Center for Immigration Studies

Backgrounder

May 2011

Built to Fail

Deception and Disorder in America's Immigration Courts

By Mark H. Metcalf

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.

Mark H. Metcalf is a former judge on the immigration court in Miami, Fla. Under President George W. Bush he served in several posts at the Justice and Defense Departments.

- 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.

- 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 immigration 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 orders[8] — 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 removed[9] 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.

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 fraud[18] 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 country[22] 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, Virginia — on February 10, 2011.[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 entry[29] 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 summons[42] 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 accountability 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 security[48] — 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 2008[55] 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

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 %

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 levels[60] — 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 closed[63] 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 Council[69] 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 percent[82] 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 of these applications.[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 caseloads. 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 nondetained 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 removal[102] 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 worsens 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 try[129] — 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 percent[143] 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 orders[146] 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 way. This inertia is nothing less than the familiar failure of leadership and management[153] 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 Constitution[155] 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 States[158]—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 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 non-existent. 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.

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/198514critiquebecomingamericanbydineshdsouza. 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/statspub/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 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."

[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/factsheets/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,* August18, 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*, August18, 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 — 769,737 — 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 769,737 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 Submission,* "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,* August18, 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 Immigration 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. Hernandez 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, Immigration 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 2001the 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 295,617of 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 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 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/statspub/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,* August18, 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/mgmtrpts/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/disp/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 contracted 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."

Backgrounder

Built to Fail
Deception and Disorder in America's Immigration Courts

By Mark H. Metcalf

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.

Center for Immigration Studies
1522 K Street, NW, Suite 820
Washington, DC 20005-1202
(202) 466-8185 • (202) 466-8076
center@cis.org • www.cis.org

Center for Immigration Studies
1522 K Street, NW, Suite 820
Washington, DC 20005-1202
(202) 466-8185
center@cis.org
www.cis.org