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## **Tilted Justice**

**Backlogs Grow While Fairness Shrinks in U.S. Immigration Courts**

October 2017



**ON HUMAN RIGHTS**, the United States must be a beacon. Activists fighting for freedom around the globe continue to look to us for inspiration and count on us for support. Upholding human rights is not only a moral obligation; it's a vital national interest. America is strongest when our policies and actions match our values.

Human Rights First is an independent advocacy and action organization that challenges America to live up to its ideals. We believe American leadership is essential in the struggle for human rights so we press the U.S. government and private companies to respect human rights and the rule of law. When they don't, we step in to demand reform, accountability, and justice. Around the world, we work where we can best harness American influence to secure core freedoms.

We know that it is not enough to expose and protest injustice, so we create the political environment and policy solutions necessary to ensure consistent respect for human rights. Whether we are protecting refugees, combating torture, or defending persecuted minorities, we focus not on making a point, but on making a difference. For over 30 years, we've built bipartisan coalitions and teamed up with frontline activists and lawyers to tackle issues that demand American leadership.

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# Contents

<b>Executive Summary</b>	<b>4</b>
Key Findings	5
Recommendations	7
<b>Background: The Immigration Court Backlog</b>	<b>9</b>
Excessive Wait Times for Immigrants in Court Proceedings	11
Delays are Harmful to Asylum Seekers	12
<b>Impact of Trump Administration Policy Shifts</b>	<b>13</b>
Detailing Immigration Judges to Detention Centers “at the Border”	14
Changes that Risk Sacrificing Fairness to Speedy Decision-making	16
DHS Abandons Prosecutorial Discretion; Attorneys Report Decreased Cooperation	17
<b>Local Challenges</b>	<b>19</b>
<b>Immigration Judge Hiring</b>	<b>20</b>
Changes in Hiring Process	21
Hiring Trends	22
<b>Due Process Implications of the Backlog and Recent Trump Administration Policies</b>	<b>22</b>
Impact of Backlog and Trump Administration Policies on Access to Counsel	22
Expanding Expedited Removal Will Thwart Due Process	23
<b>Appendix I</b>	<b>25</b>
Figure 1	27

## Executive Summary

The backlog in the U.S. immigration courts has reached an all-time high, with 632,261 cases pending as of August 2017. In some of the nation's largest immigration courts, people wait an average of three to five years for their next hearing. In an April 2016 report, Human Rights First detailed the growth of the backlog and its devastating effect on asylum seekers and their families. Since then, the backlog has continued to grow. Trump Administration policies are making it worse.

On January 25, 2017, President Trump issued two executive orders that are aggravating the backlog and threatening the fair treatment of asylum seekers and other immigrants. In these orders, the president called for the expansion of detention facilities to hold immigrants for the duration of their immigration court proceedings, and instructed Attorney General Jeff Sessions to “immediately” assign immigration judges to detention facilities. He stated that it was executive branch policy to “expedite determinations of apprehended individual’s claims of eligibility” to remain in the country, and declared an end to strategies that prioritize some categories of immigrants for enforcement. One of the orders also threatened the expansion of summary deportation proceedings known as expedited removal, which deny people the due process safeguard of an immigration court hearing.

In response to the president’s instruction, Attorney General Jeff Sessions directed immigration courts to temporarily assign up to 50 judges to detention centers in border areas—a move that has caused thousands of hearing adjournments. Also in response, the Department of Homeland Security (DHS), in a February 20 memorandum, called for the “expedited

resolution” of asylum claims in detention facilities near the border, raising concerns that “rocket-docket” hearings could deprive asylum seekers and other immigrants of the chance to secure legal counsel and gather evidence needed to meet the requirements of complex U.S. laws.

On October 8, the White House released its “Immigration Policy Priorities,” a long list of the administration’s demands for what should be included in legislation providing immigration status to young people who were protected under the Deferred Action for Childhood Arrivals (DACA) program. In addition to calling for increased hiring of immigration judges to address backlogs, the administration’s list makes clear that it is using the existence of the backlog as a pretext for advancing policies that deprive people of immigration court hearings through expanded use of expedited removal. It also raises additional concerns that cases may be rushed through the courts due to the imposition of rigid “performance metrics” on immigration judges.

These proposals, if enacted, would curtail access to asylum and the due process safeguard of an immigration court hearing. On October 12, Attorney General Sessions traveled to the immigration court’s headquarters in Virginia to give a speech that inaccurately painted asylum cases as “overloaded with fake claims,” raising concerns that he is trying to influence judges to deny even more cases.

This report draws on research conducted in the summer and early fall of 2017, including a survey of 50 nonprofit and pro bono lawyers representing immigrants in immigration courts across the country, as well as interviews with former immigration court judges and officials, experts, and practitioners.

## Key Findings

- **The backlog continues to expand, reaching 632,261 cases as of August 2017, and has increased by over 82,000 since President Trump took office.** The courts in California and Texas have the largest caseloads, with 118,752 and 100,566 cases, respectively, and the New York City court has the largest for a single court, nearly 83,000. The number in Houston grew from 6,423 to 48,473 between 2010 and August 2017. The Los Angeles court has nearly 2,000 cases before each judge, and eight judges in San Antonio handle more than 27,000 pending cases.
- **Wait times in immigration courts continue to grow.** In August 2015, there were 168,000 cases nationwide in courts with average waits of more than three years. In April 2017, that number climbed to 240,000 cases in the nation's most backlogged courts, where people wait on average three to five years for their next hearing. In Chicago, the most delayed court, people will wait nearly five years on average for their next hearing, and in the most backlogged courts in California (San Francisco, Los Angeles, and San Diego)—which together handle over 112,000 cases—people wait more than three years on average. The nearly 90,000 cases in Texas's three largest courts (San Antonio, Houston, and Dallas) will wait almost four years on average. In New York's 83,000 cases, people will wait nearly three years on average for their next immigration court hearing.
- **Immigrants and their families suffer because of the backlog.** As a result of the long waits, many asylum seekers and other immigrants face hardships ranging from physical danger to financial difficulties. In some cases, refugees' children and spouses—who can't be brought to safety until their family member receives asylum—continue to face persecution in their home countries.
- **President Trump's executive orders have exacerbated the backlog and triggered even longer waits in some of the nation's busiest courts.** In an executive order, President Trump instructed Attorney General Jeff Sessions to reassign immigration judges to border detention facilities. The ten detention facilities first selected to receive judges on detail account for around 4,500 (or less than one percent) of the over 600,000 pending court cases, while the courts from which immigration judges were pulled handle a combined non-detained total of 550,000 pending cases that will wait three to five years on average for their next day in court. In the three months after Sessions directed this move, 22,600 hearings were postponed in some of the most backlogged immigration courts according to data provided by the Department of Justice in response to a Freedom of Information Act (FOIA) request by the National Immigrant Justice Center (NIJC). By contrast, in all of 2015 just 6,983 such adjournments were issued. Trial ready cases, including ones in which witnesses had traveled great distances, were adjourned. Work preparing cases, including court time, will need to be repeated years down the road. Between March and June 2017, there were 3,459 adjournments in the Los Angeles court, 2,612 in New York, and 1,822 in San Francisco—all courts with wait times averaging close to three years.
- **White House call for immigration judge "performance metrics" and DOJ**

**memorandum limiting immigration court continuances may cause cases to be rushed.** On July 31, 2017, the DOJ's Executive Office for Immigration Review (EOIR) issued a memorandum instructing judges to "carefully consider" adjournment requests by individuals in immigration court proceedings, citing their "strong incentive" to "abuse continuances." The memo describes its purpose as the "efficient handling of motions for continuance in order to ensure that adjudicatory inefficiencies do not exacerbate the current backlog of pending cases nor contribute to the denial of justice for respondents and the public." It neglects to mention, however, the importance of legal counsel and the need to allow immigrants sufficient time to seek pro bono representation. Moreover, the Government Accountability Office (GAO) recently identified the sharpest rises in adjournment requests as DHS and operational-related continuances (as opposed to respondent-related requests, which would include requests to adjourn to secure legal counsel). The White House's October 8 call for "performance metrics" levied on immigration judges also raises concerns that immigration judges may be pressured to rush cases through hearings without adequate time for asylum seekers to secure counsel or gather evidence.

- **Changes to prosecutorial discretion practices by government attorneys are adding to the backlog.** In the memorandum implementing the executive order "Enhancing Public Safety in the Interior of the United States," then DHS Secretary John Kelly declared that the agency will "no longer exempt classes or categories of removable aliens from potential enforcement." As a result,

immigration officers are referring cases into removal proceedings that they wouldn't have previously. Given the administration's effort to increase the use of detention, the bulk of new cases involve detained people. This leaves immigration judges little time to tackle the backlog. Moreover, case closures based on prosecutorial discretion have plummeted, from around 2,400 per month in 2016 to fewer than 100 per month during the first five months of the Trump Administration. In addition, U.S. Immigration and Customs Enforcement (ICE) attorneys are now, in many cases, refusing to stipulate to uncontested facts or legal questions, wasting court time and resources.

- **Trump Administration directives are undermining the fairness of the immigration courts.** Secretary Kelly's February 2017 implementing memorandum references the "expedited resolution" of asylum claims, which could signal the imposition of rocket dockets that would deprive asylum seekers of the time needed to secure legal counsel and gather evidence. Some nonprofit attorneys have already reported that judges in detention facilities are requiring asylum seekers to prepare their cases in weeks. Asylum seekers typically need several months to gather evidence, prepare witnesses, and present legal arguments necessary to prove eligibility for asylum under increasingly complex U.S. laws and legal standards. In addition, the July 2017 the Executive Office for Immigration Review (EOIR) memorandum discourages immigration judges from granting adjournments, which immigrants often need to secure legal counsel, particularly pro bono counsel.
- **Five-Hundred Twenty-Four immigration judges, plus support staff, are needed to**

**eliminate the backlog by 2029.** At current prosecutorial, case completion, and staffing levels, the number of pending cases will likely increase to over 640,000 by the end of fiscal year 2017 (final data is not yet available), and will continue to expand until DOJ fills all funded immigration judge positions. Recent hiring, bringing the number of judges to more than 300 for the first time, is a step in the right direction. However, if the corps remains at its current size of 334 judges, the number of pending cases would reach over 1 million in FY 2026. If DOJ fills all funded 384 judge positions, the backlog would decrease but would persist until 2048.

- **Of the 123 immigration judges hired since October 2014, 85 percent were former attorneys for immigration enforcement agencies or other branches of the federal government.** Only eight percent of new judges came from a non-governmental organization background, and seven percent came from private practice (most *not* from private immigration practices). In a 2010 study, the American Bar Association noted that hiring a large proportion of immigration judges with prior government experience could undermine the appearance of neutrality.
- **The attorney general's change to the immigration judge hiring process raises concerns about safeguarding against politicized hiring.** Career immigration officials appear to have been removed from near-final immigration judge hiring panels, according to internal EOIR correspondence attained by NIJC through its FOIA request to the DOJ. While a faster hiring pace is desperately needed, Congress should take steps to assure non-politicized hiring. Other reforms, such as prioritizing the approval of

judge candidates and fast-tracking FBI background checks—steps recommended by senior administration officials to Human Rights First in 2016 and 2017—were not in the EOIR correspondence describing changes to the hiring process.

## Recommendations

Both the Trump Administration and Congress must take steps to address the immigration court backlog, ensure fair and timely immigration court proceedings, and protect people who are suffering hardships and dangers due to the backlogs. The Department of Justice's Executive Office for Immigration Review should, as detailed below, immediately create a reliable and fair process for advancing cases.

Chronic underfunding of the immigration courts, in conjunction with massive increases in enforcement resources, helped create the massive backlog. Congressional leaders and former government officials who served in both Democratic and Republican administrations have recognized that insufficient funding undermines the ability of the courts to carry out their duties. The Trump Administration has acknowledged the backlog, and expressed support for hiring additional immigration judges.

But the White House should not use the backlog as a pretext to advance policies that block access to asylum and the immigration courts or otherwise undermine justice, including: rocket dockets, unreasonable case processing goals, and similar efforts that rush asylum seekers and other immigrants through their court proceedings, as well as the expanded use of expedited removal and immigration detention. If the administration is serious about wanting to address the backlogs, it should support increased immigration court staffing without simultaneously curtailing access to fair process, refrain from redeploying judges to satisfy

political objectives, and take the additional steps outlined below.

**The White House should:**

- **Refrain from advancing—and revise—policies, directives, “principles” and orders that undermine fair immigration hearings**, including the encouragement of rocket dockets or rushed hearings, re-directing immigration court docket management priorities to respond to political priorities, any efforts to encourage immigration judges to deny asylum or other cases, and the expanded use of summary processing such as expedited removal.

**The Department of Justice and the Executive Office for Immigration Review should:**

- **Implement an effective process—such as a “short list”—in all courts to advance cases ready for final adjudication.** EOIR should implement a system that enables immigrants to request earlier hearings. Currently, the only way to request an earlier hearing is through a motion handled, with varying efficiency, by judges. EOIR should issue an Operating Policies and Procedures Memorandum designating an official in each court, such as the court administrator, to maintain a list of respondents who have filed all documents and requested an earlier merits hearing date. Then, should an earlier hearing become available on the docket of the judge assigned to the case, the official can offer it to those on the list. Such a system would particularly benefit the many asylum seekers with urgent humanitarian needs—those, for example, with families who remain in danger abroad. Moreover, it will promote the effective use of court time and help alleviate the backlog.
- **Refrain from any directives, policies or other efforts that pressure immigration judges to deny cases or rush them through immigration court hearings.**
- **Issue guidance to immigration judges on pre-trial communication and pre-trial conferencing.** This would narrow the issues, and therefore reduce the time needed to resolve them, at court hearings.
- **Support the expansion of government-funded legal representation programs that provide appointed counsel to immigrants in removal proceedings**, which have been proven to save taxpayer money—or at the very least, pay for themselves—due to improved efficiency.
- **Support access to counsel.** It should ensure that unrepresented children, asylum seekers, and other vulnerable immigrants who cannot afford legal counsel are given sufficient time to secure it. EOIR should also revise directives that discourage adjournments to secure legal representation, and avoid rocket dockets or other efforts to rush cases through the system.
- **Meet regularly with pro bono legal organizations, bar associations, human rights groups and other outside stakeholders** to address concerns about access to counsel, due process, and humanitarian protection.
- **Fill the currently funded 384 immigration judge positions**, which include about 40 vacant positions and accompanying support staff positions.
- **Assure fairness of the system by hiring a neutral pool of immigration judges**, including experienced candidates with immigration experience from outside the government. This would mitigate over-representation by former immigration enforcement and other federal government



staff. DOJ should also improve the pace of hiring while assuring the integrity and fairness of the hiring process—with, for example, safeguards to assure non-politicized hiring.

### **The Department of Homeland Security should:**

- **Review policies that may be contributing to the backlog** and encourage ICE attorneys to ensure court resources are focused on cases requiring full adjudication by stipulating to well-established facts and law.

### **Congress should:**

- **Provide robust oversight of the Department of Justice with respect to the immigration courts.** This oversight should aim to secure a timely and neutral judge hiring process, as well as procedures for immigrants to advance their hearing dates. Congress should also seek to ensure that cases are not rushed and that political objectives or redeployments do not undermine judges' ability to efficiently and effectively manage their dockets or the fairness of court proceedings.
- **Fund an additional 140 immigration judge positions, including the corresponding support staff, over the next two fiscal years (FY 2018 and FY 2019).** This increased funding must be allocated in coordination with the robust oversight described above to ensure that fairness and due process are safeguarded.

## **Background: The Immigration Court Backlog**

Beginning in FY 2007, the number of cases pending before the immigration courts began to

rise. Since then it has grown by around 50,000 cases each year. As Congress increased immigration enforcement budgets to widen U.S. agencies' capacity to apprehend and prosecute immigrants, it did not proportionately increase the budget for systems charged with resolving those cases. Many experts point to this funding imbalance as a root cause of the backlog.<sup>1</sup>

Because of Congress's failure to fund the immigration courts adequately, along with a three-year hiring freeze known as sequester, the number of immigration judges increased only slightly, from 210 in FY 2007 to 256 at the end of FY 2015.<sup>2</sup> Additional funding and a surge in hiring since FY 2015 has brought the number of judges to more than 300 for the first time in its history. As of May 2017, 384 judge positions were funded, and as of August 2017, 334 immigration judges were hearing cases across the country.<sup>3</sup>

However, other factors—including the regional refugee and displacement crisis stemming from violence and human rights abuses in the Northern Triangle of Central America, shifting docketing priorities during the Obama Administration, and new policies under the Trump Administration—have undercut the court's ability to make a meaningful dent in the backlog or even slow its growth. New enforcement priorities and policies—which call on DHS to detain all newly charged individuals and instruct the immigration courts to prioritize cases of people in detention—are requiring the immigration courts to focus on recent arrivals, potentially creating further delay for non-detained cases that have already been stuck in the backlog for years.<sup>4</sup>

During the first ten months of FY 2017, the number of pending cases increased by more than 100,000.<sup>5</sup> This is twice the pace of growth in FY 2016, which was approximately 5,000 cases per month. As of August 2017, 632,261

cases were pending before the courts nationwide— an increase of over 82,000 since President Trump took office in January 2017.<sup>6</sup>

Based on data analyzed by Syracuse University’s Transactional Records Access Clearinghouse (TRAC), the immigration courts in California and Texas have the largest caseloads, with 118,752 and 100,566 respectively, and the New York City court carries the largest pending caseload of any single court at nearly 83,000 cases.<sup>7</sup> The number of cases pending in the Houston court grew from 6,423 to 48,473 between 2010 and August 2017. The Los Angeles court has nearly 2,000 cases pending before each judge, and just eight judges in San Antonio have over 27,000 pending cases.<sup>8</sup>

Without additional immigration judges, the immigration court backlog will continue to grow, leaving immigrants and their families in limbo. In an April 2016 report, “In the Balance: Backlogs Delay Protection in the U.S. Asylum and Immigration Court Systems,” Human Rights First found that delays in asylum cases often left family members stranded in dangerous circumstances abroad and exacerbated the suffering of asylum seekers waiting for the court to decide their case. At current prosecutorial, case completion, and staffing levels, the number of pending cases will grow to over 642,000 by the end of FY 2017 and will reach over 1 million in FY 2026. If DOJ successfully fills all currently funded 384 judge positions the backlog will begin to decrease, but it would take until 2048 to eliminate it.<sup>9</sup>

From September 2015 to March 2016, Human Rights First undertook a detailed analysis of the court’s pending caseload. The resulting report published in April 2016 found that a court with 524 judges would efficiently work off backlogged cases and—at historically stable rates of incoming cases and a case completion rate that

ensures due process rights—would be adequately staffed to adjudicate cases within one year of filing.<sup>10</sup> A court with 524 judges would eliminate the backlog in 10 years, instead of 30.<sup>11</sup>

Efforts to reduce the backlog and add immigration judges have long garnered diverse and bipartisan support. Congressional leaders and former government officials who have served under both Democratic and Republican administrations have recognized that the funding imbalance undercuts the ability of the courts to carry out their duties. Between FY16 and FY17, Congress funded an additional 65 judges, marking a step in the right direction to rebuild the court’s capacity to hear cases in a timely manner.

However, the Trump Administration, while recognizing the need to reduce the backlog, has used the crisis in the immigration courts as a pretext to promote policies that will thwart due process and human rights. In its “Immigration Policy Priorities,” released on October 8, 2017, the White House proposed a series of extreme policies (many of which have previously been rejected by Congress) to address what it called the “massive asylum backlog.” These policy priorities include the expansion of expedited removal, various measures that would block access to asylum for most asylum seekers, and mandating the detention of asylum seekers for the duration of their claims, which typically take many months to resolve. In light of these extreme proposals, and the plans to impose numerical quotas on immigration judges, Congressional oversight will be even more critical to ensure that due process is not violated as the administration advances its plans for expedited decision making.

## Excessive Wait Times for Immigrants in Court Proceedings

As a result of the ballooning backlog, hundreds of thousands of immigrants are in legal limbo, with many waiting years before even an initial hearing. As of August 2015, 168,000 cases had wait times of over three years. As of April 2017, 240,000 cases in the nation's most backlogged courts will wait on average three to five years for their next hearing.<sup>12</sup>

Cases pending in the Chicago court, the most delayed court, will wait nearly five years on average for their next hearing.<sup>13</sup> The nearly 90,000 cases in Texas' three largest courts (San Antonio, Houston, and Dallas) will wait an average of nearly 1,400 days for the court to hold another hearing in their case. The most backlogged courts in California (San Francisco, Los Angeles, and San Diego)—which together have over 112,000 pending cases—have average wait times of over 1,200 days. New York's 83,000 cases will wait an average of nearly three years for their next hearing before an immigration judge.<sup>14</sup>

Recent hiring may have helped stem the backlog's growth and reduce wait times in certain courts, including some of the previously most delayed courts. For example, in August 2015 Detroit, Denver, and Houston courts had projected wait times of over 1,700 days, with Detroit topping the list at 2,371 days (six-and-a-half years). Each court hired two, three, and four immigration judges, respectively. By April 2017, Detroit and Denver had reduced their wait times by over two years, while Houston lessened its delay by nearly a year.

But other courts, such as San Antonio, saw their backlog and wait times increase, despite receiving newly hired judges. (This may be due to judge retirements—meaning the newly hired judges simply replaced others—an increase in

incoming cases, or any number of administrative or procedural factors.) The San Antonio court's average wait time increased by 50 days, despite adding four judges. The wait time in Atlanta grew by 274 days, despite adding two judges. Baltimore's immigration court wait time increased by 253 days and received no additional judges. Wait times in Dallas ballooned by 255 days, despite two additional judge positions, and Seattle saw wait times expand by 331 days and has not received additional judges.

Furthermore, these averages do not reflect the full wait time (meaning the time it takes to fully resolve a case in immigration court) of all cases nationally. Overall, 69 percent of cases in TRAC's analysis are awaiting preliminary hearings, where judges review whether the individual is eligible to seek some form of relief from removal and other steps essential for preparing a case for a hearing on the merits. These preliminary hearings are called "master calendar hearings." As TRAC noted, "[w]ith the current backlog and already overcrowded dockets, the ultimate delay for individuals requiring merits hearings will as a result be a great deal longer than reflected in these data."<sup>15</sup>

According to a July 2017 Government Accountability Office (GAO) report, "half of the immigration courts had master calendar hearings scheduled as far as January 2018 or beyond."<sup>16</sup> Human Rights First attorneys representing clients in Baltimore, Maryland report that families who entered the United States in January 2017 will not have their initial master calendar hearing until April 2018. One asylum seeker who entered the country in October 2016 will wait until August 2018 for an initial hearing. These clients can then expect to wait an additional two to four years after that initial master calendar hearing for a merits hearing where an immigration judge will decide

on their case. In general, asylum seekers who are not held in immigration detention can expect wait times longer than detained immigrants.

### Delays are Harmful to Asylum Seekers

As described in its April 2016 report, Human Rights First found that long waits can be devastating to asylum seekers and their families.<sup>17</sup> Some family members of asylum seekers must wait abroad in life-threatening situations, while others struggle to provide for themselves and their families due to the uncertainty of their status. For example:

- **Honduran victim of severe domestic violence awaits a 2020 hearing while her young daughter tries to evade danger in Honduras.** Ms. L fled Honduras in 2013 after enduring severe domestic violence that caused her to suffer, among other things, a miscarriage. She was scheduled for a master calendar hearing in December 2013, and a merits hearing in the summer of 2015. Days before her final hearing, and after her lawyers had filed all supporting documents, the immigration court moved the merits hearing *sua sponte* to April 2017. Then, days before the April 2017 hearing, it was again reset by the immigration court to a master calendar hearing in November 2020. Ms. L suffers from severe depression and post-traumatic stress disorder, which have been exacerbated by her separation from her daughter, who continues to face danger in Honduras. As of the latest rescheduling, her asylum case will require a minimum of seven years to be resolved.
- **Zimbabwean asylum seeker's family remains in danger after court rescheduled case filed in 2012 for hearing in 2017.** Mr. F fled Zimbabwe after being targeted due to his criticism of the

### Hurricane Survivors

When Hurricane Harvey and subsequent storms hit the United States last month, the devastation revealed just how detrimental a court backlog can be on asylum seekers. Hurricane Harvey wreaked havoc on the lives of everyone in its path. To compound this tragedy, asylum seekers are ineligible for the majority of disaster relief assistance. Asylum seekers, who've fled persecution for protection in the United States, found themselves survivors once again without possessions and worried about how to rebuild their lives and feed their families.

The average wait time for a court hearing in Texas is five years. During the lengthy wait times, asylum seekers become eligible for work permits after six months, but little additional assistance. After hurricanes, federal and state governments make assistance available to cover temporary housing, home repairs and replacement of essential items, medical needs, unemployment benefits, cash assistance, food, and baby necessities. Asylum seekers are not eligible for any of this. Asylum seekers in the Houston area, including refugees represented pro bono by Human Rights First and its volunteer attorneys, have struggled to find food and diapers for their families while their employers can't pay them while their businesses are closed and under repair.

If asylum seekers had timely immigration court hearings in their case and the immigration judge found the individuals to be refugees in need of protection, then asylum seekers would not have the tragedy of surviving a hurricane compounded by the inability to recover.

Mugabe regime. He applied for asylum affirmatively in December 2012, and his case was referred to the Dallas immigration court in August 2013 by the Asylum Office. His merits hearing, originally scheduled for 2015, was postponed two times *sua sponte* by the immigration court. He is now scheduled for a merits hearing in late November 2017, and his lawyers are concerned that it will be rescheduled yet again due to shifting dockets at the Dallas immigration court. Mr. F is desperate to be reunited with his wife and children, who remain in danger in Zimbabwe and with whom he cannot even communicate openly due to concerns about government surveillance.

- **Salvadoran asylum seeker raped and beaten by gang members suffers while she waits until 2020 for a final hearing.** Ms. S fled El Salvador after being beaten and raped in front of her children by MS-13 members who wanted to forcibly recruit her son. She was forced to leave her son behind because he was having panic attacks and could not make the journey. She applied for asylum in the United States in October 2015. At a master calendar hearing in Arlington immigration court, she was told that the assigned judge had no available hearings until 2022. Her case was transferred to a new judge, who scheduled her merits hearing for October 2020. Ms. S fears for the safety of her son, who remains at risk of forcible gang recruitment in El Salvador. Moreover, she and her son continue to experience severe psychological effects of the trauma they suffered, which has been exacerbated by the uncertainty of her asylum claim.

The long delays force many others to suffer as they wait for work authorization to support their

families or simply an end to the uncertainty that keeps them in limbo for years.

## Impact of Trump Administration Policy Shifts

On January 25, 2017, President Trump issued two executive orders on immigration enforcement. The first, titled “Border Security and Immigration Enforcement Improvements,” called on the executive branch to “detain individuals apprehended on suspicion of violating [...] immigration law,” “expedite determinations of apprehended individuals claims of eligibility” to remain in the country, and restrict options for release from detention during the course of immigration court proceedings. It further instructed the attorney general to “take all appropriate action and allocate all immediately available resources to immediately assign immigration judges to immigration detention facilities.”

In a second executive order titled “Enhancing Public Safety in the Interior of the United States,” the president declared that the executive branch would no longer “exempt classes or categories of removable aliens from potential enforcement.” The order signaled a shift from previous efforts by the U.S. Department of Homeland Security to improve efficiency by operating according to priorities when seeking the removal of unauthorized immigrants. In addition, on September 5, 2017, the attorney general announced the end of the Deferred Action for Childhood Arrivals program—a move that garnered considerable criticism from both sides of the political spectrum and which will leave 800,000 young people who have built their lives in the United States at risk of being referred into immigration court removal proceedings.

Various policy actions implementing these executive orders—including the reassignment of judges to detention centers along the border, revisions to the court’s guidance on granting requests for continuances, plans to impose numerical quotas on immigration judge decision-making, and changes to DHS prosecutorial discretion—have exacerbated the backlog, undercut court efficiency and fairness, and raised concerns about politicization of immigration court docket management.

### **Detailing Immigration Judges to Detention Centers “at the Border”**

President Trump’s January 25, 2017 executive order instructed the attorney general to “take all appropriate action and allocate all immediately available resources to immediately assign immigration judges to immigration detention facilities.”<sup>18</sup> In early March, Attorney General Jeff Sessions requested that EOIR “begin detailing 50 immigration judges in person to various locations at or near the border, and other detention locations around the country,” according to internal EOIR correspondence obtained by the National Immigrant Justice Center (NIJC) through a Freedom of Information Act (FOIA) request.<sup>19</sup>

In later public comments, Sessions announced that DOJ had “surged 25 immigration judges to detention centers along the border,” in support of the president’s mission to detain “all adults who are apprehended at the border.”<sup>20</sup> Judges were first sent to eight locations— Dilley, LaSalle, Karnes, Laredo, Otero, Polk, Otay Mesa, and Adelanto—and later to two additional detention centers—Cibola and Prairieland.<sup>21</sup>

The swift decision by the attorney general, in accordance with the president’s mandate to “immediately assign immigration judges to immigration detention facilities,” did not appear to take into full consideration the need for

additional judges at those detention facilities, nor the impact of judge details on existing backlogs. Based on information obtained through NIJC’s FOIA request, it was only after judges were pulled off their normal dockets and reassigned to detail locations that EOIR was able to conduct an internal review of those decisions.

That review, circulated internally on April 4, 2017, revealed that only two of the ten detention centers listed in the March DOJ announcements—Otay Mesa and Adelanto—had a confirmed need for additional judges.<sup>22</sup> EOIR’s analysis indicated:

- The judge detailed to Karnes only had a “light” docket, according to the EOIR review.
- Regarding Dilley, “at this time nothing is pending at Dilley. The one judge detailed there is not occupied.”
- The two judges sent to Cibola had only received 14 new cases and five credible fear reviews during their detail.
- Prairieland’s docket only required an immigration judge for 1.5 days, and did not have “enough cases to truly fill a docket or even come close to it.”
- The Laredo court had to combine multiple dockets to “ensure there is a full week of cases.”<sup>23</sup>

Lawyers at nonprofit organizations reported similar observations. An attorney serving immigrants at the LaSalle Detention Center in Jena, Louisiana reported that detailed immigration judges’ dockets are “usually quite sparse and they have a lot of free time.”<sup>24</sup> EOIR’s internal analysis indicated that although five judges had already been detailed to LaSalle, only three were needed.<sup>25</sup>

EOIR’s internal review of the “surge” hearing locations also included analysis of seven detained hearing locations not publicly

highlighted as part of DOJ's effort to implement President Trump's January 25<sup>th</sup> "border security" Executive Order. Those hearing locations include Chicago-detained, Elizabeth, Eloy, Hutto, Imperial, Krome/Broward, and Oakdale.<sup>26</sup> While EOIR indicated that most of these hearing locations had caseloads to sustain the current number of immigration judges at those courts, the review also noted that "5 Miami [immigration judges] were asked to cover Hutto, despite the limited number of cases at Hutto. There are not enough cases to fill one IJ's docket, and certainly not five."<sup>27</sup>

According to TRAC analysis of pending caseloads in April 2017, the same month of EOIR's review, the 17 "surge" hearing locations had around 8,600 pending cases and average wait times of around three months. Meanwhile, non-detained dockets faced over 550,000 pending cases with average wait times of well over two years.<sup>28</sup> As a result, thousands of cases were postponed—including in some of the most backlogged courts, such as Chicago, New York, Los Angeles, Dallas, Houston, San Francisco, Denver, Miami, San Antonio, and Baltimore. Those delays wasted limited attorney resources, exacerbated backlogs, and left asylum seekers and other immigrants in limbo for even longer.

In total, over 22,600 hearings were postponed due to judge details in just the first three months after Attorney General Sessions instructed the surge of immigration judges to the border and other detained courts, according to data provided in response to NIJC's FOIA request.<sup>29</sup> By contrast, in all of 2015, just 6,983 such adjournments were issued.<sup>30</sup>

Attorneys in Los Angeles, San Antonio, Baltimore, and Chicago (the nation's most delayed court) report that adjournments due to judge details have caused over a year of additional delay in cases with cancelled

hearings.<sup>31</sup> Between March and June 2017, data shows 3,459 adjournments in Los Angeles, 200 in San Antonio, 129 in Baltimore, and nearly 400 in Chicago, due to the "surge" in judge details.<sup>32</sup> Others in San Francisco and Kansas City report that hearings cancelled due to judge details in early 2017 have been rescheduled for 2019. According to data from NIJC's FOIA response, 1,822 cases were adjourned in San Francisco and 242 in Kansas City between March and June 2017 due to judge details.<sup>33</sup> In New York, 2,612 hearings were adjourned due to judge details. In Arlington, 1,987 were adjourned and 856 hearings were adjourned in Atlanta.

In some cases, asylum seekers who have suffered traumatic experiences had already been prepared to testify about the persecution they suffered—which is often highly re-traumatizing—only to have had that preparation wasted when the case was postponed for over a year. For example:

- In April the court postponed until 2019 the hearing of a traumatized Salvadoran asylum seeker who had prepared to tell her horrific story to an immigration judge in May 2017. Ms. C fled El Salvador where she suffered severe domestic violence by her partner, who repeatedly beat and raped her and held her locked inside of a house. Ms. C was scheduled for a May 2017 merits hearing before a judge at the New York Immigration Court. In preparation for the hearing, Human Rights First submitted documentation in support of the case and began the process of practicing Ms. C's testimony about her traumatic experiences in El Salvador. In April 2017, counsel received written notice that the hearing had been postponed to February 2019. Counsel called the judge's clerk and was told that the judge had been reassigned away from New York and that

the judge's hearings had been postponed as a result.

Pro bono and nonprofit attorneys across the country report that EOIR did not provide sufficient notice that hearings were canceled. Most survey respondents indicated they received notice of canceled hearings between a week before and the day of scheduled hearings. One attorney in Chicago described a case in which counsel, witnesses, and the asylum seeker flew in from out of state before receiving last minute notice that EOIR had canceled the individual hearing. "One witness came from across the country, and another came from another country. Both said they couldn't afford to keep coming to court hearings."<sup>34</sup>

Current and former immigration judges have criticized the administration's actions and raised concern that politics are driving decision making. Retired immigration judge Paul Wickham Schmidt recently noted that "nobody cares what's happening on the home docket ... It's all about showing presence on the border."<sup>35</sup> Judge Dana Leigh Marks, president of the National Association of Immigration Judges, noted that "letting political forces impact the courts' docketing strategy disrupts our system."<sup>36</sup> "The temporary assignment of judges to border courts creates increasing backlogs in the dockets they leave behind in their home courts and may not be conducive to the overall reduction of our burgeoning caseload."<sup>37</sup>

While EOIR acknowledged—in response to questions from Congress—that the implementation of Sessions' instructions to send judges to detention centers would likely cause the backlog to increase at courts that lost judges to detail reassignments,<sup>38</sup> it does not appear that DOJ took meaningful steps to assess the impact on the backlog at those courts, or the need for additional judges at the detention centers where they were detailed. Instead, judges were quickly

"surged" to detention centers to pursue the political objective of "detaining all adults who are apprehended at the border."<sup>39</sup>

### **Changes that Risk Sacrificing Fairness to Speedy Decision-making**

In the wake of President Trump's order calling on the executive branch to "expedite determinations" relating to "individuals' claims of eligibility," the administration has taken a number of steps that raise concerns that asylum and immigration court cases will be rushed through their hearings in ways that undermine due process and fair decision making. In a February 2017 memorandum implementing President Trump's January 25 executive order, then DHS Secretary Kelly referenced "expedited resolution" of asylum claims.

The White House's October 8 laundry list of "principles" calls for the imposition of "performance metrics" on immigration judges, and the Washington Post has reported that the DOJ is attempting to place numerical standards on immigration judge decision making. The imposition of numerical quotas risks sacrificing fairness to speed. As stated by the American Bar Association, "performance metrics based on the number and speed of cases resolved undermines the independence of the judiciary and threatens to subvert justice."<sup>40</sup>

Moreover, on July 31, 2017, EOIR issued an Operating Policies and Procedures Memorandum (OPPM) on the "efficient handling of motions for continuance in order to ensure that adjudicatory inefficiencies do not exacerbate the current backlog of pending cases nor contribute to the denial of justice for respondents and the public," raising concerns that cases will be rushed through the system at the expense of due process.<sup>41</sup> According to a June 2017 report by the Government



Accountability Office (GAO), EOIR collects data on the number and reasons for continuances (adjournments)—with approximately 70 unique continuance categories listed in its database. However, EOIR does not systematically analyze this data to identify areas in which immigration judges could benefit from additional guidance, or operational challenges affecting the courts. The GAO recommended that EOIR—in developing and implementing a strategic workforce plan—systematically analyze court continuance data to identify and address court challenges and issue guidance to judges.<sup>42</sup>

The July 31 OPPM references the GAO report’s finding that between 2006 and 2015 continuances increased by 23 percent overall. However, it does not elaborate on the GAO’s findings, which indicate that DHS-related and operational-related continuances were responsible for the bulk of that increase. Specifically, DHS and operational-related continuances increased by 54 percent and 33 percent respectively. (The reasons for operational-related continuances include immigration judge retirements, postponement to allow for scheduling of a priority case instead, improper service, weather or environmental factors, issues related to EOIR’s case management system, or problems such as a video-teleconference malfunction or lack of interpreter.) In that same time frame, respondent-related continuances increased by only 18 percent, and immigration judge-related continuances stayed relatively constant, decreasing by two percent.<sup>43</sup> This last category will increase significantly in fiscal year 2017, due to the 22,600 immigration judge-related continuances issued between March and June to accommodate judge details to detention centers.

Nevertheless, the top concerns highlighted in the July 31 OPPM relate to respondents’

requests to continue cases to find legal counsel, or to further prepare their case. Citing immigrants’ “strong incentive” to “abuse continuances,” the new policy calls for immigration judges to exercise restraint in granting these requests for adjournment. The memorandum does not acknowledge the difficulty many respondents face finding legal representation or the importance of having counsel. Previous policies had suggested that immigration judges grant two or more continuances to find legal representation. The new policy requires judges to exercise heightened review after only one continuance.<sup>44</sup>

Moreover, some attorneys report that immigration judges are increasingly rushing cases. For example, a pro bono attorney practicing in Laredo, Texas said that detained asylum seekers were sometimes given only weeks to prepare their case—generally, far too little time to gather evidence, prepare witnesses, and prepare a full asylum case for trial.<sup>45</sup>

### **DHS Abandons Prosecutorial Discretion; Attorneys Report Decreased Cooperation**

President Trump’s January 25, 2017 executive order, “Enhancing Public Safety in the Interior of the United States,” called for the executive agencies to “faithfully execute the immigration laws of the United States,” and declared that to do so it cannot “exempt classes or categories of removable aliens from potential enforcement.”<sup>46</sup> Because of the implementation of this provision, cases that previously would not have been enforcement priorities are entering the immigration court system. In addition, ICE trial attorneys have reportedly been less likely to stipulate to uncontested facts or legal issues in cases, or to agree to administrative closure in certain cases—actions that help save court time.

On February 20, 2017, then DHS Secretary John Kelly issued a memorandum implementing the January 25<sup>th</sup> interior enforcement order, rescinding previous policy memoranda related to immigration enforcement priorities, and clarifying that DHS personnel have “full authority to initiate removal proceedings against any alien who is subject to removal under any provision of the [Immigration and Nationality Act]...”<sup>47</sup> ICE officers are putting into the system at an increasing rate cases previously considered lower priorities—such as people who have lived in the United States for many years and have not had contact with the criminal justice system. For example, arrests of “ordinary status violators” increased by 529 percent in Philadelphia, 460 percent in Atlanta, and 400 percent in Miami during the first 100 days of the Trump Administration.<sup>48</sup>

According to data analyzed by TRAC, “during the first five months of the Trump Administration prosecutorial discretion closures precipitously dropped to fewer than 100 per month from an average of around 2,400 per month during the same five-month period in 2016.”<sup>49</sup> On September 5, 2017, the attorney general announced that the administration would end the Deferred Action for Childhood Arrivals (DACA) program—which provides temporary work authorization to approximately 800,000 young people who met certain criteria, such as having no criminal record and completing high school or other educational programs. When DACA ends, these young people could also be placed in immigration court proceedings.

In the wake of the executive order and its implementing memorandum, ICE trial attorneys are increasingly reluctant to stipulate to facts or clear cut legal issues—actions that have previously helped remove cases from the docket or speed up cases. When asked at a liaison meeting in April 2017 whether ICE trial attorneys

continue to have authority to exercise their discretion with respect to actions on certain cases, ICE responded that it “will continue to exercise prosecutorial discretion under a totality of the circumstances approach, such as deciding which cases to appeal, which bars to raise in litigation, and whether to stipulate to facts or bond, etc.”<sup>50</sup>

Yet pro bono attorneys representing clients in immigration court have reported a noticeable difference in ICE’s willingness to stipulate to facts or legal conclusions. Lawyers in Atlanta, Arlington, Baltimore, Houston, San Francisco, Los Angeles, New York, Miami, Denver, Chicago, and south Texas report refusals by ICE attorneys to work with opposing counsel to minimize unnecessary court time. “There seems to be a clear ‘no stipulation to anything’ approach from the Office of Chief Counsel (OCC),” explained one lawyer from New Orleans. Another lawyer in Chicago, the most delayed court in the country, said OCC attorneys “refuse to stipulate to anything.” In New York “ICE is refusing to stipulate to even the most obvious, uncontested issues,” according to one lawyer. An attorney in south Texas indicated that ICE is no longer stipulating even to identify where all identification documents are on file. This attorney reported having been told by ICE that this refusal to stipulate is a matter of internal policy within OCC.<sup>51</sup>

Moreover, attorneys across the country have reported that ICE is opposing motions to administratively close cases, based on the new enforcement priorities.<sup>52</sup> This has been reported in cases involving almost all petitions filed with another agency, such as U.S. Citizenship and Immigration Services (USCIS), including petitions for an immediate relative, U visas, and special immigrant juvenile petitions.<sup>53</sup> According to the Migration Policy Institute, in the first six months of the Trump Administration, ICE agreed

to close fewer than 100 cases per month, while during the last six months of the Obama Administration, ICE agreed to administrative closure at a monthly average of 2,400 cases per month.<sup>54</sup> Previously, ICE had not generally opposed administrative closure in certain cases, particularly where an individual had already been granted an immigration benefit by USCIS. More of these cases now remain on judges' dockets.

## Local Challenges

Some immigration courts face additional challenges due to staffing gaps, the Trump Administration's new policies, and local administrative shortcomings—such as a systemic lack of notice of scheduling changes, long delays in recording Notices to Appear, and prioritization shifts—which have decreased efficiency and added to the delays.

Human Rights First attorneys in New York, for example, cite as a problem the court's use of "visiting judge" dockets—dockets not actually assigned to a judge. Implemented to handle shifting EOIR priorities and Trump Administration details of judges to the border, the system has caused extensive delays in cases ready for trial and confusion among immigrants and lawyers about when the court will hear their case.

An EOIR spokesman described the "visiting judge" docket system as a concept "for internal case management," whereby the court assigns dockets of already retired or otherwise departed judges to a "visiting judge" docket "to maintain continuity."<sup>55</sup> Attorneys and news outlets, however, report that clients rarely receive advanced notice that their hearing on the "visiting docket" will not have a judge. One news report states that, "on a single day in May, when

almost 400 hearings were scheduled to take place in immigration court, WNYC [a local NPR affiliate] counted 60 people who didn't have judges." The same reporter interviewed confused families who had traveled hours and missed work only to be told their case would be reassigned to an unnamed judge for a hearing on an unknown date.<sup>56</sup>

The use of "visiting judge" dockets appeared to increase in the New York Immigration Court in the wake of case prioritization shifts. Under the Obama Administration, EOIR issued docketing procedures requiring that cases involving unaccompanied children and adults with children be prioritized.<sup>57</sup> As Human Rights First found in its April 2016 report, this decision, coupled with the backlog, led the immigration courts to re-calendar other non-priority cases for as late as five years later in November 2019.<sup>58</sup>

On January 31, 2017, EOIR issued a memorandum revising the immigration court's case processing priorities, rescinding the Obama-era prioritization of unaccompanied children and family cases and largely limiting prioritized cases to those of individuals held in federal immigration custody.<sup>59</sup> In New York Immigration Court, the de-prioritization of these categories meant that many "adults with children" or "AWC" cases that were trial-ready—and to which judges had already devoted significant time through initial hearings and case conferences to prepare for a final hearing—were suddenly postponed and placed on "visiting judge" dockets, with no clear indication as to when they would actually be heard. For example:

■ **Guatemalan asylum seeker has no date for a final hearing after her case was placed on NYC's "visiting judge" docket.** Ms. F fled Guatemala with her partner and children after they made a police report against gang members who tried to extort them. The gang

members threatened to kill Ms. F's husband and her family as a result. Ms. F's case, which was placed on the AWC docket in November 2015, was scheduled for a merits hearing in May 2017. However, in early 2017, the case was moved from Judge Khan's docket and placed on a so-called "visiting judge docket," but with the same merits hearing date in May 2017. Counsel prepared the case and repeatedly emailed the court administrator to inquire whether the matter would indeed go forward. Finally, in late April, the court administrator responded that "as of now the case will not be going forward." This case has still not yet been rescheduled by EOIR.

- **A Guatemalan family waited over two years for their hearing, only to be informed it was on NYC's "visiting judge docket." EOIR has not provided the family a future hearing date.** Ms. Y fled Guatemala with her son to escape domestic violence at the hands of her partner. In late 2015, she was placed on the AWC docket, and was eventually scheduled for a merits hearing in July 2017. In early 2017, the court shifted her case to the "visiting judge docket." Counsel learned only through a local chapter of the American Immigration Lawyers Association in June 2017 that "visiting judge dockets" were not going forward. By that point, counsel had already done significant work on the case, including the prepping of a medical witness. No updated information had been posted on the immigration court hotline until after the scheduled date had passed. This case has still not yet been re-calendared by EOIR.

While such scenarios appear to happen more often than not on "visiting judge" dockets, without a definitive notification that a client's hearing will not move forward, attorneys must still fully prepare the case. Such uncertainty undermines attorneys' ability to manage and

predict their work flow, take on additional cases, and place cases with pro bono counsel.

According to attorneys in Chicago, Los Angeles, Baltimore, San Francisco, and Memphis, the court's inability to timely enter Notices to Appear (NTAs) into the EOIR system—apparently due to lack of administrative staff and a cumbersome paper-based filing system—has posed challenges. In Chicago, San Francisco, and Baltimore, attorneys report that NTAs are not entered into the court system until more than one year after their clients entered the country and presented themselves to, or were apprehended by, immigration agents.<sup>60</sup> This poses a significant problem for asylum seekers, who must file their asylum applications within one year of arrival in the United States. It also hinders efficient case management, as attorneys need to be able to file within a year, know when their clients can apply for work permits, and predict their work flow. Moreover, attorneys waste time repeatedly calling the EOIR hotline to check the status of the case. Human Rights First attorneys working at the Arlington Immigration Court have similarly experienced delays in NTA filings. One client who arrived in the United States in November 2016 is still waiting for her NTA to be filed by the Court.

## Immigration Judge Hiring

As of FY 2017, Congress has allocated funding for 384 immigration judges. However, long delays in hiring have prevented EOIR from filling these positions.

In July 2017, Rep. Richard Shelby (R-AL), Chairman of the House Committee on Appropriations, complained that "over the last eight years, dozens of these immigration judge benches have gone unfilled while the backlog of immigration cases has grown to a staggering

number of over 600,000.”<sup>61</sup> A recent surge in hiring has filled 334 of the currently funded 384 positions. However, the backlog will continue to swell until all 384 positions are filled, and will not be adequately addressed until 524 judges are funded and hired (see explanation of the need for 524 judges above).<sup>62</sup>

## Changes in Hiring Process

The GAO concluded in a June 2017 report that EOIR “does not have efficient practices for hiring new immigration judges” and found that from 2011 through August 2016 it took an average of 742 days to hire a new judge.<sup>63</sup> Presumably to address this delay, Attorney General Jeff Sessions, in April 2017, announced “a new, streamlined hiring plan,” to onboard immigration judges.<sup>64</sup> However, the only publicly available details regarding the new “streamlined hiring plan” was his assurance that the plan “requires just as much vetting as before, but reduces the timeline, reflecting the dire need to reduce the backlogs in our immigration courts.”<sup>65</sup>

Information received in response to an NIJC FOIA request, which provides details regarding Sessions’ recent hiring procedure changes, raises questions about the status of measures put in place in 2007 to protect against politicized hiring.<sup>66</sup> Notably, EOIR leadership indicated in an internal email that DOJ is doing away with the deputy attorney general (DAG) panel, which was a final panel in the hiring process made up of senior EOIR and DOJ career staff that made recommendations to the attorney general. Instead, the deputy attorney general and assistant attorney general for administration will “designate officials to review candidates and make recommendations.”<sup>67</sup>

Prior to 2004, the Chief Immigration Judge had sole authority to hire immigration judges. In 2004, under the administration of George W. Bush, Attorney General John Ashcroft took the

autonomous hiring of immigration judges from EOIR and granted hiring authority to the DOJ Office of the Attorney General (OAG). Between 2004 and 2007, OAG solicited candidates and instructed EOIR whom to hire.<sup>68</sup>

In March 2007, DOJ’s Office of Professional Responsibility (OPR) and the Office of the Inspector General (OIG) began an investigation into the discriminatory use of political or ideological affiliations in the hiring process of immigration court and Board of Immigration Appeals (BIA) judges.<sup>69</sup> The resulting report found that OAG staff had improperly treated immigration judge positions as political appointments. The report also found that the White House Office of Political Affairs and Republican members of Congress provided the attorney general’s office with immigration judge candidates based on their political leanings. OIG concluded that the attorney general’s office had violated federal law prohibiting politicized hiring.<sup>70</sup>

On April 2, 2007, then Attorney General Alberto Gonzales approved a hiring process that returned primary hiring authority to EOIR, and installed safeguards designed to prevent politicized hiring. These included a two-panel hiring process that assured career staff at EOIR and DOJ participated in the selection of candidates, including by placing DOJ and EOIR career staff on the DAG panel. In a subsequent 2008 report, the OIG found no evidence of politicized selections under the new hiring procedure.<sup>71</sup>

Ending the “DAG panel” raises concerns that politically appointed officials have been granted more control over the selection of immigration judge candidates. The deputy attorney general is a politically appointed position and the assistant attorney general for administration is appointed by the attorney general (a political appointee). Both serve under the DOJ Office of

the Attorney General (OAG) or at the direct appointment of the attorney general.<sup>72</sup>

Senior administration officials in 2016 and 2017 indicated to Human Rights First that two steps allowing senior DOJ and EOIR staff and the attorney general to prioritize the approval of immigration judge candidates and fast-tracking FBI background checks (the most delayed step in the hiring process)—could reduce delays in the onboarding process. Such changes, however, were not listed in the internal EOIR correspondence describing changes to the hiring process.

### Hiring Trends

In a 2010 study, the American Bar Association noted that hiring a large proportion of immigration judges with prior government experiences could undermine the appearance of neutrality of the immigration courts.<sup>73</sup> Of the 123 immigration judges hired since October 2014, 85 percent were former attorneys for immigration enforcement agencies or other branches of the government. Only eight percent came from a non-governmental organization background and seven percent came from private practice (most *not* from private immigration practices).<sup>74</sup>

Since Attorney General Sessions began signing off on immigration judge hires in May 2017, twenty-one new judges were former ICE attorneys or held positions within DOJ. Only six hires came from non-governmental organizations or private practice.<sup>75</sup> Due to the delays caused by FBI background checks of immigration judge candidates, former ICE and DHS attorneys—like all federal government employees who have already undergone this process—have proceeded more quickly through the hiring process, filling vacant positions while other selected candidates have been delayed in this final step of the hiring process.

## Due Process Implications of the Backlog and Recent Trump Administration Policies

### Impact of Backlog and Trump Administration Policies on Access to Counsel

Delays in the immigration court have restricted immigrants' access to pro bono legal representation. In a Human Rights First survey of pro bono coordinators at 24 of the nation's major law firms, nearly 75 percent indicated that delays at the immigration court are a significant or very significant negative factor in the law firm's ability to take on a case for pro bono legal representation. Since associates often do not remain at law firms for more than a few years, accepting cases that take years to resolve is particularly challenging.<sup>76</sup>

Nonprofit attorneys, law school clinics, and private practitioners have also said that the backlog diminishes their ability to provide quality legal representation. As cases drag out for years, resources are wasted. Some attorneys have also highlighted the risk of re-traumatization of asylum seekers, who must retell their stories of persecution to additional members of their legal team due to staff turnover as time passes.

Recent policies of the Trump Administration have decreased access to counsel in immigration courts and added to systemic inefficiencies. The waves of postponements triggered by the attorney general's decision to send judges to detention centers "along the border" on detail assignments—along with more localized phenomena, such as the confusion created by the "visiting judge" dockets in New York—have caused lawyers (many of which provide pro bono legal services) to waste their

limited resources preparing for hearings that are often cancelled.

On July 31, 2017, EOIR issued a memorandum on the “efficient handling of motions for continuance in order to ensure that adjudicatory inefficiencies do not exacerbate the current backlog of pending cases nor contribute to the denial of justice for respondents and the public.”<sup>77</sup> While the new policy calls for immigration judges to exercise restraint when granting continuances, it doesn’t acknowledge the difficulty many respondents face finding pro bono legal representation and the importance of counsel. In fact, the memorandum explicitly lists “continuances to obtain counsel” as the first in a list of “specific recurring categories of continuance requests” which merited additional guidance and restraint. While previous policies had suggested immigration judges grant two or more continuances to find legal representation, the new policy requires judges to exercise heightened review after only one continuance.<sup>78</sup>

Legal representation is proven to be the number one factor in predicting success in immigration proceedings.<sup>79</sup> Yet, many immigrants must face a judge unrepresented. A study conducted by Syracuse University’s Transactional Records Access Clearinghouse (TRAC) in August 2017 found that the odds of obtaining representation ranged from 86 percent in Hawaii to 38 percent in Georgia. Only 44 percent of the 111,000 people with cases pending in California and the 81,000 in Texas can expect to find representation.<sup>80</sup> In detention, the odds are even lower, with only 14 percent of immigrants securing legal representation.<sup>81</sup>

Access to counsel also improves system efficiency. In August 2016, the U.S. Commission on International Religious Freedom (USCIRF) noted that “lack of counsel not only disadvantaged detainees but also burdens the system, since unrepresented cases are more

difficult and time consuming for adjudicators to decide.”<sup>82</sup> Studies have found that government-funded legal representation could pay for itself—or even save taxpayer money—due to increased efficiencies, including a reduction in both court time and immigration detention.<sup>83</sup>

### **Expanding Expedited Removal Will Thwart Due Process**

In the “Border Security and Immigration Enforcement Improvements” executive order, President Trump declared that it is the policy of the executive branch to “expedite determinations of apprehended individuals’ claims of eligibility to remain in the United States.” Later, in the DHS implementing memorandum, Secretary Kelly referenced the “historic backlog of removal cases” in immigration court when stating plans to “publish in the *Federal Register* a new Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(a)(iii) of the Immigration and Nationality Act, which may, to the extent I determine is appropriate, depart from the limitations set forth in the designation currently in force.”<sup>84</sup>

Expedited removal is a summary form of removal (or deportation) that allows immigration enforcement officers—rather than judges—to order the deportation of certain individuals who have been charged with inadmissibility under the Immigration and Nationality Act.<sup>85</sup> Critics of expedited removal have identified a range of due process and implementation concerns. In a comprehensive report issued in 2005, the bipartisan U.S. Commission on International Religious Freedom (USCIRF) identified deficiencies in the implementation of expedited removal, including the failure to follow procedures to identify and safeguard individuals expressing a fear of return. For example, the Commission found that “in 15 percent (12/79) of observed cases when an arriving alien

expressed a fear of return to the inspector, the alien was not referred [to a credible fear interview by an asylum officer]." Other organizations have documented a history of errors in the implementation of expedited removal, including wrongful deportations, and have maintained that the process deprives individuals of rights and safeguards, including the right to apply for immigration protections, such as temporary protected status, special immigrant juvenile status, or benefits available under the Violence Against Women Act.

USCIRF's urged the U.S. government not to expand expedited removal from a port-of-entry program to one that covers the entire land and sea border of the United States. Expanding the use of this process—and blocking access to immigration court removal hearings—is not the answer to the backlog. In fact, the referral of many mothers and children seeking protection at the border may have added to the backlog, since many qualified for relief and were ultimately referred to regular removal proceedings. Moreover, expedited removal generally involves the use of detention, due to a "mandatory detention" proceeding, which, in turn, requires immigration court time to conduct bond redetermination hearings. The Inter-American Commission for Human Rights has called for an end to this practice of mandatory detention, emphasizing that detention should only be used in exceptional cases.<sup>86</sup>



## Appendix I

Data on the immigration court backlog came from the Transactional Records Access Clearinghouse (TRAC) of Syracuse University, which analyses and publishes immigration court data received from the Executive Office for Immigration Review (EOIR) through Freedom of Information Act (FOIA) requests. TRAC data provides national statistics on cases pending before the court, cases filed with the court, the average number of days cases have been pending, the projected wait time, and the number of cases completed each year by the immigration courts. National averages based on TRAC data do not disaggregate detained and non-detained cases, meaning averages for non-detained cases are likely much higher given EOIR's policy of prioritizing detained caseloads. Twenty-eight percent of cases handled by the immigration court in 2015 and 2016 were detained cases.<sup>87</sup> For this report, Human Rights First used TRAC national averages and current trends with respect to incoming caseloads and case completion rates to predict the growth of the backlog, when the backlog will be eliminated, and to recommend the necessary increase in immigration judges.

**Defining the Backlog:** Throughout this report the number of pending cases is referred to as “the backlog.” However, the immigration courts will always have cases pending. If the average case completion time—for purposes of predicting future court caseloads—is one year, then the courts should never have more cases pending than they could complete within one year. The recommended 524 judges should be completing 262,000 cases per year, meaning the backlog is any number of pending cases above 262,000. For example, in 2017, the immigration court will have a projected 642,827 cases pending at the end of the fiscal year. With some 194,231 cases completed, FY 2017 will result in a backlog of 448,596 cases. Based on our projections, including recommended hiring of judges, the backlog would be eliminated by the end of FY 2029 when the pending cases drop below 262,000 for the first time. This presumes incoming caseloads do not dramatically increase and case completion rates are adjusted as illustrated in Figure 1, below.

**Incoming Caseloads:** Human Rights First calculates that since FY 2000 the immigration court has averaged approximately 238,000 new cases per year. TRAC reports the number of Notices to Appear filed through its “New Deportation Proceedings Filed” tool. According to TRAC in FY 2014 and FY 2016 the court received 266,644 and 257,235 cases, respectively. Given the stability of incoming caseloads over the past 15 years, Human Rights First predictions use the average number of new cases for FY 2015 - FY 2017 as a constant for future predictions. If the immigration court system receives an increased number of cases, the backlog will persist for longer, delay time will lengthen, and, ultimately, more judges will be needed.

**Case Completion Time:** The calculations in this report assume that immigration courts will complete cases within one year on average. Therefore, for the backlog to be considered resolved, the immigration court should not have more cases pending at any given time than it receives each year.

**Case Completion Rates per Judge:** Case completion rates have fluctuated over the years ranging from over 1,300 per judge in FY 2005 to 777 per judge in FY 2015. Experts have indicated that a case completion rate of 500 would be ideal; this would allow immigration judges to allot adequate time to each case and respect the due process rights of each immigrant. Human Rights First's predictions for

eliminating the backlog incorporate a slow trend toward a case completion rate of 500 cases per judge by FY 2022. Human Rights First calculates national average case completion rates per judge by dividing the total number of cases completed per year, as reported by TRAC, by the number of immigration judges on the bench that year, as reported by the Bipartisan Policy Center.

### **Predicting Future Pending Immigration Court Cases**

Human Rights First predicts the number of pending cases at the end of the fiscal year by adding the number of pending cases at the end of the prior fiscal year to the number of new cases received that year. The total number of cases completed that fiscal year is subtracted from this total to arrive at the number of pending cases at the end of the year. The calculation used is: (pending at end of prior fiscal year) + (new cases received) - (cases completed) = pending cases at end of fiscal year.

Human Rights First uses the projected pending case number at the end of fiscal year 2017 as a starting point for future projections (calculated as described above). To get the final FY 2017 pending case load, Human Rights First averaged the monthly backlog growth during the first 10 months of FY 2017 and added that average for the remaining two months of the fiscal year. According to TRAC, 516,031 cases were pending at the end of FY 2016 and 632,261 cases were pending at the end of August 2017. Therefore, the caseload grew by 116,230 cases during the first 11 months of FY 2017, an average of 10,566 per month.

### **Predicating Future Number of Cases Completed Each Year**

Human Rights First predicts the number of cases completed each year by multiplying the number of immigration judges at the beginning of the fiscal year by the average case completion rate per judge. The calculation used is: (total number of judges at beginning of fiscal year) x (recommended case completion rate) = cases completed per fiscal year.

TILTED JUSTICE

Figure 1

Fiscal Year (FY)	Additional Judges	Total Judges— Start of FY	Total Judges— End of FY	Completed Cases /Judge	Completed Cases /Year	New Cases/ Year	Pending Cases— End of FY	Case Backlog
2017	33	312	345	625	194,231	211,883	642,827	448,596
2018	39	345	384	600	207,000	221,338	657,165	450,165
2019	65	384	449	575	220,800	221,338	657,703	436,903
2020	75	449	524	550	246,950	221,338	632,091	385,141
2021	0	524	524	525	275,100	221,338	578,329	303,229
2022	0	524	524	500	262,000	221,338	537,667	275,667
2023	0	524	524	500	262,000	221,338	497,005	235,005
2024	0	524	524	500	262,000	221,338	456,343	194,343
2025	0	524	524	500	262,000	221,338	415,681	153,681
2026	0	524	524	500	262,000	221,338	375,019	113,019
2027	0	524	524	500	262,000	221,338	334,357	72,357
2028	0	524	524	500	262,000	221,338	293,695	31,695
2029	0	524	524	500	262,000	221,338	253,033	0

## Endnotes

- 1 See Human Rights First, *In the Balance: Backlogs Delay Protection in the U.S. Asylum and Immigration Court Systems*, April 2016.
- 2 Due to a funding freeze, known as sequester, the number of immigration judges dropped between 2011 and 2014. See Human Rights First, *In the Balance: Backlogs Delay Protection in the U.S. Asylum and Immigration Court Systems*, April 2016.
- 3 Department of Justice, Executive Office for Immigration Review Swears in Nine Immigration Judges, August 14, 2017, available at <https://www.justice.gov/eoir/page/file/989576/download>.
- 4 See Paul Wickham Schmidt, *Immigration Courtside*, “Aimless Docketing Reshuffling,” available at <http://immigrationcourtside.com/tag/aimless-docket-reshuffling/>.
- 5 See Appendix I.
- 6 Transactional Records Access Clearinghouse (TRAC) of Syracuse University, *Immigration Court Backlog Tool*, last accessed October 12, 2017, available at [http://trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/).
- 7 *Id.*
- 8 Calculated based on pending caseloads per court, reported as 61,344 by TRAC *Immigration Court Backlog Tool*, and the number of immigration judges listed by EOIR, which was 31 judges at the time of this writing. See *Immigration Court Backlog Tool*, Transactional Records Access Clearinghouse (TRAC) of Syracuse University, available at [http://trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/); see also Department of Justice, *EOIR Immigration Court Listing*, available at <https://www.justice.gov/eoir/eoir-immigration-court-listing>.
- 9 Staffed with 384 immigration judges that backlog would begin to decrease, presuming that incoming cases and case completion rate remains constant. See Appendix I for explanation of current incoming cases and case completion rate calculations.
- 10 Human Rights First, *In the Balance: Backlogs Delay Protection in the U.S. Asylum and Immigration Court Systems*, April 2016.
- 11 See Appendix.
- 12 As of April 2017, 240,000 cases were pending in immigration courts with three to five years wait times. See Transactional Records Access Clearinghouse (TRAC) of Syracuse University, “Despite Hiring, Immigration Court Backlog and Wait Times Climb,” May 15, 2017, available at <http://trac.syr.edu/immigration/reports/468/>.
- 13 See Appendix I.
- 14 Transactional Records Access Clearinghouse (TRAC) of Syracuse University, “Despite Hiring, Immigration Court Backlog and Wait Times Climb,” May 15, 2017, available at <http://trac.syr.edu/immigration/reports/468/>.
- 15 *Id.*
- 16 United States Government Accountability Office, *Report to Congressional Requesters, “Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges,”* June 2017.
- 17 Human Rights First, *In the Balance: Backlogs Delay Protection in the U.S. Asylum and Immigration Court Systems*, April 2016.
- 18 Exec. Order No. 13767, *Presidential Executive Order: Border Security and Immigration Enforcement Improvements*, 82 Fed. Reg. 8793 (Jan. 25, 2017).
- 19 This information was provided by the Department of Justice to the National Immigrant Justice Center (NIJC) in response to a Freedom of Information Act (FOIA) request [hereinafter referred to as “NIJC FOIA data”].
- 20 Department of Justice, “Attorney General Jeff Sessions Delivers Remarks Announcing the Department of Justice’s Renewed Commitment to Criminal Immigration Enforcement,” April 11, 2017, available at <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-announcing-department-justice-s-renewed>; see also Executive Office of Immigration Review (EOIR), *Notice: EOIR Provides New Hearing Location Details*, (Falls Church, VA: U.S. Department of Justice, March 17, 2017).
- 21 Executive Office of Immigration Review (EOIR), *Notice: EOIR Provides New Hearing Location Details*, (Falls Church, VA: U.S. Department of Justice, March 17, 2017); Executive Office of Immigration Review (EOIR), *Notice: EOIR Provides Information for Two New Hearing Locations*, (Falls Church, VA: U.S. Department of Justice, March 24, 2017).
- 22 NIJC FOIA data.
- 23 NIJC FOIA data.
- 24 Survey response, on file with Human Rights First.
- 25 NIJC FOIA data.

## TILTED JUSTICE

- 26 Id. Referenced by their short-hand names in the EOIR document these name reference the following detention facilities: Chicago Immigration Court detained docket, Elizabeth Contract Detention Facility, Eloy Detention Center, T. Don Hutto Residential Center, Imperial Regional Detention Facility, Krome Service Processing Center/Broward Transition Center, and Oakdale Federal Detention Center.
- 27 NIJC FOIA data.
- 28 See Transactional Records Access Clearinghouse (TRAC) of Syracuse University, "Despite Hiring, Immigration Court Backlog and Wait Times Climb," May 15, 2017, available at <http://trac.syr.edu/immigration/reports/468/>.
- 29 Data provided by EOIR indicates collection beginning on March 6, 2017. Emails ajoined to the data indicate EOIR pulled the date in June 2017. Therefore, the data is presumed to cover a maximum of the first three months of immigration judge details (between March 2017 and June 2017). See NIJC FOIA data.
- 30 Adjourment data provided by EOIR in response to NIJC's FOIA request indicates that all 22,645 adjournments were labeled with adjournment code 65 (Unplanned IJ Leave – Detail/Other Assignment). Data included in a July 2017 GAO report indicates that adjournments labeled with the same code totaled 6,983 in 2015, the most recent data included in the GAO report. see United States Government Accountability Office, Report to Congressional Requesters, "Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges," p. 131, June 2017.
- 31 Survey response, on file with Human Rights First.
- 32 NIJC FOIA data.
- 33 NIJC FOIA data.
- 34 Survey response, on file with Human Rights First.
- 35 See Beth Fertig, "N.Y. Immigration Courts Face 2-Year Delay After Judges Sent To The Border," WNYC, June 14, 2017.
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- 37 Beth Fertig, "Even More Immigration Judges are Reassigned in Trump's Border Crackdown," WNYC News, July 20, 2017, available at <http://www.wnyc.org/story/even-more-immigration-judges-are-reassigned-trumps-crackdown-border/>.
- 38 NIJC FOIA data.
- 39 Department of Justice, "Attorney General Jeff Sessions Delivers Remarks Announcing the Department of Justice's Renewed Commitment to Criminal Immigration Enforcement," April 11, 2017, available at <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-announcing-department-justice-s-renewed>.
- 40 American Bar Association, "Statement of ABA President Hilarie Bass Re: Mandatory case completion quotas for immigration judges," Washington, D.C., Oct. 16, 2017.
- 41 U.S. Department of Justice, Executive Office for Immigration Review, "Operating Policies and Procedures Memorandum 17-01: Continuances," July 31, 2017.
- 42 United States Government Accountability Office, Report to Congressional Requesters, "Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges," p. 124, June 2017.
- 43 Id.
- 44 See U.S. Department of Justice, Executive Office for Immigration Review, "Operating Policies and Procedures Memorandum 13-01: Continuances," March 7, 2013 (stating that "it remains the general policy that, absent good cause shown, no more than two continuances should be granted by an Immigration Judge to an alien for the purpose of obtaining legal representation.").
- 45 Laura Tuell, National Stakeholder Call on Access to Counsel, Human Rights First, May 5, 2017.
- 46 Exec. Order No 13768, Presidential Executive Order: Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799, (Jan. 25, 2017).
- 47 Exec. Order No 13768, Sec. C).
- 48 Muzaffar Chishti and Jessica Bolter, The Trump Administration at Six Months: A Sea Change in Immigration Enforcement, Migration Policy Institute, July 19, 2017.
- 49 Transactional Records Access Clearinghouse (TRAC) of Syracuse University, "Immigration Court Dispositions Drop 9.3 Percent Under Trump," July 17, 2017, available at <http://trac.syr.edu/immigration/reports/474/>.
- 50 Notes, AILA/ICE Liaison Meeting, April 6, 2017, available at <http://myattorneyusa.com/storage/upload/files/matters/aila-ice-liaison-meeting.pdf>.
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- 52 American Immigration Council, Practice Advisory: Administrative Closure and Motions to Recalendar, Updated August 29, 2017.
- 53 See Id.
- 54 Muzaffar Chishti and Jessica Bolter, The Trump Administration at Six Months: A Sea Change in Immigration Enforcement, Migration Policy Institute, July 19, 2017.
- 55 Beth Fertig, "Why New York's Immigration Court is Even Busier, With Fewer Judges, Under Trump," WNYC News, June 5, 2017, available at <http://www.wnyc.org/story/why-new-yorks-immigration-court-even-busier-fewer-judges-under-trump/>.

## TILTED JUSTICE

- 56 Id.
- 57 See Department of Justice, Department of Justice Announces New Priorities to Address Surge of Migrants Crossing into the U.S., July 9, 2014, available at <https://www.justice.gov/opa/pr/departments-justice-announces-new-priorities-address-surge-migrants-crossing-us>; See also Department of Justice, Memorandum: Docketing Practices Relating to Unaccompanied Children and Adults with Children Released on Alternatives to Detention Cases in Light of the New Priorities, (Falls Church, VA: U.S. Department of Justice, March 24, 2015).
- 58 Human Rights First, "In the Balance: Backlogs Delay Protection in the U.S. Asylum and Immigration Court Systems," April 2016.
- 59 The memorandum limited case processing priorities to three categories of cases: 1) all detained individuals; 2) unaccompanied children held in the custody of the Department of Health and Human Services who do not have a U.S. sponsor identified; and 3) individuals who are released from federal custody on a Rodriguez bond—a bond hearing afforded to individuals detained in the Ninth Circuit who have been detained for six months or longer. See Executive Office of Immigration Review (EOIR), Memorandum: Case Processing Priorities, (Falls Church, VA: U.S. Department of Justice, January 31, 2017). See also, Executive Office of Immigration Review (EOIR), Press Release, "Department of Justice Announces New Priorities to Address Surge of Migrants Crossing into the U.S." July 9, 2014.
- 60 Survey responses, on file with Human Rights First.
- 61 Chairman Richard Shelby Opening Statement, Committee on Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies Subcommittee Markup of the FY2018 Commerce, Justice, Science, and Related Agencies Appropriations Bill - July 25, 2017, available at <https://www.appropriations.senate.gov/imo/media/doc/072517-Chairman-Shelby-Opening-Statement.pdf>.
- 62 See Appendix I.
- 63 United States Government Accountability Office, Report to Congressional Requesters, "Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges," June 2017.
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- 65 Department of Justice, "Attorney General Jeff Sessions Delivers Remarks Announcing the Department of Justice's Renewed Commitment to Criminal Immigration Enforcement," April 11, 2017, available at <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-announcing-department-justice-s-renewed>.
- 66 See Human Rights First, "In the Balance: Backlogs Delay Protection in the U.S. Asylum and Immigration Court Systems," April 2016.
- 67 NIJC FOIA data.
- 68 See American Bar Association, Commission on Immigration, "Reforming the Immigration Court System," February 2010.
- 69 U.S. Department of Justice, "An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General, July 28, 2008, available at <https://oig.justice.gov/special/s0807/final.pdf>.
- 70 Id.
- 71 U.S. Department of Justice, "An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General, July 28, 2008, page 115, available at <https://oig.justice.gov/special/s0807/final.pdf>.
- 72 See Department of Justice, Organizational Chart, (last accessed September 17, 2017), available at <https://www.justice.gov/agencies/chart>.
- 73 American Bar Association, Commission on Immigration, "Reforming the Immigration Court System," page 2-19, February 2010.
- 74 Human Rights First compiled and reviewed the published biographical information of all 128 immigration judges appointed since Oct. 2014. See Department of Justice Executive Office for Immigration Review, News and Information, available at <https://www.justice.gov/eoir/news-and-information>.
- 75 Human Rights First compiled and reviewed the published biographical information of immigration judges appointed since, for the first time, a press release in May 2017 indicated that Attorney General Jeff Session appointed the new immigration judges. See Department of Justice Executive Office for Immigration Review, "Executive Office for Immigration Review Swears in Seven Immigration Judges," May 8, 2017; See also Department of Justice Executive Office for Immigration Review, News and Information, available at <https://www.justice.gov/eoir/news-and-information>.
- 76 Human Rights First, In the Balance: Backlogs Delay Protection in the U.S. Asylum and Immigration Court Systems, April 2016.
- 77 U.S. Department of Justice, Executive Office for Immigration Review, "Operating Policies and Procedures Memorandum 17-01: Continuances," July 31, 2017.
- 78 See U.S. Department of Justice, Executive Office for Immigration Review, "Operating Policies and Procedures Memorandum 13-01: Continuances," March 7, 2013 (stating that "it remains the general policy that, absent good cause shown, no more than two continuances should be granted by an Immigration Judge to an alien for the purpose of obtaining legal representation.").
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## TILTED JUSTICE

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85 The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 includes a provision allowing immigration enforcement officers to order the deportation of individuals who have been charged with inadmissibility under section 212(a)(6)(c) and/or section 212(a)(7) of the Immigration and Nationality Act (INA) through a process called "expedited removal." Prior to the enactment of IIRIRA, only an immigration judge could order a person removed from the United States. See U.S.C. § 1225(b).

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87 U.S. Department of Justice Executive Office of Immigration Review, FY 2016 Statistics Yearbook, March 2017.