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# Skipping Court

## U.S. Immigration Courts & Aliens Who Disappear Before Trial

By Mark H. Metcalf

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### Key Takeaways

- 43 percent of all aliens free pending trial failed to appear for court in 2017.
- Since 1996, 37 percent of all aliens free before trial disappeared from court.
- Aliens abscond from court more often today than they did before 9/11.
- Deportation orders for failing to appear in court exceed deportation orders from cases that were tried by 306 percent.
- 46 percent of all unaccompanied children disappeared from U.S. immigration courts from 2013 through 2017.
- 49 percent of unaccompanied children failed to appear in U.S. immigration courts in 2017.

### Introduction

U.S. immigration courts recently released their numbers to Congress for fiscal year 2017. Hoped-for improvements are largely absent and problems that have defined the courts since their beginning persist. Most persistent of all is the failure of aliens to appear for their trials. These no-shows remain high, with 43 percent of all those free before trial — 41,302 aliens out of 95,342 — disappearing from court in 2017.<sup>1</sup> More to the point, these numbers add up.

### Failures to Appear in Court

American immigration courts consistently have the highest failure to appear (FTA) rates of any state or federal courts in the country.<sup>2</sup> From 1996 through 2017, 37 percent of all aliens free pending trial disappeared. From the 2,680,598 foreign nationals that Immigration and Customs Enforcement (ICE) released on their own recognition, 1,320,000, received deportation orders, 75 percent of them (993,593) for failure to appear. Only 25 percent of this group — some 324,402 people altogether — actually tried their cases.<sup>3</sup> This dynamic, first reported at a House Judiciary Committee hearing on June 17, 2010, eventually prompted heated denial by the Obama Justice Department<sup>4</sup> but it is not solely a problem of Democrat administrations. Administrations of both parties have failed to effectively address it.<sup>5</sup>

Immigration trial courts issued three times more deportation orders for failure to appear in court than deportation orders for cases that were actually tried (993,593 ÷ 324,402) over the last 22 fiscal years. (See Figure 1.) On average, more than 45,000 people each year disappeared from court since 1996, making failures to appear the single greatest source of deportation orders in the immigration court system.<sup>6</sup>

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In any other court system, such dysfunction would cry for redress. Only in U.S. immigration courts can litigants literally abandon their cases without fear of incarceration or removal, while litigants in nearly any other state or federal court risk arrest, contempt, and new charges for the same conduct. Federal law — 18 U.S.C. § 3146 — imposes penalties from one year all the way to 15 years or more for absconding from a U.S. district court or circuit court of appeals. Not so in federal immigration courts.<sup>7</sup> Rarely, if at all, are aliens held accountable for the same misconduct that in other court systems would land them —or citizens— in jail and in some instances brand them felons.

Even more rarely are those who abscond from court ever found much less removed. A 2006 Department of Homeland Security Inspector General report summarized this perennial problem:

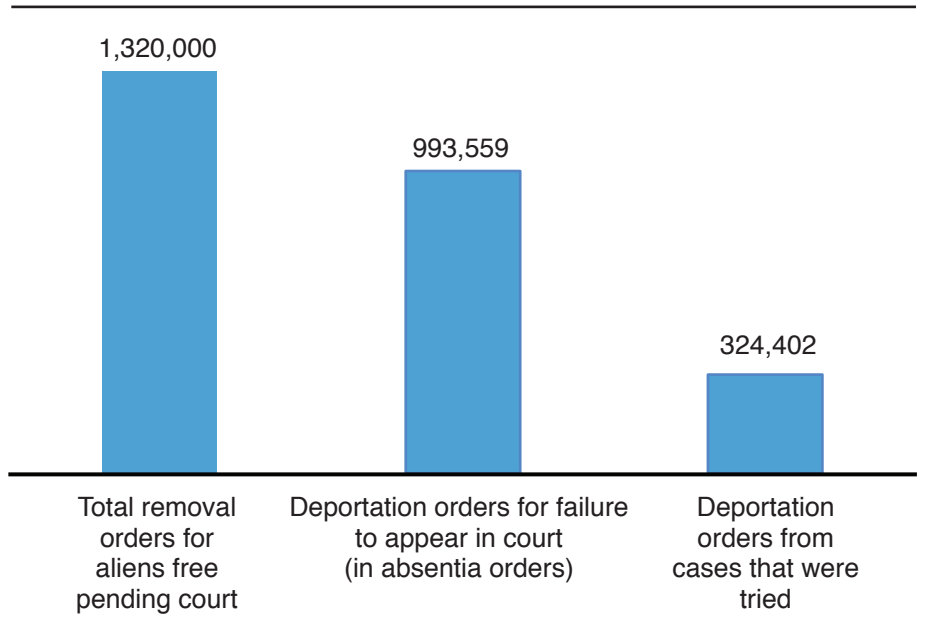
*Historical trends indicate that 62 percent of the aliens released [from detention] will eventually be issued final orders of removal by the U.S. Department of Justice Executive Office for Immigration Review (EOIR) and later fail to surrender for removal or abscond. ... [I]t is unlikely that many of the released aliens will ever be removed.<sup>8</sup>*

Contrast this dynamic with accused felons in state court who abscond (i.e., those who jump bail or commit escape) while free pending trial. According to the Bureau of Justice Statistics, 70 percent of these absconders are returned to custody within a year of their disappearance.<sup>9</sup> But not so in immigration courts. The greatest number of fugitive aliens re-arrested in one year — 34,155 — occurred in 2008, leading to a record 6 percent reduction in a population numbering 557,762 at the time.<sup>10</sup>

Indeed, those who dodged court in 2017 did so with identically the same frequency under Donald Trump as they did in 2015 when Barack Obama sat in the Oval Office.<sup>11</sup> Over the past three years, an average of 42 percent of all aliens free before trial failed to appear, with 113,753 people out of 272,440 skipping their court dates. (See Figure 2.) This chronic failure loudly echoes the broader themes of disorder that have plagued these federal tribunals since their inception in 1983.<sup>12</sup>

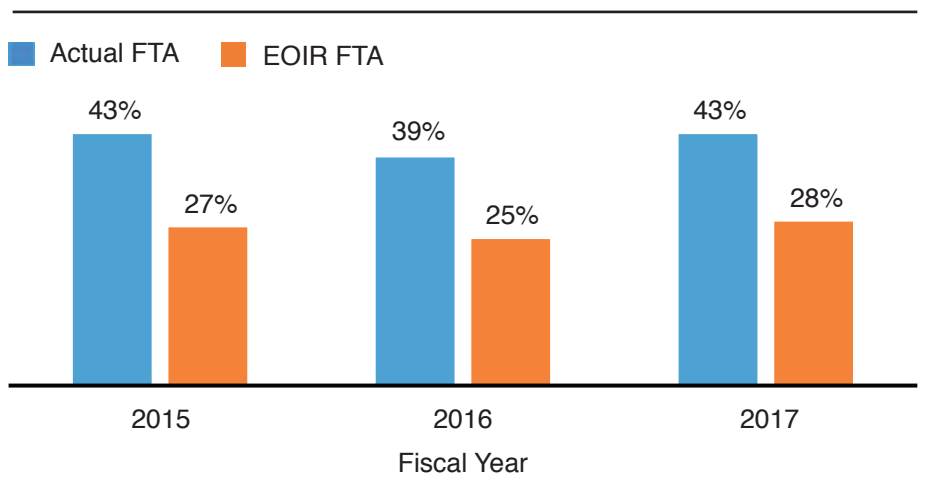
Never in 22 years of reporting has EOIR (i.e., Executive Office for Immigration Review, the Justice Department agency that manages the courts) squared with Congress and given an accurate descrip-

**Figure 1. Deportation Orders for Failure to Appear vs. Those from Cases That Were Tried**



**Source:** U.S. Department of Justice, Executive Office of Immigration Review, statistics yearbooks for 2013-2017.

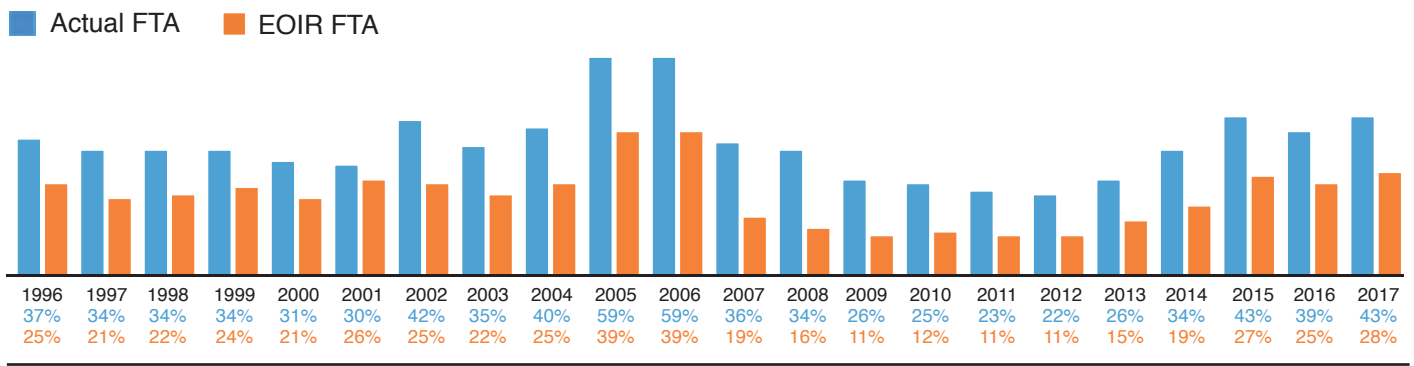
**Figure 2. Actual Failure to Appear Rates, 2015-2017**  
An average of 42 percent of all aliens free pending court absconded between FYs 2015 and 2017.



**Source:** U.S. Department of Justice, Executive Office of Immigration Review, statistics yearbooks for 2015-2017.

tion of failures to appear.<sup>13</sup> Since 1996, it has dramatically understated FTA rates in its annual reports. In 2017, EOIR stated the FTA rate *for all cases* was 28 percent, never mentioning this number includes aliens whose trials occurred in detention facilities. In other words, EOIR calculates the FTA rate — or what it now calls the *for all cases* rate — by including those who could not evade court. Yet over the last 22 years, court records show not even one deportation verdict for failure to appear was handed down in a detention facility. (See Figure 3.)

Figure 3. Actual vs. Published EOIR Failure to Appear Rates, FYs 1996-2017

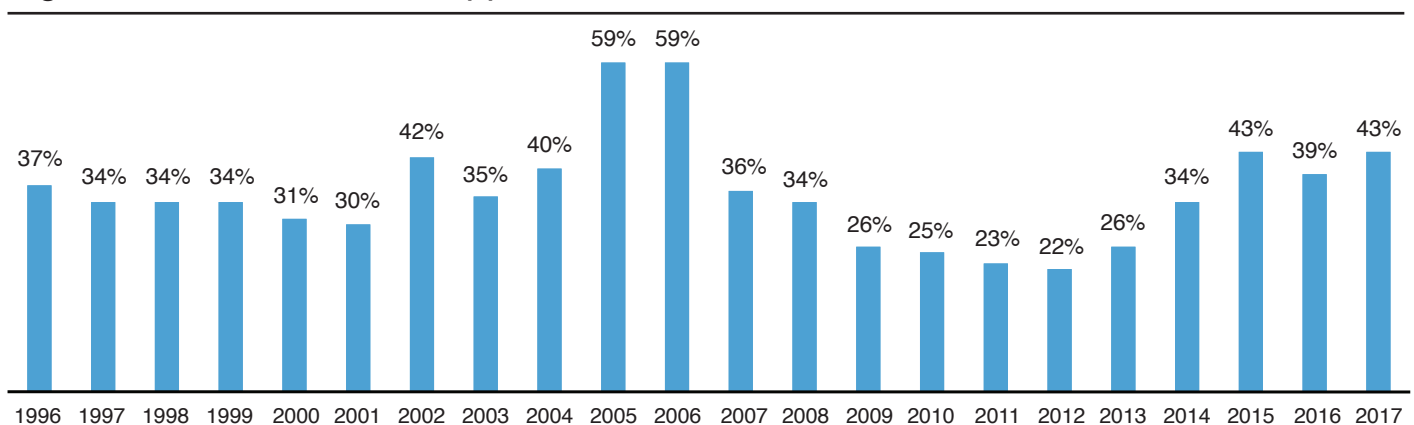


Source: U.S. Department of Justice, Executive Office of Immigration Review, statistics yearbooks for 2000-2017.

Instead of a direct comparison of aliens free before trial who failed to attend court out of all aliens free before trial ( $n = x \div y$ ), EOIR compares those who failed to appear to the much larger number of all those who were free before trial *plus* all those who were detained before trial ( $n = x \div (y + z)$ ). This comparison always yields a lower number than the actual failure to appear rate. By adding aliens in detention to its equation — persons who have no choice but to appear in court — EOIR enlarges the denominator and, by doing so, shrinks the value of the numerator. This skewed equation make failures to appear seem much lower than they really are.<sup>14</sup>

The truth is something else. When accurate accounting is used, failure to appear rates in some years doubled the rates EOIR declared to Congress.<sup>15</sup> EOIR stated the FTA rate was 19 percent in 2007, when the real number was 36 percent. In 2008, the courts stated that the FTA rate was 16 percent. Instead, it was 34 percent. In 2009, EOIR proudly declared failures to appear came in at 11 percent and noted it was the lowest number in five years. The real number was 26 percent.<sup>16</sup> From 2010 to 2014, the same dynamic is present: actual FTA rates significantly exceeded those EOIR reported to Congress. (See Figure 4.)

Figure 4. Actual Failure to Appear Rates, FYs 1996-2017

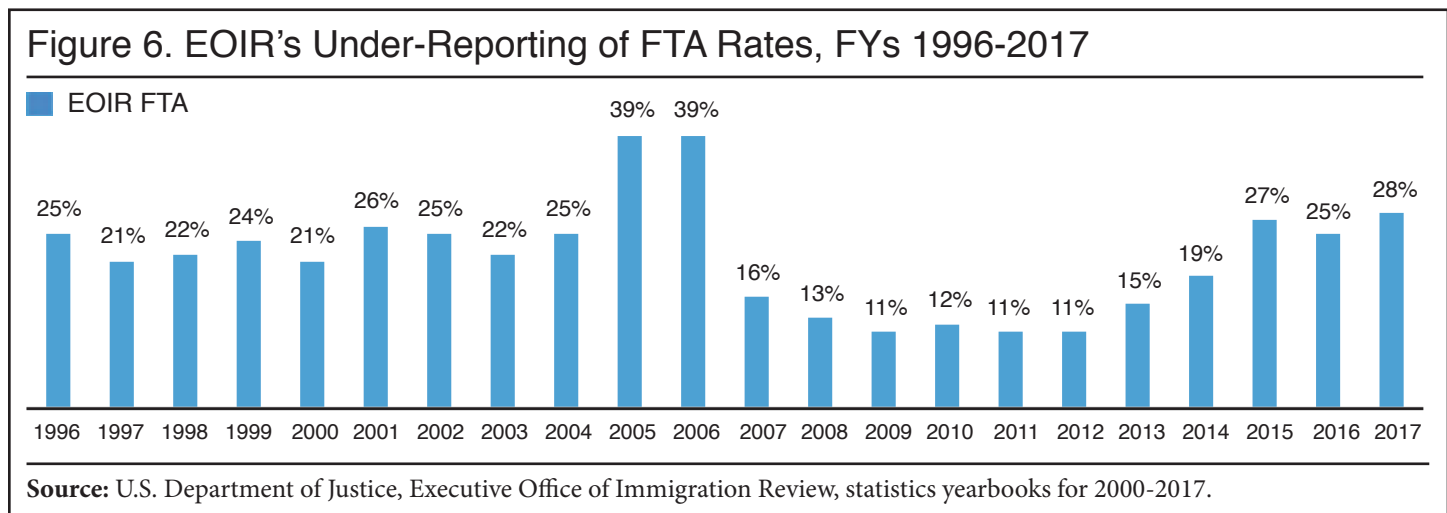
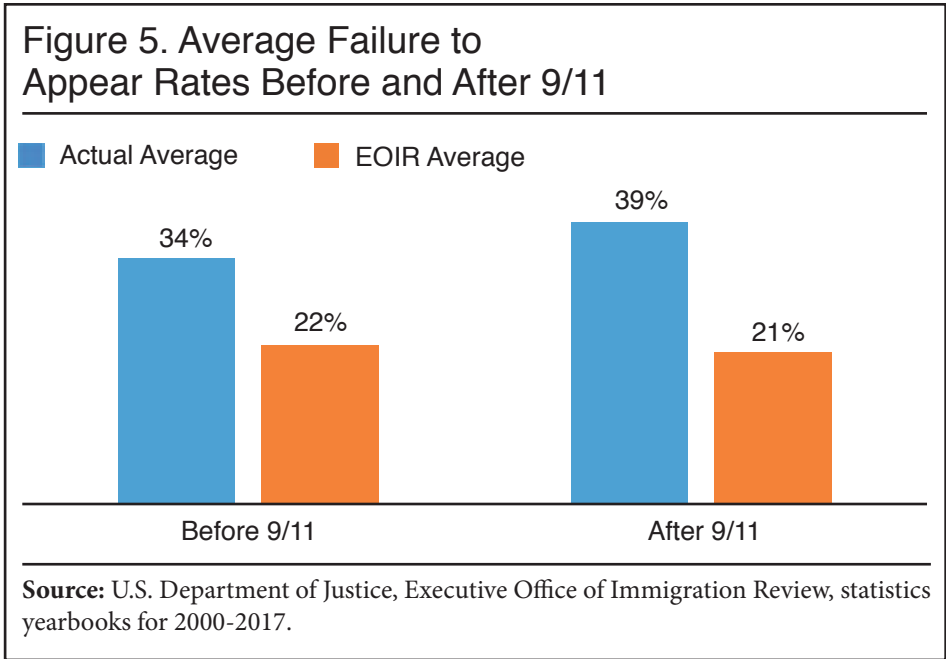


Source: U.S. Department of Justice, Executive Office of Immigration Review, statistics yearbooks for 2000-2017.

EOIR’s misleading failure to appear rates leave Congress and the public ignorant of both dysfunction in the courtroom and risks that too often end badly.<sup>17</sup> One fact stands out above all the rest: Aliens flee court in greater numbers now than they did before September 11, 2001.<sup>18</sup> From 1996 through 2000, 34 percent of all aliens free before trial — 251,309 out of 730,453 — disappeared. After 9/11, these numbers climbed. From 2002 through 2017, 39 percent — 699,641 people out of 1,808,449 — failed to keep their court dates.<sup>19</sup> On either side of 9/11, EOIR never provided candid numbers to alert policy-makers to this problem. (See Figure 5.)

Instead, EOIR’s reports to Congress showed average FTA rates of 21 percent each year in the five years leading up to

9/11 and an average FTA rate of 22 percent each year following 9/11. On average, EOIR under-reported FTAs by a factor of 162 percent from 1996 through 2000 and a factor of 186 percent from 2002 through 2017. (See Figure 6.)



An accurate description of the courts’ failure to appear rate *for all cases* should first state this number is derived from all cases heard both inside and outside detention facilities that resulted in the issuance of in absentia orders of removal. EOIR should qualify this description with the fact that aliens whose cases are heard in detention facilities almost never miss court and when they do miss, it’s because of illness or transportation failures, *not* intentional evasion. EOIR should add that these detention-based misses are so rare that they are not broken down in annual reports.

Most importantly, EOIR should acknowledge error. Only aliens who intentionally fail to appear for court can receive in absentia orders of removal, not those who were sick or whose bus broke down.<sup>20</sup> EOIR should either remove detained aliens from calculations of failure to appear rates or explain its inclusion of detained aliens in a rate termed *for all cases* whose chief attributes are lazy math and false impressions of how many aliens skip court. There is more to this dynamic, though.

EOIR’s use of labels — overall failure to appear rate, in absentia order rate, and now its new *for all cases* rate — wrongly characterizes all aliens as potential absconders when the problem is limited solely to one group: *aliens free before trial*. These labels have impaired understanding of court evasion and have insidiously promoted stereotypes regarding the foreign-born.

The many multiple opportunities for the courts to provide Congress and the public with critical analysis of this problem have been ignored at oversight hearings and in annual reports throughout the courts’ 36-year history.

The consequence of shallow reporting could not be clearer. Congress cannot fix a problem that isn’t identified as one. Errant reporting hides this problem and its effect is nothing less than corrosive to the courts themselves and to the public’s perception of its immigration mechanisms. Guidance authored by the National Research Council indicts EOIR’s slack accounting:

*Statistics that are publicly available from government agencies are essential for a Nation to advance the economic well-being and quality of life of its people. Its public policy makers are best served by statistics that are accurate, timely, relevant for policy decisions, and credible. ... [T]he operation of a democratic system of government depends on the unhindered flow of statistical information that citizens can use to assess government actions.”<sup>21</sup>*

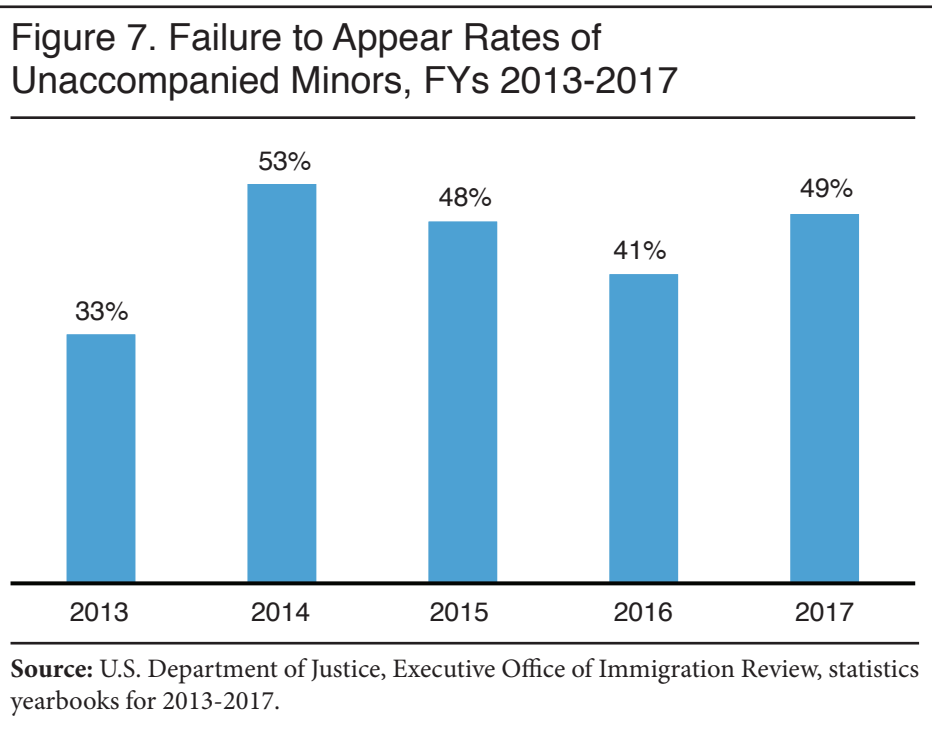
In short, EOIR’s yearly tabulations on this point are a pretense of candid audit and ignore those standards the National Research Council recommends for all federal agencies that report statistics,<sup>22</sup> chief among them the principle that “An agency should make every effort to provide accurate and credible statistics that will permit policy debates to be concerned about policy, not about the credibility of the data.”<sup>23</sup> Simply put, EOIR’s accounting invites doubt and distracts from discussions that seek solutions.

If not wholly deaf, EOIR is tone deaf to its grave responsibilities. The 9/11 Commission found failures among federal agencies that disserved their and their sister agencies’ statutory enforcement missions.<sup>24</sup> Among its conclusions, the Commission determined that U.S. borders were permeable and that immigration controls were lacking.<sup>25</sup> Among those grounds cited as cause for concern are the same issues immigration courts confront every day in hearings conducted across the United States: fraudulent passports, false statements on visa applications, false statements to border officials to gain entry into the United States, and violations of immigration laws while in the United States.<sup>26</sup> Still, 36 years after its creation and 18 fiscal years since 9/11, EOIR cannot honestly broker a critical dynamic that embraces illegal entry, asylum fraud, and shammed documents.

## Unaccompanied Minors

An unaccompanied minor is formally known as an “unaccompanied alien child” (UAC), a technical term defined by federal law as a child who “(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom — (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.” The frequency with which UACs miss court is only now being reported by EOIR and the numbers tell a further story of disorder and a more troubling one for children whose whereabouts may never be known.<sup>27</sup> This metric is long overdue.

From 2013 through 2017, 46 percent of these children disappeared before court. In raw numbers, 22,149 children out of 48,543 never made their court dates, meaning the person or agency with custody of the child ignored their summons (better known as a Notice to Appear or NTA). Over this time, FTAs increased each year with 49 percent missing court in 2017.<sup>28</sup> The likelihood that many — just like the adults who evade court — will never be found also increases with each passing day.<sup>29</sup>



## Conclusion

The challenges facing America's immigration courts are significant. Balancing liberty and order has never been easy regardless of the forums in which cases are tried. Balancing these sometimes opposing concepts is made more difficult by government reporting that intentionally misses the mark and leaves policymakers and, more importantly, the American public, less able to make informed decisions about these courts, spending priorities affecting them, and the enforcement imperatives that follow their rulings. It is not immigration that has failed America, but the American government that has often failed immigration.



## End Notes

<sup>1</sup> For 2017, 43 percent of aliens free pending trial never came to court. EOIR reported that the failure to appear (FTA) rate for all cases was 28 percent. Total failures to appear equaled 41,302, while the total aliens free pending trial equaled 95,342. Dividing 41,302 by 95,342 shows that 43 percent of aliens failed to appear in court in 2017, 54 percent higher than the 28 percent failure to appear rate stated by EOIR. See [“EOIR Statistics Yearbook: FY 2017”](#), “Figure 25. I-862 in Absentia Rates” and “Table 19. I-862 in Absentia Orders and ICCs by Respondent Type”, pp. 33-34. See also Brian H. Bornstein, Alan J. Tomkins, and Elizabeth M. Neeley, [“Reducing Courts’ Failure-to-Appear Rate: A Procedural Justice Approach”](#), National Criminal Justice Reference Service, Office of Justice Programs, May 2011, p. 6. States the article in pertinent part:

*One area of the criminal justice system where compliance is particularly lacking is in individuals’ response to orders to appear in court for relatively minor offenses such as traffic offenses, misdemeanors, and low-level felonies. Non-custodial criminal defendants often fail to appear for court. This occurs for all kinds of mandated appearances: arraignment, pre-trial (post-arraignment) hearings, trial, and post-trial. Initial (i.e., arraignment) failure-to-appear (FTA) rates for non-waiverable offenses are particularly problematic, as they involve the greatest volume of defendants. Many, if not most, of these individuals are not detained prior to trial (Goldkamp & White, 2006; VanNostrand & Keebler, 2009). There are a number of alternatives to pretrial detention (VanNostrand & Keebler, 2009), the most common of which, for minor offenses, is simply to release individuals in the community with little if any government oversight, placing the burden to appear in court entirely on defendants themselves (Goldkamp & White, 2006). Not surprisingly, this can result in substantial failure-to-appear (FTA) rates. FTA rates vary depending on jurisdiction and offense type, ranging from less than 10% (e.g., Cuvelier & Potts, 1997; VanNostrand & Keebler, 2009) to as high as 25-30% (e.g., Davis, 2005; Helland & Tabarok, 2004; McGinty, 2000). These failures to appear are costly for both the court system and defendants (Levin, Kennel, Pellegrino, Simmons, & Surett, 2007).*

See also Timothy R. Schnacke, Michael R. Jones, and Dorian M. Wilderman, [“Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Resulting Court Date Notification Program”](#), *Court Review*, Vol. 48, 2012. State the authors:

*In 2004, one of the most important issues facing Jefferson County, Colorado, criminal justice leaders was the rising numbers of these failures to appear (FTAs). That year, consultants working on behalf of the National Institute of Correction’s Jails Division completed a local system assessment showing that 33 percent of the county jail’s inmates were compliance violators (i.e., failure to comply with court orders by failing to appear, pay, or perform some task) up from only 8 percent in 1995. Subsequent jail-population analyses found that three-fourths of these compliance violators had been booked on failure to appear warrants for misdemeanor, traffic, or municipal offenses, and in 90 percent of the studied cases these FTA warrants were issued to defendants missing the very first court event in their case. ... As a matter of jail-population management alone, a facility with roughly 25 percent of its inmates incarcerated for failing to appear for mostly lower-level offenses did not seem like the best use of the limited jail resources.*

See also Brian H. Bornstein, Alan J. Tomkins, Elizabeth M. Neeley, Mitchel N. Herian, and Joseph A. Hamm, [“Reducing Courts’ Failure-to-Appear Rate by Written Reminders”](#), *Psychology, Public Policy, and Law* Vol. 19, No. 1, 2013, pp. 70–80. States the article: “FTA rates vary depending on jurisdiction and offense type, ranging from less than 10% (e.g., Cuvelier & Potts, 1997; VanNostrand & Keebler, 2009) to as high as 25–30% (e.g., Davis, 2005; Helland & Tabarok, 2004; McGinty, 2000).”

<sup>2</sup> All studies measuring failure to appear rates, without exception, compared those who failed to appear only to those who were free before trial. Never were those in custody added to the control group of those free before trial in order to determine the failure to appear rate. See Brian H. Bornstein, Alan J. Tomkins, and Elizabeth M. Neeley, [“Reducing Courts’ Failure-to-Appear Rate: A Procedural Justice Approach”](#), National Criminal Justice Reference Service, Office of Justice Programs, May 2011 p. 6; Timothy R. Schnacke, Michael R. Jones, and Dorian M. Wilderman, [“Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Resulting Court Date Notification Program”](#), *Court Review: The Journal of the American Judges Association*, Vol. 48, 2012; Thomas H. Cohen, and Brian A. Reaves, [“Pretrial Release of Felony Defendants in State Courts”](#), Bureau of Justice Statistics Special Report, Department of Justice, Office of Justice Programs, November 2007, pp. 1 and 8-10; Thomas H. Cohen, [“Pre-](#)

[trial Release and Misconduct in Federal District Courts, 2008-2010](#)”, U.S. Department of Justice, Bureau of Justice Statistics, November 2012, Table 9 and p. 10.

<sup>3</sup> Of the 2,680,598 foreign nationals released on their own recognizance pending their court proceedings, 1,320,000 were ordered removed, 75 percent of them, or 993,593, for failing to appear in court. See EOIR statistics yearbooks for: [2000](#), pp. L1-L2, Figures 15-17 and p. T1, Figure 23; [2005](#), pp. H1-H4, Figures 10-12 and p. O1, Figure 23; [2010](#), pp. H1-H4, Figures 10-12 and pp. O1, Figure 23; and [2015](#), pp. P1-P4 and Figures 23 and 26. See also “[EOIR Statistics Yearbook: FY 2017](#)”, “Figure 25. I-862 in Absentia Rates” and “Table 19. I-862 in Absentia Orders and ICCs by Respondent Type”, pp. 33-34. Over the same period (1996 through 2017), 25 percent, or 324,402, of those free pending trial actually litigated their claims. Dividing 993,593 by 22 (993,593 ÷ 22 = 45,163) reveals 45,000 people on average failed to appear for their hearings in immigration courts each year and were ordered removed.

<sup>4</sup> U.S. House Judiciary Committee, Subcommittee on Immigration and Border Security, [Testimony of Mark H Metcalf](#), June 17, 2010. See also Juan Osuna, “[Immigration Numbers Are Accurate](#)”, *Miami Herald*, July 27, 2011.

<sup>5</sup> Presidential administrations of both parties have not addressed failures of aliens to appear in court. While FTA rates were highest under George W. Bush, a record number of aliens for the time were removed from the United States, some 2.1 million. See Ana Gonzalez-Barrera and Mark Hugo Lopez, “[U.S. immigrant deportations fall to lowest level since 2007](#)”, Pew Research Center, FactTank, December 16, 2016. Though FTA rates declined under Barrack H. Obama, the backlog of untried cases nearly tripled from 201,333 in 2009 to 594,959 in 2017. Both administrations witnessed high FTAs and made no significant progress in curtailing this dynamic. See [Syracuse University’s TRAC Immigration Court Backlog Tool](#). Of the 2,680,598 aliens the United States permitted to remain free pending trial over the last 20 years, 37 percent of this number — 993,593 — never came to court. Composites for five-year periods may be found in EOIR statistics yearbooks: for [2000](#), pp. L1-L2, Figures 15-17 and p. T1, Figure 23; [2005](#), pp. H1-H4, Figures 10-12 and p. O1, Figure 23; [2010](#), pp. H1-H4, Figures 10-12 and pp. O1, Figure 23; and [2015](#), pp. P1-P4 and Figures 23 and 26.; See also “[EOIR Statistics Yearbook: FY 2017](#)”, “Figure 25. I-862 in Absentia Rates” and “Table 19. I-862 in Absentia Orders and ICCs by Respondent Type”, pp. 33-34.

<sup>6</sup> Over the last 22 years, 993,593 aliens absconded from U.S. immigration courts. Dividing 993,593 by 22 reveals that an average of 45,163 each year people disappeared before their trials between 1996 and 2017.

<sup>7</sup> [18 U.S.C. § 3146](#), Penalty for Failure to Appear:

- (a) *Offense—Whoever, having been released under this chapter knowingly—*
  - (1) *fails to appear before a court as required by the conditions of release; or*
  - (2) *fails to surrender for service of sentence pursuant to a court order; shall be punished as provided in subsection (b) of this section.*
  
- (b) *Punishment.—*
  - (1) *The punishment for an offense under this section is—*
    - (A) *if the person was released in connection with a charge of, or while awaiting sentence, surrender for service of sentence, or appeal or certiorari after conviction for—*
      - (i) *an offense punishable by death, life imprisonment, or imprisonment for a term of 15 years or more, a fine under this title or imprisonment for not more than ten years, or both;*
      - (ii) *an offense punishable by imprisonment for a term of five years or more, a fine under this title or imprisonment for not more than five years, or both;*
      - (iii) *any other felony, a fine under this title or imprisonment for not more than two years, or both; or*
      - (iv) *a misdemeanor, a fine under this title or imprisonment for not more than one year, or both; and*
    - (B) *if the person was released for appearance as a material witness, a fine under this chapter or imprisonment for not more than one year, or both.*
  - (2) *A term of imprisonment imposed under this section shall be consecutive to the sentence of imprisonment for any other offense.*



<sup>8</sup> [“Detention and Removal of Illegal Aliens”](#), Audit Report OIG-06-33, Department of Homeland Security, Office of Inspector General, April 2006, p. 3.

<sup>9</sup> Eric Helland and Alexander Tabarrok, [“The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping”](#), *Journal of Law and Economics*, Vol. 47, No. 1, February 2004, pp. 93-122 (using figures from the State Court Processing Statistics program of the Bureau of Justice Statistics at the U.S. Department of Justice). Some of these failures to appear are due to sickness or forgetfulness and are quickly corrected, but many represent planned abscondments. Because this is completely unacceptable, considerable resources are put into getting these defendants into court for their trials. Still, after one year, some 30 percent of the felony defendants who initially fail to appear remain fugitives from the law. In absolute numbers, some 200,000 felony defendants fail to appear every year, and of these, approximately 60,000 will remain fugitives for at least one year.

<sup>10</sup> [“U.S. Immigration and Customs Enforcement Fiscal Year 2008 Annual Report: Protecting National Security and Upholding Public Safety”](#). States the annual report:

*These efforts continued to pay dividends in FY08 as ICE arrested 34,155 fugitives, which is an increase of more than 12 percent over the previous year. This has led to a 6 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. ICE also spearheads various joint fugitive task forces in communities throughout the nation, through which ICE agents coordinate and collaborate with other federal, state and local law enforcement agencies to share information leading to the arrest and removal of fugitive aliens.*

<sup>11</sup> [“FY 2015 Statistics Yearbook”](#), EOIR, pp. P1-P4. Figures 23 and 26 reveal 43 percent of all aliens free pending trial failed to appear in court. In other words, 38,229 aliens out of 88,868 free before trial absconded from immigration courts.

<sup>12</sup> In 1989, GAO found aliens who failed to appear at their deportation hearings “do not suffer penalties ... or such adverse consequences as loss of appeal rights or denial of the rights to claim relief from deportation.” “Even if they [aliens] are reapprehended,” stated the report, “the deportation process continues where it was interrupted” by their absconding. Not only did aliens pick up where they left off, but GAO determined “the additional time aliens ... accumulated in the country by avoiding deportation proceedings [might] support their requests for relief from deportation because of their good conduct while they were here.” In short, aliens who absconded from court were rewarded for bad conduct. A “failure to appear [did] not jeopardize their claim of good conduct when applying for relief” from removal. See [“Immigration Control: Deporting and Excluding Aliens from the United States”](#), GAO/GGD-90-18, U.S. General Accounting Office, October 1989, p. 31. (Note: the Executive Office of Immigration Review, the Department of Justice agency that manages the courts, was founded in 1983.)

<sup>13</sup> For 2017, 43 percent of aliens free pending trial never came to court. EOIR reported the failure to appear rate for all cases was 28 percent. Total failures to appear equaled 41,302, while the total aliens free pending trial equaled 95,342. Dividing 41,302 by 95,342 shows that 43 percent of aliens failed to appear in court in 2017, 54 percent higher than the 28 percent failure to appear rate stated by EOIR. See [“EOIR Statistics Yearbook: FY 2017”](#), “Figure 25. I-862 in Absentia Rates” and “Table 19. I-862 in Absentia Orders and ICCs by Respondent Type”, pp. 33-34.

<sup>14</sup> The courts’ 2017 annual report provides a telling example of EOIR’s institutional misguidance. Here’s how they did it: Conceding 41,302 aliens ran from court in 2017, court executives didn’t compare the runaways to all aliens free pending trial, *i.e.*  $41,302 \div 95,292 = 43$  percent. Instead, they added all aliens in detention to the denominator, so the equation was  $41,302 \div 149,436$  (95,292 aliens free pending trial + 54,094 aliens in detention) = 28 percent. Nowhere in 22 years of annual reports are direct comparisons ever made between aliens free before trial who fled court vs. all aliens free before trial. See [“EOIR Statistics Yearbook: FY 2017”](#), “Figure 25. I-862 in Absentia Rates” and “Table 19. I-862 in Absentia Orders and ICCs by Respondent Type”, pp. 33-34. Using this method, the courts minimized failures to appear in 2017 and every year reported back to 1996 and in the process hid the fact that nearly two-fifths of all those released on their own recognizance never made it to court.

<sup>15</sup> Mark Metcalf, [“Built to Fail: Deception and Disorder in America’s Immigration Courts”](#), Center for Immigration Studies, May 20, 2011, p. 39, Table 1. In 2007, the courts stated the FTA rate was 19 percent. It was actually 38 percent. In 2008, the

courts stated the FTA rate was 16 percent. Instead, it was 37 percent. In 2009, the court said the FTA was 11 percent, when it was really 32 percent.

<sup>16</sup> *Ibid.*

<sup>17</sup> [“ICE Arrests 156 Criminal Aliens and Immigration Violators During Operation Keep Safe in Chicago Area”](#), ICE Newsroom, U.S. Immigration and Customs Enforcement, May 25, 2018. States the article:

*Of the 156 [aliens] arrested, 74 had criminal convictions.*

...

*Most of the aliens arrested by ERO deportation officers during this operation had prior criminal histories that included convictions for the following crimes: battery, commercial sex, criminal trespass (vehicle), dangerous drugs, domestic violence, driving under influence, drug trafficking, felony burglary, homicide, illegal entry, indecency/sex conduct, larceny, obstructing justice, possessing cocaine, possessing controlled substance, possessing marijuana, reckless discharge of a weapon, retail theft, sexual assault, solicitation of a sex act, traffic offense and trespassing.*

*Fourteen of those arrested were immigration fugitives who have final orders of removal. Thirty-six others illegally re-entered the United States after having been previously deported, which is a felony. Depending on an alien’s criminality, an alien who re-enters the United States after having been previously deported commits a felony punishable by up to 20 years in federal prison, if convicted. The remaining 106 arrests were at-large aliens who are illegally present in the United States.*

<sup>18</sup> Mark Metcalf, [“Courting Disaster: Absent attendance and absent enforcement in America’s immigration courts”](#), Center for Immigration Studies, March 2017, p. 13 and see end notes 144-147. States the report:

*Large numbers of ICE’s Level I and II offenders — murderers, drug traffickers, kidnappers, and sex offenders — obtained release from ICE custody, only to again jeopardize the communities that once placed them behind bars and hopefully off U.S. soil. Having the highest removal priority made no difference. From 2013 through 2015, 86,288 criminal aliens—over whose custody and removal from the United States ICE had full discretion —were turned back on the American public. Since 2010, 124 criminal aliens were implicated in 135 deaths after ICE declined to remove them. Where removal to their home countries would have significantly reduced, if not eliminated, further threats to American neighborhoods, releasing these criminals prompted a return to the lifestyles that first made them felons. Criminal aliens proved the truism common to all lawbreakers regardless of nationality: Felony offenders tend to offend again and ICE’s releasing them on an unsuspecting public proved the point.*

<sup>19</sup> This comparison of totals for failures to appear before and after 9/11 does not include fiscal year 2001. In 2001, 30 percent of aliens free pending trial — or 42,643 out of 142,515 — failed to appear for court. See EOIR [“Statistical Year Book 2001”](#), March 2002, pp. L1-L2.

<sup>20</sup> See EOIR’s [“FY 2007 Statistical Year Book”](#), April 2008, p. H2 and Figures 10-12; and EOIR’s [2002](#) statistics yearbook, p. H2 and Figures 10-12. In both years, EOIR stated: “Failures to appear for detained cases occur infrequently, generally only because of illness or transportation problems, and are not broken out in the following figures.” Sitting as a special judge in Los Angeles, Calif., (Mira Loma Detention Facility) and San Antonio, Texas, the author heard cases involving detained aliens. In a few instances, hearings were rescheduled because the detainees were not present in court because of transportation or illness issues. The non-appearances were no one’s fault or intention and in absentia removal orders were not imposed.

<sup>21</sup> Margaret E. Martin, Miron L. Straf, and Constance F. Citro, eds., [Principles and Practices for A Federal Statistical Agency, 3rd ed.](#), Washington, D.C.: The National Academies Press, 2005, p.3. 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.” Note: This book is now in its sixth edition and can be downloaded [here](#).)

<sup>22</sup> The National Academies of Science, Engineering, and Medicine [Committee on National Statistics](#) (CNSTAT) was established in 1972 at the National Academies of Sciences, Engineering, and Medicine to improve the statistical methods and information on which public policy decisions are based. The committee carries out studies, workshops, and other activities to foster better measures and fuller understanding of the economy, the environment, public health, crime, education, immigration, poverty, welfare, and other public policy issues. It also evaluates ongoing statistical programs and tracks the statistical policy and coordinating activities of the federal government, serving a unique role at the intersection of statistics and public policy. The committee’s work is supported by a consortium of federal agencies through a National Science Foundation grant. The Committee on National Statistics first issued *Principles and Practices for a Federal Statistical Agency* in 1992. Beginning in early 2001, with the second edition, it committed to updating “P&P” every four years to coincide with a new presidential administration or second term. This slim document underscores for the executive and legislative branches of government the important public good provided by strong federal statistical agencies.

<sup>23</sup> Margaret E. Martin, Miron L. Straf, and Constance F. Citro, eds., [Principles and Practices for A Federal Statistical Agency, 3rd ed.](#), Washington, D.C.: The National Academies Press, 2005, p.3. States the book: “An agency should make every effort to provide accurate and credible statistics that will permit policy debates to be concerned about policy, not about the credibility of the data.”

<sup>24</sup> [“The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States”](#), Executive Summary, pp. 13-14. States the report:

*Considered collectively, the 9/11 hijackers ... presented passports manipulated in a fraudulent manner; presented passports with suspicious indicators of extremism; made detectable false statements on visa applications; made false statements to border officials to gain entry into the United States; and violated immigration laws while in the United States. Neither the State Department’s consular officers nor the Immigration and Naturalization Service’s inspectors and agents were ever considered full partners in a national counterterrorism effort. Protecting borders was not a national security issue before 9/11.*

(Author’s Note: This section of the report clearly states U.S. borders were permeable and immigration controls lacking.)

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> [“Detention and Removal of Illegal Aliens”](#), Audit Report OIG-06-33, Department of Homeland Security, Office of Inspector General, April 2006, p. 3. See also Amy B. Wang, [“The U.S. lost track of 1,475 immigrant children last year”](#), *The Washington Post*, May 29, 2018. States the article:

*During a Senate committee hearing late last month, Steven Wagner, an official with the Department of Health and Human Services, testified that the federal agency had lost track of 1,475 children who had crossed the U.S.-Mexico border on their own (that is, unaccompanied by adults) and subsequently were placed with adult sponsors in the United States. As the Associated Press reported, the number was based on a survey of more than 7,000 children:*

*From October to December 2017, HHS called 7,635 children the agency had placed with sponsors, and found 6,075 of the children were still living with their sponsors, 28 had run away, five had been deported and 52 were living with someone else. The rest were missing, said Steven Wagner, acting assistant secretary at HHS.*

<sup>28</sup> [“EOIR Statistics Yearbook: FY 2017”](#), “Figure 25. I-862 in Absentia Rates” and “Table 19. I-862 in Absentia Orders and ICCs by Respondent Type”, pp. 33-34.

<sup>29</sup> [“Detention and Removal of Illegal Aliens”](#), Audit Report OIG-06-33, Department of Homeland Security, Office of Inspector General, April 2006, p. 3.