



The Massive Increase in the Immigration Court Backlog, Its Causes, and Solutions

By Andrew R. Arthur

Summary

On Thursday, June 1, 2017, the Government Accountability Office (GAO) issued its long-awaited report on the management of the immigration court system by the Executive Office for Immigration Review (EOIR).¹

In particular, GAO found:

- The immigration courts' "case backlog — cases pending from previous years that remain open at the start of a new fiscal year — more than doubled from fiscal years [(FY)] 2006 through 2015 ... primarily due to declining cases completed per year."²
- The courts' backlog increased from approximately 212,000 cases pending at the start of FY 2006, when the median pending time for those cases was 198 days, to 437,000 pending cases at the start of FY 2015, when the median pending time was 404 days.³
- "[C]ontinuances increased by 23 percent from [FY] 2006 to [FY] 2015,"⁴ and "immigration judge-related continuances increased by 54 percent from about 47,000 continuances issued in [FY] 2006 to approximately 72,000 continuances issued in [FY] 2015."⁵ Department of Homeland Security (DHS) attorneys and others complained that the "frequent use of continuances [by immigration judges] resulted in delays and increased case lengths that contributed to the backlog."⁶
- The number of cases the immigration courts "completed annually declined by 31 percent between [FY] 2006 and [FY] 2015 — from 287,000 cases completed in [FY] 2006 to about 199,000 completed in [FY] 2015."⁷
- Total case completions declined, even though the number of immigration judges (IJs) increased 17 percent.⁸

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

- **Resources.** There are too few judges and support staff to do the job adequately.
- **Increases in Benefits and Leave.** IJs are government employees, and as they get more seniority, they receive more leave. This limits the amount of time that is spent hearing cases.
- **The "Surge".** The number of families and unaccompanied alien children (UACs) entering the United States began to increase in FY 2014.⁹ EOIR responded by "prioritizing" certain "cases involving migrants who had recently crossed the Southwest border and whom DHS had placed into removal proceedings."¹⁰ This both swelled dockets and led to IJs being reassigned from already scheduled hearings. Those surge cases were also more complicated than cases involving single adult males, requiring more courtroom time (and continuances) per case.¹¹

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- **Case Law.** Recent federal court decisions have complicated IJs removal decisions, slowing proceedings and requiring additional continuances.¹² In addition, recent decisions from the Ninth Circuit Court of Appeals have increased the number of aliens who are eligible for bond, requiring the scheduling of bond hearings and rescheduling of cases when aliens are released from custody.¹³
- **Obama Administration Policies.** Policies instituted in the last administration led to numerous continuances, as aliens sought counsel and applied for relief or discretionary closures, release, or termination based on those policies.
- **IJ Burnout.** A crushing docket adds to the stress of being a judge, and as that stress rises, performance logically suffers. This, in turn, results in more reversals and remands, adding even more cases to the backlog.

Trump administration policies will, if properly implemented and supported by congressional appropriations, ease and begin to reduce the backlogs:

- The attorney general has stated that he will hire significantly more IJs in the next two years, and streamline the hiring of IJs.¹⁴
- Changes in border enforcement policies will limit the number of new cases that are added to the immigration courts' dockets.
- Changes to interior enforcement policies will reduce the incentives for aliens to remain in the United States and fight meritless cases.
- Rescission of Obama-era policies will also reduce the incentives for aliens to remain in removal proceedings.

There is more that the administration can do, however:

- The attorney general must use his certification authority to set stricter standards for IJs to follow in granting continuances.
- The Department of Justice must vigorously litigate cases in the federal circuit courts to provide the IJs with more "bright-line" rules to follow in deciding cases, and to limit variations in the law among circuits.

Findings of the GAO Report

For those not familiar with its work, GAO "is an independent, nonpartisan agency that works for Congress. Often called the 'congressional watchdog,' GAO investigates how the federal government spends taxpayer dollars."¹⁵ The impetus for the GAO report was a request from Congress that GAO "review EOIR's management and oversight of the immigration court system, as well as options for improving EOIR's performance, including through restructuring."¹⁶

EOIR, an office within the Department of Justice (DOJ), is headed by a director "who is responsible for the supervision of the Deputy Director, the Chairman of the Board of Immigration Appeals [BIA], the Chief Immigration Judge, the Chief Administrative Hearing Officer, and all agency personnel in the execution of their duties in accordance with 8 CFR Part 3."¹⁷ The more than 300 immigration judges in the nation's 58 immigration courts fall under the control of the Office of the Chief Immigration Judge (OCIJ), and appeals from those courts are taken to the BIA.¹⁸

GAO determined that EOIR's "case backlog — cases pending from previous years that remain open at the start of a new fiscal year — more than doubled from fiscal years [FY] 2006 through 2015 ... primarily due to declining cases completed per year."¹⁹ Specifically, GAO found that backlog rose from "about" 212,000 cases pending at the start of FY 2006, when the median pending time for those cases was 198 days, to 437,000 pending cases at the start of FY 2015, when the median pending time was 404 days.²⁰ Because of this backlog, GAO noted:

[S]ome immigration courts were scheduling hearings several years in the future. ... As of February 2, 2017, half of courts [sic] had master calendar hearings scheduled as far as January 2018 or beyond and had individual merits hearings, during which immigration judges generally render case decisions, scheduled as far as June 2018 or beyond. However, the range of hearing dates varied; as of February 2, 2017, one court had master calendar hearings scheduled no further than March 2017 while another court had master calendar hearings scheduled in May 2021 — more than 4 years in the future. Similarly, courts varied in the extent to which individual merits hearings were scheduled into the future. As of February 2, 2017, one court had individual hearings scheduled out no further than March 2017 while another court had scheduled individual hearings 5 years into the future — February 2022.²¹

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

[T]otal case receipts remained about the same in fiscal years 2006 and 2015 but fluctuated over the 10-year period, with new case receipts generally decreasing and other case receipts generally increasing. Specifically, there were about 305,000 total case receipts in fiscal year 2006 and 310,000 in fiscal year 2015. The number of new cases filed in immigration courts decreased over the 10-year period but fluctuated within this period. New case receipts increased about four percent between fiscal year 2006 and fiscal year 2009, from about 247,000 cases to about 256,000 cases, but declined each year after fiscal year 2009, with the exception of an increase in fiscal year 2014. Overall, new case receipts declined by 20 percent after fiscal year 2009 to about 202,000 during fiscal year 2015.²²

While the number of new cases received fell, the number of “other” case receipts by the court, including motions to reopen, reconsider, or recalendar, and remands by the BIA, increased by 86 percent over this 10-year period, from 58,000 cases in FY 2006 to 108,000 cases in FY 2015.²³

As new case receipts fell, and other case receipts rose, the immigration courts were completing fewer cases annually. Incredibly, GAO found, “the number of immigration court cases completed annually declined by 31 percent from fiscal year 2006 to fiscal year 2015 — from about 287,000 cases completed in fiscal year 2006 to about 199,000 completed in 2015,” even as the number of IJs increased by 17 percent over that 10-year period.²⁴

Even those statistics do not tell the whole story, according to the GAO: During this 10-year period, the number of cases that were decided on the merits of the case declined from 95 percent of all cases completed in FY 2006 to 77 percent completed in FY 2015, while the number of cases administratively closed increased.²⁵

A case is decided on the merits when the IJ resolves all of the outstanding matters in the case — that is, whether the alien is removable (or, in some cases, whether the person is an alien at all) and whether the alien should be granted any benefit or relief from removal that he or she seeks.²⁶ “Administrative closure”, on the other hand, “is a docket management tool that is used to temporarily pause removal proceedings.”²⁷ As GAO noted:

An [IJ] may grant administrative closure for various reasons, including in cases for which DHS exercises prosecutorial discretion and requests a case to be administratively closed because the respondent does not meet enforcement priorities. ... A judge may also administratively close a case where the respondent plans to apply for certain immigration benefits under the jurisdiction of USCIS, such as an unaccompanied alien child’s initial asylum claim, or other forms of relief due to specific circumstances such as being the victim of a severe form of trafficking in persons or certain qualifying crimes. An immigration judge can return an administratively closed case to the calendar at his or her discretion or at the request of the respondent or DHS attorney. The primary consideration for an immigration judge in evaluating whether to administratively close or recalendar proceedings is whether the party in opposition has provided a persuasive reason for the case to proceed and be resolved on the merits; and in considering administrative closure, the judge cannot review whether an alien falls within DHS’s enforcement priorities.²⁸

The major driver in the backlog appears to be a significant increase in the amount of time that it is taking IJs to complete cases. In particular, GAO found that “[i]nitial case completion time”, that is, “the time period between the date EOIR receives the [removal case charging document, the Notice to Appear [(NTA)] from the Department of Homeland Security] and the date an [IJ] issued an initial ruling on the case”²⁹ grew “more than fivefold”³⁰ between FY 2006 and FY 2015, with the “median initial completion time for cases” increasing “from 43 days in FY 2006 to 286 days in FY 2015.”³¹

One of the main reasons why IJs are taking more time to complete cases today than they did 10 years ago is an increase in the number of continuances that IJs have granted over that period. As the GAO noted (logically): “[C]ases that experience more continuances take longer to complete.”³² After reviewing 3.7 million continuance records from FY 2006 through FY 2015, GAO concluded that continuances increased by 23 percent³³ from FY 2006 to FY 2015 with “the percentage of completed cases which had multiple continuances”³⁴ also increasing during that period. Most critically, the cases in which the largest number of continuances that GAO identified were issued, those with “four or more continuances,” increased from 9 percent of cases completed in FY 2006 to 20 percent of cases completed in FY 2015.³⁵ Those continuances made an impact, as GAO found: “[C]ases that were completed in [FY] 2015 and had no continuances took an average of 175 days to complete. In contrast, cases with four or more continuances took an average of 929 days to complete” that year.³⁶

Reasons for the Increased Backlog

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

Resources

The first is resources. There are, simply put, too few judges (and complementary staff) to adequately do the job. With the swearing-in of 11 new IJs in June 2017, there are 326 so-called “adjudicator” IJs, including assistant chief IJs in the field who hear some cases.³⁷ According to the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, through May 2017, there were 598,943 pending cases in the nation’s immigration courts.³⁸ This means that there are approximately 1,837 pending cases per IJ. GAO determined that the average IJ completed 807 cases in FY 2015.³⁹ Therefore, even if no new cases were filed, it would take the immigration courts more than two years to complete their pending cases.

IJs are not the only resource in short demand. In June 2009, TRAC reported that there were just under four IJs for each judicial law clerk (JLC).⁴⁰ As TRAC noted, JLCs “perform many functions that can help Immigration Judges handle their caseload ... [and] are hired each year for temporary one-to-two year positions from recent law school graduates through the Attorney General’s Honors Program.”⁴¹ The fewer hours of a JLC’s time that an IJ can draw upon, the more time an IJ must spend doing research on unique issues and drafting opinions. GAO also found that a lack of “other support staff” (including clerical workers and legal technicians) was a “contributing factor” in the backlog.⁴²

Increasing Seniority of Immigration Judges

Second, the number of hours that those IJs actually spend hearing cases is, on average, shrinking as the judges gain seniority. According to GAO, 39 percent of all IJs are eligible for retirement, which means that many are senior government employees, at the high end of the pay and leave scale.⁴³ Senior government employees, those who have 15 or more years of federal government service, are entitled to eight hours of leave each pay period, about 208 hours or 23 (nine-hour) days per year.⁴⁴ There are also 10 federal holidays per year when court is not in session.⁴⁵ Finally, many IJs are on a “flex schedule,” or “alternative work schedule” (AWS), meaning that they work eight nine-hour days and one eight-hour day per pay period, and get one extra day off, for an additional 26 “working” days off per year. Assuming that there are 260 working days in a year (five days in a work week times 52 weeks in the year), any potential IJ entitled to the full rate of leave receiving each federal holiday with AWS may only be working 201 of them (260-23-10-26), or just more than 40 work weeks per year. In addition, IJs receive one-half day every two weeks for case preparation (too little time for this purpose), another 13 “working” days per year not spent in court.

As a result, as IJs work their way up the federal employment ladder, they spend fewer and fewer actual hours in court hearing cases. This likely explains in part why, as GAO found, continuances for “unplanned immigration judge leave — sick or annual leave” were up by 95 percent between FY 2006 and FY 2015.⁴⁶

The Surge

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

The number of unaccompanied alien children apprehended along the border increased by 76 percent (to 68,541) between FY 2013 and FY 2014, while the number of “family units” increased by 360 percent (to 68,445) during the same period, according to U.S. Customs and Border Protection (CBP).⁴⁷ EOIR responded on July 9, 2014, by “prioritizing” certain “cases involving migrants who have recently crossed the Southwest border and whom DHS has placed into removal proceedings” in order to ensure “that these cases are processed both quickly and fairly to enable prompt removal in appropriate cases, while ensuring the protection of asylum seekers and others.”⁴⁸ Those “new priority” cases consisted of “unaccompanied children who [had] recently crossed the Southwest border; families who [had] recently crossed the border and [were] held in detention; families who [had] recently crossed the border but [were] on ‘alternatives to detention;’ and other detained cases.”⁴⁹ Specifically, “[t]o allocate resources with these priorities, EOIR [] reassign[ed] immigration judges in immigration courts around the country from their current dockets to hear the cases of individuals falling in these four groups,” and “rescheduled [c]ases not falling into one of these groups ... to accommodate higher priority cases.”⁵⁰

This is likely a major contributing factor for the 112 percent increase between FY 2006 (3,296 cases) and FY 2015 (6,983 cases) in continuances for “[u]nplanned immigration judge leave — detail or other assignment” identified by GAO.⁵¹

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

*[T]he nature of cases resulting from the surge exacerbated the effects of the backlog. Specifically, many of the surge cases were cases of unaccompanied children, which may take longer to adjudicate than other types of cases because, for example, such a child in removal proceedings could apply for various forms of relief under the jurisdiction of USCIS, including asylum and Special Immigrant Juvenile Status. In such cases the immigration judge may administratively close or continue the case pending resolution of those matters. Therefore, these experts and stakeholders told us that the surge not only added volume to the immigration court’s backlog, but resulted in EOIR prioritizing the cases of unaccompanied children over cases that may be quicker for EOIR to resolve.*⁵²

Increasing Legal Complexity

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

*[H]ighlighted increasing legal complexity as a contributing factor to longer cases and a growing case backlog. In particular, EOIR officials cited Supreme Court decisions in 2013 and 2016, which define analytical steps a judge must complete in determining whether a criminal conviction renders a respondent removable and ineligible for relief.*⁵³

The cases highlighted⁵⁴ by the referenced “EOIR officials” did, in fact, complicate courts’ application of the “categorical approach” that IJs are required to apply in determining removability on many criminal grounds (*Mathis v. United States*, 136 S. Ct. 2243 (2016) and *Descamps v. United States*, 133 S. Ct. 2276 (2013)), as well as the standard for determining whether a drug offense is “illicit trafficking in a controlled substance” and therefore an “aggravated felony” under section 101(a)(43)(B) of the Immigration and Nationality Act (INA) (*Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013)). In certain instances, those decisions would have mandated numerous remands from the BIA and federal circuit courts, and may have rendered otherwise-ineligible aliens eligible for relief; either scenario would have extended the length of numerous removal proceedings for IJ review and briefing by the parties.

More directly, however, the Ninth Circuit’s decision in *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016), both increased the number of cases on the immigration courts’ dockets in the Ninth Circuit, and gave aliens in that circuit cause to continue to litigate otherwise meritless cases. In that decision, the Ninth Circuit held that aliens in detention for more than six months must receive individualized bond hearings before an IJ to justify their continued detention, and be provided bond hearings every six months thereafter.⁵⁵

Under *Rodriguez*, an alien is entitled to a bond hearing wherein the government bears the burden of showing by *clear and convincing evidence* that the alien poses a risk of flight or a danger to the community.⁵⁶ This is a higher burden of proof than the “preponderance of the evidence” standard, “which only requires a showing that something is more likely than not to be true.”⁵⁷ Moreover, unlike an initial bond hearing, where the alien bears the burden⁵⁸ of showing that he or she is not a danger or flight risk, as noted, under *Rodriguez*, the government now bears that burden for continued detention past six

months. This decision will encourage aliens with questionable cases to continue to fight their cases, knowing that they have a greater chance to be released after six months.

In addition, as noted above:

[T]he percentage of completed cases which had multiple continuances increased from fiscal year 2006 to fiscal year 2015 and that, on average, cases with multiple [] continuances took longer to complete than cases with no or fewer continuances. Specifically, 9 percent of cases completed in fiscal year 2006 experienced four or more continuances compared to 20 percent of cases completed in fiscal year 2015. Additionally, cases that were completed in fiscal year 2015 and had no continuances took an average of 175 days to complete. In contrast, cases with four or more continuances took an average of 929 days to complete in fiscal year 2015.⁵⁹

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

By regulation, an IJ “may grant a motion for continuance for good cause shown.” Despite this permissive standard, a number of recent decisions have limited that authority.⁶⁰

For example, in *Matter of Hashmi*,⁶¹ the BIA held:

In determining whether to continue proceedings to afford the respondent an opportunity to apply for adjustment of status premised on a pending visa petition, a variety of factors may be considered, including, but not limited to: (1) the DHS response to the motion; (2) whether the underlying visa petition is prima facie approvable; (3) the respondent’s statutory eligibility for adjustment of status; (4) whether the respondent’s application for adjustment merits a favorable exercise of discretion; and (5) the reason for the continuance and other procedural factors.

The BIA made clear, however, that while “[t]he Immigration Judge may also consider any other relevant procedural factors ... [c]ompliance with an Immigration Judge’s case completion goals ... is not a proper factor in deciding a continuance request, and Immigration Judges should not cite such goals in decisions relating to continuances.”⁶² Nor, the BIA held, were “[t]he number and length of prior continuances ... alone determinative.”⁶³

Similarly, in *Simon v. Holder*,⁶⁴ the Court of Appeals for the Third Circuit held that the BIA erred in denying a motion to reconsider a case in which an alien had been granted four continuances (over a period of almost two years), including a six-month continuance to seek adjustment of status. When, at the fifth hearing, there was no visa number available to the alien, alien’s counsel “sought a further continuance or administrative closure of the removal case until a visa number was available.”⁶⁵ The government attorney refused to agree, and the IJ ordered the alien deported.⁶⁶ The alien’s appeal to the BIA was dismissed, and the alien filed a motion to reconsider with the BIA that was denied.⁶⁷

In his motion to reconsider, the alien “argu[ed] that the BIA committed error by failing to address *Hashmi*,” in its denial, the BIA held “that the *Hashmi* factors were not applicable because [the alien] could not establish prima facie eligibility for adjustment: i.e., he could not establish that a visa was immediately available.”⁶⁸ The Third Circuit held (more than five years after the case started) that the BIA erred in relying solely on “the remoteness of visa availability,” and remanded the case.⁶⁹

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

If an IJ grants a continuance, on the other hand, there is little downside for the court. Attorneys for the government (who work for U.S. Immigration and Customs Enforcement (ICE)) have in the past been limited by policy in the number of appeals that they are allowed to take. Moreover, an appeal from a continuance would be “interlocutory” in any case, that is, it would ask “the [BIA] to review a ruling by the Immigration Judge before the Immigration Judge issues a final decision.”⁷⁰ As the BIA has often held, however: “To avoid piecemeal review of the myriad questions that may arise in the course of

proceedings ... [it does] not ordinarily entertain interlocutory appeals.”⁷¹ For these reasons, and to conserve resources, ICE attorneys rarely appeal continuance grants, even if they don’t like them: As GAO noted, government attorneys to whom it spoke told it “that granting multiple continuances in cases resulted in inefficiencies and wasted resources such as [those] attorneys having to continually prepare for hearings that continued multiple times.”⁷²

Obama Administration Policies

Fifth, Obama administration policies exacerbated the backlog and increased the number of continuances. One example of such a policy is “Deferred Action for Childhood Arrivals” (DACA).⁷³ As U.S. Citizenship and Immigration Services (USCIS) explains DACA:

*On June 15, 2012, the Secretary of Homeland Security announced that certain people who came to the United States as children and meet several guidelines may request consideration of deferred action for a period of two years, subject to renewal. They are also eligible for work authorization. Deferred action is a use of prosecutorial discretion to defer removal action against an individual for a certain period of time. Deferred action does not provide lawful status.*⁷⁴

To be granted DACA, an alien has to have been born after June 14, 1981, have come to the United States before age 16, and “have continuously resided in the United States since June 15, 2007, up to the present time.”⁷⁵ USCIS states that even aliens in “removal proceedings, with a final removal order, or with a voluntary departure order (and not in immigration detention), may affirmatively request consideration of DACA.”⁷⁶ In fact, many DACA-eligible aliens were in proceedings at the time that DACA was announced, and many sought (or were granted) continuances to apply for that relief. As one immigration practitioner has put it: “Requesting prosecutorial discretion or seeking time to have a DACA application adjudicated can serve as a basis to seek a continuance. In other words, making such a request can serve as the ‘good cause’ required by the regulations.”⁷⁷

Another Obama administration policy that adversely affected the completion of removal proceedings is the aforementioned “prosecutorial discretion.” Generally, “[p]rosecutorial discretion” is the authority of an agency or officer to decide what charges to bring and how to pursue each case.”⁷⁸ Explaining early prosecutorial actions of the Obama administration, the Immigration Policy Council stated in a September 2011 fact sheet:

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

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

*The new initiative involve[d] the creation of a joint committee with [DOJ] to review each of the nearly 300,000 pending removal cases to assess whether each case me[t] the high priority factors set forth in the June 2011 Morton memo. In order to clear the seriously backlogged immigration court dockets and to better focus resources on high priority cases, all low priority cases [were to be] administratively closed following this review – that is, they [would] be removed from the active docket of the immigration courts.*⁷⁹

As the ICE Office of the Principal Legal Advisor (OPLA) stated in a memorandum describing the agency’s actions during this period: “In late 2011 and 2012, [ICE] attorneys performed a complete review of all cases pending on the [EOIR] court dockets, exercising prosecutorial discretion as appropriate.”⁸⁰

Thereafter, on November 20, 2014, Secretary of Homeland Security Jeh Johnson issued a new memorandum on “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants”, also known as the “Enforcement Memo.”⁸¹

The Enforcement Memo set the following immigration priorities for DHS:

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

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

- (a) aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security;*
- (b) aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States;*
- (c) aliens convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 52 l(a), or aliens not younger than 16 years of age who intentionally participated in an organized criminal gang to further the illegal activity of the gang;*
- (d) aliens convicted of an offense classified as a felony in the convicting jurisdiction, other than a state or local offense for which an essential element was the alien's immigration status; and*
- (e) aliens convicted of an "aggravated felony," as that term is defined in section 101(a)(43) of the [INA] at the time of the conviction.*

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

Priority 2 (misdemeanants and new immigration violators)

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

- (a) aliens convicted of three or more misdemeanor offenses, other than minor traffic offenses or state or local offenses for which an essential element was the alien's immigration status, provided the offenses arise out of three separate incidents;*
- (b) aliens convicted of a "significant misdemeanor," which for these purposes is an offense of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence; or if not an offense listed above, one for which the individual was sentenced to time in custody of 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence);*
- (c) aliens apprehended anywhere in the United States after unlawfully entering or re-entering the United States and who cannot establish to the satisfaction of an immigration officer that they have been physically present in the United States continuously since January 1, 2014 ; and*
- (d) aliens who, in the judgment of an ICE Field Office Director, USCIS District Director, or USCIS Service Center Director, have significantly abused the visa or visa waiver programs.*

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

Priority 3 (other immigration violations)

Priority 3 aliens are those who have been issued a final order of removal on or after January 1, 2014. Aliens described in this priority, who are not also described in Priority 1 or 2, represent the third and lowest priority for apprehension and removal. Resources should be dedicated accordingly to aliens in this priority. Priority 3 aliens should generally be

*removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an immigration officer, the alien is not a threat to the integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority.*⁸²

As the Enforcement Memo stated:

*In the immigration context, prosecutorial discretion should apply not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad range of other discretionary enforcement decisions, including deciding: whom to stop, question, and arrest; whom to detain or release; **whether to settle, dismiss, appeal, or join in a motion on a case**; and whether to grant deferred action, parole, or a stay of removal instead of pursuing removal in a case. (Emphasis added.)*⁸³

Providing guidance to ICE attorneys on the implementation of these policies, the OPLA memo directed ICE attorneys to:

*[C]ontinue to review their cases, at the earliest opportunity, for the potential exercise of prosecutorial discretion, in light of the enforcement priorities. OPLA should generally seek administrative closure or dismissal of cases it determines are not priorities. [ICE] attorneys should also review available information in incoming cases to determine whether, in a case that falls within an enforcement priority, unique factors and circumstances are present that may warrant the exercise of prosecutorial discretion. Understanding that these factors and circumstances may change as the case progresses, if further prosecutorial discretion review is requested by the respondent, the case should be reviewed again in light of any changed facts and circumstances. Keep in mind that prosecutorial discretion may encompass actions beyond offers for administrative closure or dismissal of the case, including waiving appeal, not filing Notices to Appear, and joining in motions.*⁸⁴

As a whole, these policies required IJs to consider numerous motions to continue and administratively close cases, adding to the burden on their dockets. These policies are likely the reason that, as GAO found, continuances based on a joint request to continue by both parties increased by 518 percent between FY 2006 (1,319 cases) and FY 2015 (8,615 cases).⁸⁵

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

This is especially true in light of the fact that the Enforcement Memo made clear that, as of November 20, 2014, final orders of removal issued before January 1, 2014, were not a priority.⁸⁶ Given the lack of enforcement that memo represented, it would have been reasonable for any given IJ in a non-detained court to conclude that a removal order in today's case would soon no longer be tomorrow's priority, either.

IJ Burnout

This leads to the final factor: IJ burnout. A 2009 study found "many immigration judges adjudicating cases of asylum seekers are suffering from significant symptoms of secondary traumatic stress and job burnout, which, according to the researchers, may shape their judicial decision-making processes."⁸⁷ IJs' working conditions have only gotten worse as the backlogs have grown.⁸⁸ A crushing docket adds to the stress of being a judge, and as that stress rises, performance logically suffers. This would, in turn, result in more reversals and remands, adding even more cases to the backlog.

Solutions to the Backlog

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

More Resources

If the attorney general is to be believed, more resources will soon be available to the immigration courts.

In remarks to CBP officers in Nogales, Ariz., on April 11, 2017, Attorney General Jeff Sessions “revealed that [DOJ] will add 50 more immigration judges to the bench this year and 75 next year,” and “highlighted the Department [of Justice’s] plan to streamline its hiring of judges, reflecting the dire need to reduce the backlogs in our immigration courts.”⁸⁹

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

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

Change in Border Policy and Its Effect

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

Throughout the campaign, then-candidate Donald Trump made it clear that he intended to enforce the immigration laws if elected.⁹⁰ Backing up this rhetoric as it pertained to those entering illegally, on January 25, 2017, President Trump issued Executive Order 13767, captioned “Border Security and Immigration Enforcement Improvements.”⁹¹ While each of the sections of that order enhance immigration enforcement, four in particular will reduce the number of aliens who are placed into removal proceedings, by reducing the number of aliens entering the United States illegally.

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

- (a) secure the southern border of the United States through the immediate construction of a physical wall on the southern border, monitored and supported by adequate personnel so as to prevent illegal immigration, drug and human trafficking, and acts of terrorism;*
- (b) detain individuals apprehended on suspicion of violating Federal or State law, including Federal immigration law, pending further proceedings regarding those violations;*
- (c) expedite determinations of apprehended individuals’ claims of eligibility to remain in the United States;*
- (d) remove promptly those individuals whose legal claims to remain in the United States have been lawfully rejected, after any appropriate civil or criminal sanctions have been imposed; [and]*
- (e) cooperate fully with States and local law enforcement in enacting Federal-State partnerships to enforce Federal immigration priorities, as well as State monitoring and detention programs that are consistent with Federal law and do not undermine Federal immigration priorities.*⁹²

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

- (a) The Secretary shall take all appropriate action and allocate all legally available resources to immediately construct, operate, control, or establish contracts to construct, operate, or control facilities to detain aliens at or near the land border with Mexico.*
- (b) The Secretary shall take all appropriate action and allocate all legally available resources to immediately assign asylum officers to immigration detention facilities for the purpose of accepting asylum referrals and conducting credible fear determinations pursuant to section 235(b)(1) of the INA (8 U.S.C. 1225(b)(1)) and applicable regulations and reasonable fear determinations pursuant to applicable regulations.*

(c) *The Attorney General shall take all appropriate action and allocate all legally available resources to immediately assign immigration judges to immigration detention facilities operated or controlled by the Secretary, or operated or controlled pursuant to contract by the Secretary, for the purpose of conducting proceedings authorized under title 8, chapter 12, subchapter II, United States Code.*⁹³

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

*[S]hall immediately take all appropriate actions to ensure the detention of aliens apprehended for violations of immigration law pending the outcome of their removal proceedings or their removal from the country to the extent permitted by law. The Secretary shall issue new policy guidance to all Department of Homeland Security personnel regarding the appropriate and consistent use of lawful detention authority under the INA, including the termination of the practice commonly known as “catch and release,” whereby aliens are routinely released in the United States shortly after their apprehension for violations of immigration law.*⁹⁴

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

*The Attorney General shall take all appropriate steps to establish prosecution guidelines and allocate appropriate resources to ensure that Federal prosecutors accord a high priority to prosecutions of offenses having a nexus to the southern border.*⁹⁵

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

The number of aliens apprehended along the Southwest border has dropped precipitously since the election and since the issuance of this order. Specifically, according to CBP, the number of apprehensions along the border and inadmissible persons at ports of entry declined from 66,712 in October 2016 to 63,364 in November 2016; 58,426 in December 2016; 42,473 in January 2017; 23,563 in February 2017; 16,600 in March 2017; and to 15,780 in April 2017, before increasing slightly in May 2017 (to 19,967).⁹⁶

Of that number, CBP states, Southwest border apprehensions in FY 2017 dropped 76 percent from a high of 47,211 aliens in November 2016 to 11,126 aliens in April 2017, before ticking up slightly in May (to 14,535 aliens).⁹⁷

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

As I explained in an April 2017 *Backgrounder* on “Fraud in the ‘Credible Fear’ Process”:⁹⁸

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

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

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

Once a “credible fear” case is referred to the immigration court, at least four separate hearings are held: a master calendar hearing at which pleadings are taken and the alien requests an opportunity to apply for asylum, withholding of removal, and/or protection under Article III of the Convention Against Torture; a request for a bond; a hearing at which the asylum application is filed; and at least one hearing on the merits of that application.⁹⁹ While the first and second (or second and third) hearings are often held on the same docket, each requires at least a setting of the matter and takes up time on a docket. Moreover, there may be additional continuances when an alien seeks counsel or is released (requiring the case to be reset to a non-detained docket), or when additional time is sought to complete the application or to obtain evidence or witnesses. The fewer the “credible fear” cases, the fewer the hearings, and the lower the backlog, or at least the lower the increase in the backlog.

More importantly for purposes of the backlog, however, is the fact that the number of UACs and family unit members has decreased significantly since the election and the inauguration.¹⁰⁰ The number of UACs apprehended at the Southwest border dropped 86 percent between November 2016 (7,348 aliens) and April 2017 (997 aliens), and the number of family unit members apprehended declined 92 percent during the same period, from 15,588 aliens in November 2016 to 1,188 aliens in April 2017.¹⁰¹ The number of UACs and family unit members attempting to enter along the Southwest border should continue to be monitored, however, because UAC apprehensions increased 49 percent between April and May 2017 (to 1,493 aliens), and family unit members increased 41 percent during that time period (to 1,577 aliens).¹⁰²

All told, however, according to CBP, there was “a 64 percent decrease in migration when comparing May 2016 to May 2017.”¹⁰³

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

That said, however, the reassignment of IJs under section 5(c) of the order has (or is likely to have) caused delays in the short term in the courts from which they were reassigned.¹⁰⁴ In the long run, however, by deterring future illegal entries of aliens who will never appear on court dockets, the result of this change in policy should be a net decrease in the immigration courts’ backlog.

Change in Interior Enforcement Policy

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

On the same day the president issued the executive order above, January 25, 2017, he issued Executive Order 13768, “Enhancing Public Safety in the Interior of the United States.”¹⁰⁵ Section 2 of that order, captioned “Policy”, makes clear that the policy of the executive branch is to:

- (a) Ensure the faithful execution of the immigration laws of the United States, including the INA, against all removable aliens, consistent with Article II, Section 3 of the United States Constitution and section 3331 of title 5, United States Code;*
- (b) Make use of all available systems and resources to ensure the efficient and faithful execution of the immigration laws of the United States;*
- (c) Ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law;*
- (d) Ensure that aliens ordered removed from the United States are promptly removed; and*
- (e) Support victims, and the families of victims, of crimes committed by removable aliens.*¹⁰⁶

That policy was echoed in statements made by Acting ICE Director Thomas Homan on Capitol Hill.¹⁰⁷ In his June 13, 2017 written testimony before the House Committee on Appropriations, Subcommittee on Homeland Security, Homan stated:

*To ensure the national security and public safety of the United States, and the faithful execution of the immigration laws, our officers may take enforcement action against any removable alien encountered in the course of their duties who is present in the U.S. in violation of immigration law.*¹⁰⁸

Press reports state that in his oral testimony, Homan similarly told the Subcommittee: “If you’re in this country illegally and you committed a crime by being in this country, you should be uncomfortable, you should look over your shoulder. You need to be worried.”¹⁰⁹

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

*Under prior enforcement priorities, approximately 345,000, or 65 percent, of the fugitive alien population were not subject to arrest or removal. President Trump’s EOs have changed that. As a result, ICE arrests are up 38 percent since the same time period last year, charging documents issued are up 47 percent, and detainers issued are up 75 percent. Thus far in this fiscal year, through May 15, 2017, ERO has removed 144,353 aliens from the United States and repatriated them to 176 countries around the world; these are aliens who posed a danger to our national security, public safety, or the integrity of the immigration system. Of those removed, 54 percent (78,301) had criminal convictions. ERO has also issued 78,176 detainers and 63,691 charging documents; maintained an average daily population of 39,610 in detention; and monitored an average of 70,044 participants daily under the Intensive Supervision Appearance Program (ISAP) III contract or Alternatives to Detention (ATD) program.*¹¹⁰

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

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

Limiting Dockets by Encouraging Self-Deportation

These policies and their implementation will also encourage aliens to leave the United States without ever coming to the attention of ICE. It is axiomatic that no one wants to be detained, and most aliens at large in the United States do not want to go through the process of deportation, either. As immigration enforcement becomes more of a certainty, therefore, aliens will be more likely to leave on their own. This is the “self-deportation” concept that Mitt Romney was excoriated for promoting in the 2012 election,¹¹¹ but that has actually been demonstrated in at least one discrete context: aliens facing registration under post-9/11 policies, especially NSEERS.

NSEERS, or the “National Security Entry-Exit System”, was a tool used by the former Immigration and Naturalization Service (INS) as part of its role in the War on Terror following the attacks of September 11, 2001.¹¹² It was announced by then-Attorney General John Ashcroft in November 2002, and consisted of “registration through various ports-of-entry and registration through the Special Registration program”.¹¹³ As the Migration Policy Institute (MPI) noted in April 2003:

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

* * * *

*The Special Registration program, which was announced in November 2002 and officially launched in December 2002, requires all male foreign visitors, already in the U.S., aged 16 and older from specified countries to register at designated immigration offices within a given time period. This program, unlike the port-of-entry program that requires registration based on an elevated national security concern, depends on nationality-based criteria. To date, nationals from 25 countries have been identified to report to designated U.S. immigration offices to register. Except for North Korea, nearly all of the countries designated in Special Registration are predominantly Arab and Muslim. As of March 25, 2003, some 60,822 foreign visitors had registered through Special Registration.*¹¹⁴

Of the 82,000 aliens who had signed up for “Special Registration” as of June 2003, 13,000 were found to be removable, and were placed into deportation proceedings.¹¹⁵ As the *New York Times* reported at the time:

*For decades, illegal immigrants have often flourished because officials lacked the staff, resources and political will to deport them. But since the attacks on the World Trade Center and the Pentagon, the government has been detaining and deporting illegal immigrants from countries considered breeding grounds for terrorists.*¹¹⁶

As an apparent consequence, many of those affected left rather than be deported. For example, according to the Pakistani embassy at that time, as a result of this program and other enforcement in the wake of the attacks, 15,000 Pakistanis in the United States illegally were “believed to have left for Canada, Europe, and Pakistan.”¹¹⁷

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

Rescission of DAPA

Similarly, the rescission of the “Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents” (DAPA) by the Secretary of Homeland Security on June 15, 2017, ends a policy that needlessly extended removal proceedings, burdening the immigration courts.¹¹⁸ As USCIS has explained DAPA:

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

*These initiatives include: ... Allowing parents of U.S. citizens and lawful permanent residents to request deferred action and employment authorization for three years, in a new [DAPA] program, provided they have lived in the United States continuously since January 1, 2010, and pass required background checks.*¹¹⁹

MPI has estimated that as many as 3.7 million aliens could have been covered by DAPA.¹²⁰ Many aliens who were in removal proceedings at the time that DAPA was announced sought, and were granted, continuances to assess their eligibility and apply for that benefit, even though federal District Court Judge Andrew Hanen blocked that program from going into effect in February 2015.¹²¹ The ending of the program should clear the way for the completion of those cases.

Attorney General Decision on Certification Limiting Continuances

The next step is for Attorney General Sessions is to issue a decision on certification that sets standards for the issuance of continuances in immigration court. As I explained above, there is currently little downside for an IJ who grants a continuance, but the judge may face problems if he or she denies one.

It is apparent that better standards are needed to guide IJs in evaluating a motion for continuance. And, the attorney general:

*[H]as authority to conduct de novo review of BIA decisions. ... “The BIA is entirely a creation of the Attorney General,” and exercises only such authority as is delegated to it by the Attorney General. See 8 C.F.R. § 1003.1(d)(1) (2005). The Attorney General has retained full decision-making authority under the immigration statutes, including “full authority to receive additional evidence and to make de novo factual determinations.”*²¹²²

He should use this authority to set limits on the ability of IJs to grant continuances by specifying the parameters of their regulatory authority to do so “for good cause shown.”¹²³ I believe that most IJs would prefer such guidance to a system in which they have scant ability to control their dockets without running the risk of a reviewing court finding that they have denied “due process” by denying continuances to aliens who have already been granted numerous continuances.

Department of Justice Litigation

Finally, DOJ must fight vigorously for decisions that provide uniformity of law and “bright-line” rules for IJs to apply in real-world cases. Most people I talk to about my work as an IJ are surprised when I tell them that I handled more than 15,000 cases in eight years on the bench. Because of the volume of cases they handle, IJs must be able to decide cases quickly, or run the risk that their dockets will be uncontrollable; otherwise, justice suffers, and the job becomes overwhelming. Uniform, clear standards of law are essential to this task.

In *Hawaii v. Trump*,¹²⁴ its recent decision on the Executive Order¹²⁵ suspending entry of nationals from six countries in Asia and Africa, the Court of Appeals for the Ninth Circuit stated that a nationwide injunction of portions of that order was necessary “because ‘immigration laws of the United States should be enforced vigorously and uniformly.’” This is ironic coming from a court that has set rules for IJs to apply that vary significantly from those in the other circuits. The Supreme Court’s docket, however, is finite, so cases must be won or lost in the circuit courts. It is the Justice Department’s job to do so.

Conclusion

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

End Notes

¹ [“Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges”](#), GAO-17-438, Government Accountability Office, June 2017.

² *Id.* “Highlights”.

³ *Id.* at 22.

⁴ *Id.* “Highlights”.

⁵ *Id.* at 68.

⁶ *Id.* at 27.

⁷ *Id.* at 22.

⁸ *Id.* at 23.

⁹ [“United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016”](#), U.S. Customs and Border Protection, October 18, 2016.

¹⁰ [“Department of Justice Announces New Priorities to Address Surge of Migrants Crossing into the U.S.”](#), U.S. Department of Justice, Office of Public Affairs, July 9, 2014.

¹¹ See [“Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges”](#), GAO-17-438, Government Accountability Office, June 2017, at 23.

¹² *Id.* at 27-28.

¹³ See [Rodriguez v. Robbins](#), 804 F.3d 1060, 1078-85 (9th Cir. 2015), cert. granted sub nom. *Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016).

¹⁴ [“Attorney General Jeff Sessions Announces the Department of Justice’s Renewed Commitment to Criminal Immigration Enforcement”](#), U.S. Department of Justice, Office of Public Affairs, April 11, 2017.

¹⁵ [“About GAO”](#), Government Accountability Office, undated.

¹⁶ [“Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges”](#), GAO-17-438, Government Accountability Office, June 2017, at 3.

¹⁷ [“Office of the Director”](#), U.S. Department of Justice, Executive Office for Immigration Review, updated May 30, 2017.

¹⁸ See [“Office of the Chief Immigration Judge”](#), U.S. Department of Justice, Executive Office for Immigration Review, updated September 22, 2016.

¹⁹ [“Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges”](#), GAO-17-438, Government Accountability Office, June 2017, Highlights.

²⁰ See *id.* at 22.

²¹ *Id.*

²² *Id.* at 21.

²³ *Id.*

²⁴ *Id.* at 22.

²⁵ *Id.* at 24.

²⁶ See [“Immigration Court Practice Manual”](#), U.S. Department of Justice, Executive Office for Immigration Review, undated, at 75-78.

²⁷ See [Matter of W-Y-U-](#), 27 I&N Dec. 17, at 17-18 (BIA 2017) (citations omitted).

²⁸ [“Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges”](#), GAO-17-438, Government Accountability Office, June 2017, at 24 n. 48.

²⁹ *Id.* at 25, n. 50.

³⁰ *Id.* at 25.

³¹ *Id.*

³² *Id.* at 68.

³³ *Id.*, Highlights.

³⁴ *Id.* at 69.

³⁵ *Id.*

³⁶ *Id.*

³⁷ [“Executive Office for Immigration Review Swears in 11 Immigration Judges”](#), U.S. Department of Justice, Executive Office for Immigration Review, June 16, 2017.

³⁸ [“Immigration Court Backlog Tool, Pending Cases and Length of Wait in Immigration Court”](#), Syracuse University, Transactional Records Access Clearinghouse (TRAC), May 2017.

³⁹ [“Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges”](#), GAO-17-438, Government Accountability Office, June 2017, at 23.

⁴⁰ [“Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow”](#), Syracuse University, Transactional Records Access Clearinghouse (TRAC), June 18, 2009.

⁴¹ *Id.*

⁴² [“Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges”](#), GAO-17-438, Government Accountability Office, June 2017, at 27.

⁴³ *Id.* at 34.

⁴⁴ See [“Fact Sheet: Annual Leave \(General Information\), Annual Leave Entitlement”](#), U.S. Office of Personnel Management, undated.

⁴⁵ [“2017 Holiday Schedule”](#), U.S. Office of Personnel Management, undated.

⁴⁶ [“Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges”](#), GAO-17-438, Government Accountability Office, June 2017, at 131, Appendix III, Table 15.

⁴⁷ [“United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016”](#), U.S. Customs and Border Protection, October 18, 2016.

⁴⁸ [“Department of Justice Announces New Priorities to Address Surge of Migrants Crossing into the U.S.”](#), U.S. Department of Justice, Office of Public Affairs, July 9, 2014.

⁴⁹ [“Department of Justice Actions to Address the Influx of Migrants Crossing the Southwest Border in the United States”](#), U.S. Department of Justice, Office of Public Affairs, undated.

⁵⁰ *Id.*

⁵¹ [“Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges”](#), GAO-17-438, Government Accountability Office, June 2017, at 131, Appendix III, Table 15.

⁵² *Id.* at 27.

⁵³ *Id.* at 27-28.

⁵⁴ *Id.*

⁵⁵ [Rodriguez v. Robbins](#), 804 F.3d 1060, 1078-85 (9th Cir. 2015), *cert. granted sub nom. Jennings v. Rodriguez*, 136 S. Ct. 2489 (2016).

⁵⁶ *Id.* at 1086-87.

⁵⁷ Michael Kaufman and Michael Tan, [“Bond Hearings for Immigrants Subject to Prolonged Immigration Detention, in the Ninth Circuit”](#), American Civil Liberties Union, December 2015, at 8.

⁵⁸ [Matter of Fatahi](#), 26 I&N Dec. 791, 793 (BIA 2016).

⁵⁹ [“Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges”](#), GAO-17-438, Government Accountability Office, June 2017, at 69.

⁶⁰ [8 C.F.R. § 1003.29](#) (2017).

⁶¹ [Matter of Hashmi](#), 24 I&N Dec. 785, 790 (BIA 2009).

⁶² *Id.* at 793-94.

⁶³ *Id.* at 794.

⁶⁴ [Simon v. Holder](#), 654 F. 3d 440 (3d Cir. 2011).

⁶⁵ *Id.* at 441-42.

⁶⁶ *Id.* at 442.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 443.

⁷⁰ [“Board of Immigration Appeals Practice Manual, § 4.14”](#), U.S. Department of Justice, Executive Office for Immigration Review, July 27, 2015, at 69.

⁷¹ See [Matter of M-D-](#), 24 I&N Dec. 138, 139 (BIA 2007).

⁷² [“Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges”](#), GAO-17-438, Government Accountability Office, June 2017, at 69.

⁷³ [“Consideration of Deferred Action for Childhood Arrivals \(DACA\)”](#), U.S. Citizenship and Immigration Services, December 22, 2016.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ [“Consideration of Deferred Action for Childhood Arrivals Process, Frequently Asked Questions”](#), U.S. Citizenship and Immigration Services, April 25, 2017.

⁷⁷ Miley & Brown, P.C., [“Removal Proceedings – Practical Tips In A Post DACA/DAPA World”](#), undated.

⁷⁸ [“Understanding Prosecutorial Discretion in Immigration Law”](#), American Immigration Council, May 26, 2011.

⁷⁹ [“Understanding Prosecutorial Discretion in Immigration Law”](#), Immigration Policy Center, American Immigration Council, September 2011.

⁸⁰ Riah Ramlogan, acting principal legal advisor, [“Guidance Regarding Cases Pending Before EOIR Impacted by Secretary Johnson’s Memorandum entitled Policies for the Apprehension, Detention and Removal of Undocumented immigrants”](#), U.S. Immigration and Customs Enforcement, April 6, 2015, at 1-2.

⁸¹ Jeh Johnson, secretary of Homeland Security, [“Policies for the Apprehension, Detention and Removal of Undocumented Immigrants”](#), November 20, 2014.

⁸² *Id.* at 3-4.

⁸³ *Id.* at 2.

⁸⁴ Riah Ramlogan, acting principal legal advisor, [“Guidance Regarding Cases Pending Before EOIR Impacted by Secretary Johnson’s Memorandum entitled Policies for the Apprehension, Detention and Removal of Undocumented immigrants”](#), U.S. Immigration and Customs Enforcement, April 6, 2015, at 2.

⁸⁵ [“Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges”](#), GAO-17-438, Government Accountability Office, June 2017, at 126, Appendix III, Table 13.

⁸⁶ Jeh Johnson, secretary of Homeland Security, [“Policies for the Apprehension, Detention and Removal of Undocumented Immigrants”](#), November 20, 2014, at 4.

⁸⁷ See Kirsten Michener, [“Stress and burnout found among nation’s immigration judges”](#), University of California San Francisco, June 25, 2009.

⁸⁸ See Rachel Glickhouse, [“Immigration judges are burning out faster than prison wardens and hospital doctors”](#), Quartz, August 3, 2015.

⁸⁹ [“Attorney General Jeff Sessions Announces the Department of Justice’s Renewed Commitment to Criminal Immigration Enforcement”](#), U.S. Department of Justice, Office of Public Affairs, April 11, 2017.

⁹⁰ See Miriam Valverde, [“Compare the candidates: Clinton vs. Trump on immigration”](#), Politifact, July 15, 2016: “Presidential candidates Donald Trump and Hillary Clinton have taken opposite roads on their quest for immigration reform. Trump calls for mass deportations, migrant bans and a wall to keep away people from coming into the country, while Clinton wants a pathway to citizenship, immigrant integration and protection from deportation.”

⁹¹ E.O. 13767, [“Border Security and Immigration Enforcement Improvements”](#), January 25, 2017.

⁹² *Id.* at section 2.

⁹³ *Id.* at section 5.

⁹⁴ *Id.* at section 6.

⁹⁵ *Id.* at section 13.

⁹⁶ [“Southwest Border Migration”](#), U.S. Customs and Border Protection, June 8, 2017.

⁹⁷ *Id.*

⁹⁸ Andrew R. Arthur, [“Fraud in the ‘Credible Fear’ Process, Threats to the Integrity of the Asylum System”](#), Center for Immigration Studies, April 2017.

⁹⁹ [“I-589, Application for Asylum and for Withholding of Removal”](#), U.S. Citizenship and Immigration Services, March 23, 2017.

¹⁰⁰ See [“Southwest Border Migration”](#), U.S. Customs and Border Protection, June 8, 2017.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See Jonathan Blitzer, [“What Will Trump Do with Half a Million Backlogged Immigration Cases?”](#), *The New Yorker*, June 20, 2017: “Since March, New York City, for example, has had at least eight of its twenty-nine immigration judges reassigned, at least temporarily, to Texas and Louisiana, WNYC has reported. But in relocating them the federal government is exacerbating the city’s own significant backlog: roughly eighty thousand pending cases and an average delay of six hundred and twenty-five days per case.”

¹⁰⁵ [“Executive Order 13768, Enhancing Public Safety in the Interior of the United States”](#), the White House, January 25, 2017.

¹⁰⁶ *Id.*

¹⁰⁷ See Paul Bedard, [“ICE chief rips critics of deportations, entering illegally ‘is a crime’](#), *Washington Examiner*, June 13, 2017.

¹⁰⁸ Thomas Homan, [“Immigration and Customs Enforcement & Customs and Border Protection FY18 Budget Request”](#), testimony before the House Committee on Appropriations, Subcommittee on Homeland Security, 115th Congress, 2017.

¹⁰⁹ Stephen Dinan, [“No apologies: ICE chief says illegal immigrants should live in fear of deportation”](#), *Washington Times*, June 13, 2017.

¹¹⁰ Thomas Homan, [“Immigration and Customs Enforcement & Customs and Border Protection FY18 Budget Request”](#), testimony before the House Committee on Appropriations, Subcommittee on Homeland Security, 115th Congress, 2017.

¹¹¹ See Lucy Madison, [“Romney on immigration: I’m for ‘self-deportation’”](#), CBS News, January 24, 2012.

¹¹² See Kris W. Kobach, [“State and Local Authority to Enforce Immigration Law: A Unified Approach for Stopping Terrorists”](#), Center for Immigration Studies, June 2004.

¹¹³ See Maia Jachimowicz and Ramah McKay, [“Special Registration’ Program”](#), Migration Policy Institute, April 1, 2003.

¹¹⁴ *Id.*

¹¹⁵ Rachel L. Swarns, [“Thousands of Arabs and Muslims Could Be Deported, Officials Say”](#), *The New York Times*, June 7, 2003.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ [“Rescission of Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents \(‘DAPA’\)”](#), U.S. Department of Homeland Security, June 15, 2017.

¹¹⁹ [“2014 Executive Actions on Immigration”](#), U.S. Citizenship and Immigration Services, April 15, 2015.

¹²⁰ [“MPI: As Many as 3.7 Million Unauthorized Immigrants Could Get Relief from Deportation under Anticipated New Deferred Action Program”](#), Migration Policy Institute, November 19, 2014.

¹²¹ *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015), affirmed 809 F.3d 134 (5th Cir. 2015).

¹²² *Matter of A-H-*, 23 I&N Dec. 774, 779 n. 4 (A.G. 2005), review granted in part on other grounds sub nom. *Haddam v. Holder*, 547 Fed.Appx. 306 (4th Cir. 2013).

¹²³ [8 C.F.R. § 1003.29](#) (2017).

¹²⁴ [Hawaii v. Trump](#), ___ F.3d ___ (9th Cir. 2017).

¹²⁵ Executive Order 13780, [“Protecting The Nation From Foreign Terrorist Entry Into The United States”](#), the White House, March 6, 2017.