987, www.nytimes.com/1987/09/25/nyregion/visiting-judges-to-ease-backlog-in-federal-court.html.

⁴⁹² Press Release, “Caseload of Federal Courts Remains Steady Overall”, United States Courts, March 11, 2008, www.uscourts.gov/News/News-View/08-03-11/Caseload_of_Federal_Courts_Remains_Steady_Overall.aspx. In 2007, 18 percent of all circuit court appeals came from the BIA out of 58,410 cases that filled federal appellate calendars.

Annual Funding: Disorder by the Dollar

⁴⁹³ “Immigration Control: Deporting and Excluding Aliens from the United States”, U.S. General Accounting Office, GAO/GGD-90-18, October 1989, p. 18, archive.gao.gov/f0302/140072.pdf.

⁴⁹⁴ In FY 1990, courts received \$36.2 million. In 2006, immigration courts received \$219,721,000 from taxpayers. In 2007 and 2008, Congress authorized \$224,614,000 and \$245,192,000, respectively. For fiscal year 2009, \$261 million in tax dollars underwrote the courts. In 2010, courts received \$298 million. This expanse in funding constitutes a growth rate of 823 percent. Department of Justice, “Budget Trend Data”, p. 33, Spring 2002, www.justice.gov/archive/jmd/1975_2002/2002/pdf/BudgetTrand.pdf; U.S. Department of Justice, *FY 2010 Budget and Performance Summary*, www.justice.gov/jmd/2010summary/; U.S. Department of Justice *FY 2009 Budget and Performance Summary*, [133](http://www.jus-</p>
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tice.gov/jmd/2009summary/; U.S. Department of Justice *FY 2008 Budget and Performance Summary*, www.justice.gov/jmd/2008summary/; *U.S. Department of Justice FY 2007 Budget and Performance Summary*, www.justice.gov/jmd/2007summary/; U.S. Department of Justice *FY 2006 Budget and Performance Summary*, www.justice.gov/jmd/2006summary/. Federal spending increased 276 percent between 1990 and 2010. In 1990 the spending of the U.S. government was \$1.253 trillion. The 2010 outlays totaled \$3.456 trillion. Office of Management and Budget, Historical Table 15.2, “Total Government Expenditures 1948 — 2010”, www.whitehouse.gov/omb/budget/Historicals.

⁴⁹⁵ U.S. Department of Justice, *FY 2009 Congressional Budget Submission*, www.justice.gov/jmd/2009justification. Since 2006, the courts received an additional \$4 million each year from DHS. These payments did not come from tax proceeds. They came instead from the “Immigration Examination Fees” account, an account managed by USCIS. These monies have been used to defray the costs of trial transcripts which are needed for courts to review records on appeal. Fees paid to file cases with the trial courts were deposited by DHS into the Immigration Examination Fees account. Fees are charged by the courts to file all applications except for asylum cases, in which fees are not charged. 8 C.F.R. § 1003.7(a).

⁴⁹⁶ “Immigration Control: Deporting and Excluding Aliens from the United States”, U.S. General Accounting Office, p. 22.

⁴⁹⁷ Of the 1,913,507 aliens the U.S. permitted to remain free pending trial from 1996 through 2009, 40 percent of this number — 769,737 — never came to court. Composites for 5 year periods may be found in each year book. See *EOIR 2000 Year Book*, p. L1-L2, Figures 15-17 and p. T1, Figure 23; *EOIR 2004 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 23; *EOIR 2008 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 23; *EOIR 2009 Year Book*, p. H1-H4, Figures 10-12 and p. O1, Figure 23.

⁴⁹⁸ “Immigration Control: Deporting and Excluding Aliens from the United States”, U.S. General Accounting Office, p. 31.

⁴⁹⁹ Anna Gorman, “Immigration Official Says Agents Will No Longer Have to Meet Quotas”, *Los Angeles Times*, August 18, 2009, articles.latimes.com/2009/aug/18/local/me-immigration18. Said the story: “The head of Immigration and Customs Enforcement announced Monday in Los Angeles that he has ended quotas on a controversial program designed to go after illegal immigrants with outstanding deportation orders. This announcement came when teams of Immigration and Customs Enforcement (ICE) agents were expected to increase the number of annual arrests in the controversial ‘fugitive operations’ program, according to agency memos.”

⁵⁰⁰ “Immigration Control: Deporting and Excluding Aliens from the United States,” U.S. General Accounting Office, p. 16. The GAO estimated the illegal population between 1.2 and 5.1 million people, depending on how many of the estimated 2.9 million eligible aliens applied for relief under the Immigration Reform and Control Act. Assuming those 2.9 million aliens applied for relief, the remaining alien population was estimated at 1.2 to 2.2 million.

⁵⁰¹ Steven A. Camarota, “Immigrants in the United States, 2007: A Profile of America’s Foreign-Born Population”, Center for Immigration Studies, Nov. 2007, www.cis.org/articles/2007/back1007.html. States the article:

“The nation’s immigrant population (legal and illegal) reached a record of 37.9 million in 2007. Immigrants account for one in eight U.S. residents, the highest level in 80 years. In 1970 it was one in 21; in 1980 it was one in 16; and in 1990 it was one in 13. Overall, nearly one in three immigrants is an illegal alien. Half of Mexican and Central American immigrants and one-third of South American immigrants are illegal. Since 2000, 10.3 million im-

migrants have arrived — the highest seven-year period of immigration in U.S. history. More than half of post-2000 arrivals (5.6 million) are estimated to be illegal aliens.”

See also ““Immigration in the National Interest Act of 1995,” Report of the House Judiciary Committee, House Rep. 104-469 Part 1, March 4, 1996, p. 111. (The Committee found that 4 million illegal aliens resided in the U.S. prior to passage of IRRIRA); “Modes of Entry for the Unauthorized Migrant Population,” Pew Hispanic Center, May 22, 2006, pewhispanic.org/files/factsheets/19.pdf. States the report: “According to estimates from the Pew Hispanic Center, approximately 12 million illegal immigrants reside in the U.S.”

⁵⁰² “Immigration Control: Deporting and Excluding Aliens from the United States”, U.S. General Accounting Office, p. 14.

⁵⁰³ Office of Immigration Statistics, Department of Homeland Security, “Immigration Enforcement Actions: 2006,” *Annual Report*, May 2008, p.1—3 and Table 1, www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_06.pdf. “In summary, DHS apprehended more than 1,206,000 foreign nationals in 2006. Nearly 88 percent were natives of Mexico.” In 2007 and 2008, 960,756 and 791,568, respectively, were arrested.

⁵⁰⁴ “Immigration Control: Deporting and Excluding Aliens from the United States,” U.S. General Accounting Office, p. 16.

⁵⁰⁵ Department of Homeland Security, “Budget-In-Brief Fiscal Year 2010”, U.S. Immigration and Customs Enforcement, p. 68, www.dhs.gov/xlibrary/assets/budget_bib_fy2010.pdf. Regarding its 2008 efforts ICE reported Fugitive Operation Teams “affected over 34,155 total arrests, including over 28,000 ICE fugitives and criminal aliens. Criminal fugitive arrests increased by 111 percent (from 2,677 to 5,652). ICE processed and eliminated more than 95,000 fugitive alien cases and reduced the backlog from 594,756 cases at the end

of FY 2007 to 557,762 cases at the end of FY 2008. This reduction of approximately 6 percent, is the second consecutive year in which the backlog has decreased.”

⁵⁰⁶ “Immigration Control: Deporting and Excluding Aliens from the United States,” U.S. General Accounting Office, p. 23.

⁵⁰⁷ U.S. Department of Justice, *FY 2002 Performance and Accountability Report*, Strategic Goal 5.2A, www.justice.gov/archive/ag/annualreports/ar2002/sg5finalacctpartone.html. “As of September 30, 2002, there was a 406,000 case backlog of removable unexecuted final orders and a 196,000 case backlog of not readily removable unexecuted final orders of removal, for a total of 602,000 unexecuted orders.” See also U.S. Immigration and Customs Enforcement, *ICE Fiscal Year 2008 Annual Report*, p. 4, www.ice.gov/doclib/news/library/reports/annual-report/2008annual-report.pdf. This report states that in 2008 “ICE arrested 34,155 fugitives, which is an increase of more than 12 percent over the previous year. This has led to a six percent reduction in the number of open fugitive alien cases from the beginning of the fiscal year with nearly 37,000 fugitive alien cases resolved. At the end of FY08, there were 557,762 such cases remaining.”

⁵⁰⁸ See Note 30.

⁵⁰⁹ “Immigration Control: Deporting and Excluding Aliens from the United States”, U.S. General Accounting Office, pp. 40-41, Figure 3.1 and Table 3.1. Sixty-two percent of cases measured by GAO took not less than three years and up to five years or more to complete.

⁵¹⁰ Surin & Griffin, P.C., “Deportation and Asylum Assistance in Immigration”, www.msgimmigration.com/deportation-asylum/. This law firm provides a realistic assessment: “It is difficult to predict how long a contested removal case can take to resolve. However, removal cases for non-detained clients often take more than a year to conclude. If there is an appeal to the Board of Im-

migration Appeals, cases frequently take another year or two.” See also Ken Reitz, “Panel Discusses Challenges in Immigration Court System”, University of Virginia, March 28, 2008, www.law.virginia.edu/html/news/2008_spr/immigration_judges.htm. Judge Osuna of the Board of Immigration Appeals was quoted as saying that while it used to take four or five years for a case to be decided, it’s now usually eight to 18 months. If a case is appealed to a circuit court, concluding it will take another year. Altogether, five years from the time a case starts to the time it is finished is not unusual.

⁵¹¹ TRAC Immigration, “Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow”, Figure 1, June 17, 2009, trac.syr.edu/immigration/reports/208/. TRAC noted that “EOIR did not dispute TRAC’s figures, nor challenge the fact that pending case backlogs were growing and wait times were increasing. Specifically, EOIR did not dispute an 11 year backlog.” See also TRAC Immigration, “Immigration Case Backlog Still Growing”, May 2010, trac.syr.edu/immigration/reports/232. The report finds that the average time that pending cases wait in the trial courts is now 443 days. Wait times continue to be longest in California, at 627 days, up from 619 days four months previously. These wait times translate to 15 to 20 months just for a trial to be held.

⁵¹² “Report on the Activities of the Committee on the Judiciary of the House of Representatives During the One Hundred Fourth Congress,” H. Rep. 104-879, January 2, 1997, p. 104, www.gpo.gov/fdsys/pkg/CRPT-104hrpt879/pdf/CRPT-104hrpt879.pdf. Stated the Committee in the “Background” section: “[M]ore than 4 million illegal aliens resided in the United States at the start of the 104th Congress, with an average net increase each year of 300,000; approximately half of these illegal residents had arrived with legal temporary visas and had overstayed.”

⁵¹³ According to estimates from the Pew Hispanic Center, nearly half of all the unauthorized migrants now living in the United States — approximately 12 million — entered the country legally

through a port of entry. At these ports of entry, such as an airport or a border crossing point, they were subject to inspection by immigration officials. “Modes of Entry for the Unauthorized Migrant Population,” Pew Hispanic Center, May 22, 2006, pewhispanic.org/files/factsheets/19.pdf.

⁵¹⁴ “Immigration Control: Deporting and Excluding Aliens from the United States”, U.S. General Accounting Office p. 17.

⁵¹⁵ Jennifer E. Lake and Blas Nunoz-Neto, “Homeland Security Department: FY2009 Appropriations”, Congressional Research Service, March 4, 2009, p. 27-34, www.fas.org/sgp/crs/homesecc/RL34482.pdf; see also, Department of Homeland Security, “Budget-in-Brief Fiscal Year 2009,” www.dhs.gov/xlibrary/assets/budget_bib-fy2009.pdf.

⁵¹⁶ Immigration and Customs Enforcement, “Fact Sheet Fiscal Year 2009”, October 23, 2008, [www.ice.gov/news/library/factsheets/#Chief Financial Officer - Management and Budget](http://www.ice.gov/news/library/factsheets/#Chief%20Financial%20Officer%20-%20Management%20and%20Budget). Altogether, \$5.9 billion was budgeted for ICE. Of this sum, \$4.3 billion includes funding for the Office for the Principal Legal Adviser (\$215 million), Detention and Removal Operations (\$2.5 billion), Investigations (\$1.5 billion), International Affairs (\$133 million).

⁵¹⁷ “Immigration Control: Deporting and Excluding Aliens from the United States,” U.S. General Accounting Office, p. 16.

⁵¹⁸ TRAC Immigration, Graphical Highlights: Immigration, “Number of Immigration Judges, 1998-2008”, 2008, trac.syr.edu/immigration/reports/189/include/payroll.html.

⁵¹⁹ See Department of Justice, “Budget Trend Data”, Spring 2002, http://www.justice.gov/archive/jmd/1975_2002/2002/pdf/BudgetTrand.pdf and Department of Justice, *FY 2010 Budget and Performance Summary*, Part Two, Executive Office of Immigration Review, www.justice.gov/jmd/2010summary/pdf/eoir-bud-summary.pdf.

⁵²⁰ U.S. Department of Justice, *2009 Budget and Performance Summary*, www.justice.gov/jmd/2009summary, and “2002 Operations Of The Executive Office For Immigration Review”, testimony of Honorable Michael Heilman, hearing before the Subcommittee on Immigration and Claims of the House Committee on the Judiciary, 107th Congress, Feb. 6, 2002, p. 39, commdocs.house.gov/committees/judiciary/hju77558.000/hju77558_of.htm.

⁵²¹ U.S. Department of Justice, EOIR, “About the Office: Board of Immigration Appeals”, www.justice.gov/eoir/biainfo.htm. The Board of Immigration Appeals is authorized up to 15 Board Members, including the Chairman and Vice Chairman who share responsibility for Board management.

⁵²² Thucydides, *History of the Peloponnesian War*, “Pericles’ Funeral Oration”, www.wsu.edu/~wldciv/world_civ_reader/world_civ_reader_1/pericles.htm. In pertinent part, Pericles could have been referring to the United States: “[Even in time of war], our city is thrown open to the world, though, and we never expel a foreigner and prevent him from seeing or learning anything of which ... might profit him.”

⁵²³ Cancellations of removal come in two types. One seeks “judicial pardon” for crimes committed by lawful permanent residents. The other seeks “judicial pardon” for an alien who entered the U.S. illegally and who, among other factors, has resided in the U.S. at least 10 years and has, for example, at least one qualifying dependent who will suffer extreme hardship if the alien is not permitted to remain in the U.S. In each instance, the applicant is allegedly removable because he is without legal status in the U.S. Absence of legal status in the case of an asylum applicant usually refers to illegal entry (called entry without inspection or EWI) into the U.S. or overstaying a visa. In the case of a lawful permanent resident, he may have committed crimes which justify taking away his “green card” status and deporting him. Thus, the lawful permanent resident seeks cancellation of removal. Numerous cases first heard as asylum cases later

become marriage adjustment cases. Many failed asylum applicants marry after their asylum applications are denied. They will then seek a marriage adjustment which, if granted, leads to lawful permanent residence.

⁵²⁴ Between 2000 and 2007, EOIR spent just less than \$30 million to produce appellate transcripts for alien litigants. During this period, EOIR contracted transcription services chiefly through three court reporting services, Free State Reporting, York Stenographic Services and Deposition Services. www.fbodaily.com/archive/2006/10-October/01-Oct-2006/FBO-01158532.htm (Contract Award No. DJJ-07-C-1478/1479/1480 dated September 29, 2006). Between 2000 and 2008, EOIR spent \$33,844,717 to produce appellate transcripts for private litigants. The largest part of this amount — altogether \$29,176,481 — were tax dollars. From 2000 through 2008, EOIR paid Free State Reporting \$14,304,667, York Stenographic Services \$2,101,308 and Deposition Services \$12,770,506. For a year by year breakdown visit www.usaspending.gov (Search under contracts, using names of the contractors. EOIR contracted through Department of Justice, Justice Management Division, Procurement Services Staff (PSS). The “identifier” or identifying number is 1501, the numeric code for “Offices, Boards and Divisions (includes Attorney General, etc.)” The contracts are 1478, 1479 and 1480 as of the last contract awarded on September 29, 2006). On average EOIR spent \$3,760,538 per year from taxes to pay for private litigation. When court personnel time is factored into total agency cost (a factor of 16 percent as provided in a 2000 court study), another \$4,668,369 was spent in processing appeals. A \$4 million transfer from DHS to DoJ placed in EOIR’s account since 2008 addresses tax dollars used to pay for alien appellate transcripts. The 2008 Budget Summary states “Fees collected for the processing of immigration appeal documents are deposited into the Immigration Examinations Fee Account, which is collected by the Department of Homeland Security. In FY 2008 [and 2009 and 2010], EOIR received \$4,000,000 [\$12 million altogether] as a transfer from the Immigra-

tion Examinations Fee Account.” Department of Justice, *FY2008 Budget and Performance Summary*, Part Three, Administrative Review and Appeals, www.justice.gov/jmd/2008summary/pdf/061_ara.pdf; see also Department of Justice, *FY2010 Budget and Performance Summary*, Part Two, Executive Office of Immigration Review, www.justice.gov/jmd/2010summary/pdf/eoir-bud-summary.pdf; and Department of Justice, *FY2009 Budget and Performance Summary*, Part Three, Administrative Review and Appeals, www.justice.gov/jmd/2009summary/pdf/ara-component-summary.pdf.

⁵²⁵ See Note 519 and “2002 Operations Of The Executive Office For Immigration Review”, testimony of Honorable Michael Heilman , hearing before the Subcommittee On Immigration and Claims of the House Committee on the Judiciary, 107th Congress, Feb. 6, 2002, p. 37. Judge Heilman states that government appeals compose less than 1 percent of all matters appealed to the BIA, commdocs.house.gov/committees/judiciary/hju77558.000/hju77558_of.htm.

⁵²⁶ *Reorganization of Regulations on Control of Employment of Aliens*, 74 Fed. Reg. 2337, (January 15, 2009), www.gpo.gov/fdsys/pkg/FR-2009-01-15/pdf/E9-526.pdf.

“EOIR was created by the Attorney General in 1983 to combine the functions performed by INS special inquiry officers (now immigration judges) and the Board of Immigration Appeals (Board) into a single administrative agency within the Department of Justice, separate from the former INS. 48 FR 8038 (Feb. 25, 1983). This administrative structure separated the administrative adjudication functions from the enforcement and service functions of the former INS, both for administrative efficiency and to foster independent judgment in adjudication. The Office of the Chief Administrative Hearing Officer (OCAHO) and its administrative law judges (ALJs) were added to EOIR in 1987, following enactment of sec-

tion 274A of the Immigration and Nationality Act (INA).”

⁵²⁷ See, for example, U.S. Department of Justice, *FY 2009 Congressional Budget Submission*, www.justice.gov/jmd/2009justification. Since the former INS left the Department of Justice to become several agencies within DHS on March 1, 2003, the inter-agency transfer of filing fees collected by USCIS has continued. Neither EOIR nor USCIS disclose in a line item the value of fees collected by USCIS. However, recent transfers (\$4 million in 2008 and \$4 million in 2009) received by EOIR from USCIS (from its “Immigration Examination Fees” account) are revealed in its annual *Congressional Budget Submission*.

⁵²⁸ See Note 519.

⁵²⁹ Sandra L. Roberts, “Should the United States Immigration Court Collect Fees?”, Institute for Court Management, Court Executive Development Program, p.12, May 2000, www.ncsconline.org/D_ICM/programs/cedp/papers/Research_Papers_2000/Immigration%20Court%20Fees.pdf.

⁵³⁰ See, for example, *Adjustment of the Immigration Benefit Application Fee Schedule*, 70 Fed. Reg. 56182 (Sept. 26, 2005), www.gpo.gov/fdsys/pkg/FR-2005-09-26/pdf/05-19226.pdf.

⁵³¹ *USCIS Annual Report for Fiscal Year 2008*, “Financial Overview,” p. 26-29, www.uscis.gov/USCIS/Resources/Reports/uscis-annual-report-2008.pdf.

⁵³² *Adjustment of the Immigration Benefit Application Fee Schedule*, 70 Fed. Reg. 56182 (Sept. 26, 2005).

⁵³³ In 1990, EOIR claimed 527 full-time employees. In 2008, EOIR employed 1424. See Department of Justice, “Budget Trend Data,” Spring 2002, www.justice.gov/archive/jmd/1975_2002/2002/pdf/BudgetTrand.pdf. See also U.S. Department of Justice, *FY 2009 Budget and Performance Summary*, www.justice.gov/

jmd/2009summary and “2002 Operations Of The Executive Office For Immigration Review”, testimony of Honorable Michael Heilman , hearing before the Subcommittee on Immigration and Claims of the House Committee on the Judiciary, 107th Congress, Feb. 6, 2002, p. 39, commdocs.house.gov/committees/judiciary/hju77558.000/hju77558_of.htm. Stated Judge Heilman:

“Growth has also characterized the BIA as an institution, to the point that it bears no real resemblance to the body that was known as the BIA for about the first 50 years of its existence. In 1986, when I was appointed to the BIA, there were 5 Members and about 25 staff attorneys. Now there are about 20 Members and over 100 staff attorneys, and an enormously larger administrative staff in addition.”

⁵³⁴ In fiscal year 1990, federal spending equaled \$1.253 trillion. In 2010 total outlays were \$3.456 trillion. Office of Management and Budget, Historical Table 15.2, . Thus, federal spending increased 276 percent over this period.

⁵³⁵ See “Inflation Rate Calculator”, InflationData.com, inflationdata.com/Inflation/Inflation_Calculators/Inflation_Rate_Calculator.asp. The inflation rate calculated from January 1990 to January 2010 is 70.08 percent.

⁵³⁶ 28 U.S.C. § 1914.

⁵³⁷ Court of Appeals Miscellaneous Fee Schedule, www.uscourts.gov/FormsAndFees/Fees/CourtOfAppealsMiscellaneousFeeSchedule.aspx .

⁵³⁸ 8 C.F.R. § 1103.7.

⁵³⁹ Department of Justice, *FY 2008 Budget and Performance Summary*, “2008 Request Compared with 2006 Actual Obligation and 2007 Estimate”, www.justice.gov/jmd/2008summary/html/024_2008_comparison.htm; Department of Justice, *FY 2009 Congressional Budget Submission*,

www.justice.gov/jmd/2009justification.

⁵⁴⁰ Department of Justice, *FY 2009 Congressional Budget Submission*, “Overview for Administrative Review and Appeals”, p. 1, www.justice.gov/jmd/2009justification. States the submission:

“The fight against terrorism is the first and overriding priority of the Department of Justice and the Administration. A key component of this effort is the securing of our Nation’s borders and the repair of the immigration system as a whole. More than ever, protecting America requires a multifaceted strategy which must include the effective coordination of investigative, enforcement, legal and adjudicative resources, both within the Department and in concert with other agencies. The application and enforcement of our immigration laws remains a critical element of this national effort.”

⁵⁴¹ Stephen P. Perkins, “A Feasibility Study for Establishment of a Court Cost Recovery System within the United States Immigration Courts and Board of Immigration Review”, Institute for Court Management, Court Executive Development Program, May 2000, p.4, www.ncsconline.org/D_ICM/programs/cedp/papers/Research_Papers_2000/Court%20Cost%20Recovery%20System.pdf.

⁵⁴² *Ibid.*

⁵⁴³ *Ibid.* p.15. The total cost of transcripts, including contracted services (typing) and court personnel’s labor, was \$2,733,042.00. Some 8,320 hours directly related to appellate transcripts were expended by staff, a factor of 16 percent of the total cost.

⁵⁴⁴ See 8 C.F.R. § 1103.7. Specifically, the regulation provides: “(a) Remittances (1) In general. Fees shall be submitted in connection with any formal appeal, motion, or application prescribed in this chapter in the amount prescribed by law or regula-

tion. Payment of any fee under this section does not constitute filing of the appeal, motion, or application with the Board of Immigration Appeals or with the immigration court.”

⁵⁴⁵ Perkins, “A Feasibility Study for Establishment of a Court Cost Recovery System”, p.26; 31 U.S.C. § 9701.

⁵⁴⁶ 31 U.S.C. § 9701(a) (b).

⁵⁴⁷ 8 C.F.R. § 1103.7.

⁵⁴⁸ Sandra L. Roberts, “Should the United States Immigration Court Collect Fees?”, Institute for Court Management, Court Executive Development Program, p.12, May 2000, www.ncsconline.org/D_ICM/programs/cedp/papers/Research_Papers_2000/Immigration%20Court%20Fees.pdf.

⁵⁴⁹ *Ibid.* p. 11. States the article: “Allowing the courts an additional avenue of funding will provide an opportunity to provide better services and to reduce the wait time to have a hearing.”

⁵⁵⁰ *Ibid.* p. 32-33.

⁵⁵¹ “2002 Operations Of The Executive Office For Immigration Review”, testimony of Honorable Michael Heilman, hearing before the Subcommittee on Immigration and Claims of the House Committee on the Judiciary, 107th Congress, Feb. 6, 2002, p. 37, commdocs.house.gov/committees/judiciary/hju77558.000/hju77558_of.htm.

⁵⁵² *Ibid.*

⁵⁵³ See Stephen Moore, “The Economics of the Melting Pot”, *Chief Executive*, April 13, 2007, chiefexecutive.net/the-economics-of-the-melting-pot. The affluence of foreign born households is also remarkable. Median income in 2006 was \$50,946 for native born households. For foreign-born households whose householder was not a U.S. citizen median income was \$37,637. For households maintained by a naturalized U.S. citizen, median income was \$52,092. Press Re-

lease, “Household Income Rises, Poverty Rate Unchanged, Number Of Uninsured Down”, U.S. Census Bureau, Aug 26 2008, www.census.gov/newsroom/releases/archives/income_wealth/cb08-129.html. Fully 56.9 percent of all foreign-born households showed income ranging between \$37,883 and \$93,577 or more. This range accounted for more than 8.4 million households out of a total of 14,860,346 foreign born households.

⁵⁵⁴ TRAC Immigration, “Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow”, June 17, 2009, trac.syr.edu/immigration/reports/208. Stated the article:

“The background of the immigrants appearing before the court have [*sic*] also been undergoing change. A large proportion of the aliens in the hearings were not newcomers to the United States but rather had come to this country years before ending up in court. Last year the typical alien appearing in the Immigration Courts had entered this country more than six years prior to his or her hearing. Presumably in part because of changing charging patterns by DHS, this length of time has been on the rise: 3.3 years in FY 2006, 5.0 years in FY 2007, 6.4 years in FY 2008 and 7.2 years so far in FY 2009.”

⁵⁵⁵ Steven Camarota, “The Open Door: How Islamic Terrorists Entered and Remained in the United States, 1993-2001”, p. 59 (2002), available at www.cis.org/articles/2002/theopendoor.pdf. Camarota’s article focuses on terrorism. Crime is a minor focus, but no less a concern. He writes: “[T]errorists have used almost every type of immigration in the last decade” to enter and remain in the United States. He further finds:

“They [terrorists] have been lawful permanent residents, naturalized U.S. citizens, temporary visitors, illegal aliens, and asylum applicants. Thus, it is not possible to focus reform efforts on just one type of immigration, such as student visas or tem-

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porary immigration in general. America's entire immigration system has been used by terrorists and thus our response must be equally broad."

⁵⁵⁶ Press Release, "USCIS Announces Fee Adjustment", United States Department of Homeland Security, U.S. Citizenship and Immigration Services, Sept. 26, 2005, www.uscis.gov/files/

[pressrelease/FeeAdjustmnts_050926.pdf](http://www.uscis.gov/files/pressrelease/FeeAdjustmnts_050926.pdf). USCIS specifically cite security enhancements adopted after September 11, 2001 as a reason for increases in filing fees.

⁵⁵⁷ "Justice, justice, shalt thou pursue, that thou mayest live and possess the land which the LORD thy God givest unto thee." See Biblos, Deuteronomy 16:20. bible.cc/

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