AILA

Law Journal

A Publication of the American Immigration Lawyers Association

Shoba Sivaprasad Wadhia
Editor-in-Chief

Volume 4, Number 1, April 2022

fastcase FULL COURT PRESS

AILA
Law Journal

Volume 4, Number 1, April 2022

AILA LAW JOURNAL is published two times per year by Full Court Press, a Fastcase, Inc., imprint. Individual issues may be purchased for $60.00, or subscriptions for $99.00 a year. Discounts are available for AILA members and Fastcase legal research users.

Publishing Staff
Publisher: Morgan Morrissette Wright
Production Editor: Sharon D. Ray
Cover Design: Morgan Morrissette Wright and Sharon D. Ray

The cover of this journal features a painting known as "The Sea" by French artist Jean Désiré Gustave Courbet. A leader of the Realist movement, Courbet is also remembered for his political content and activism. The image is provided courtesy of the Metropolitan Museum of Art under a CC0 1.0 Universal (CC0 1.0) Public Domain Dedication.

Cite this publication as:

AILA Law Journal (Full Court Press, Fastcase, Inc.)

A Full Court Press, Fastcase, Inc., Publication

Editorial Office

711 D St. NW, Suite 200, Washington, DC 20004
https://www.fastcase.com/

POSTMASTER: Send address changes to AILA LAW JOURNAL, 711 D St. NW, Suite 200, Washington, DC 20004.

Disclaimer

The articles featured in the AILA Law Journal do not necessarily represent the views of AILA or the publisher, nor should they be regarded as legal advice from the association or authors. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional.

Likewise, the articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors, or their firms or organizations.

Submissions

Direct editorial inquires and send material for publication to:

ailalawjournal@aila.org

Material for publication is welcomed—articles, decisions, or other items of interest to attorneys, law firms, and organizations working in immigration law.

Questions About This Publication?

For questions about the Editorial Content appearing in these volumes or reprint, please contact:

Morgan Morrissette Wright, Publisher, Full Court Press at mwright@fastcase.com or at 202.999.4878

For questions about Sales, or to reach Customer Service:

Customer Service
Available 8am–8pm Eastern Time
866.773.2782 (phone)
support@fastcase.com (email)

Sales
202.999.4777 (phone)
sales@fastcase.com (email)

The Sinking Immigration Court

Change Course, Save the Ship

Stacy Caplow*

Abstract: If there is one area of agreement in the many debates about the state of our immigration system, it is that the immigration court is in crisis. Years of appeals for reform have gone unheeded while backlogs continue to increase dramatically, eliminating any illusion of efficiency and fundamental fairness. The past administration's management policies exacerbated the problems. While the Biden administration is well aware of this situation and has begun to roll back some of the worst damage caused by its predecessor, much work remains to be done. This article offers some short-term proposals for ground-level reforms to some of the practices in the courts that would bring immigration adjudication into greater conformity with other litigation settings and might restore greater confidence in the courts as a place where expeditious, fair, and humane proceedings take place.

Introduction

Immigration court, where hundreds of judges daily preside over wrenching decisions, including matters of family separation, detention, and even life and death, is structurally and functionally unsound. Closures during the pandemic, coupled with unprecedented backlogs, low morale, and both procedural and substantive damage inflicted by the Trump administration, have created a full-fledged crisis. The court's critics call for radical reforms.[1] That is unlikely to happen.[2] Instead, the Biden administration has taken several much-needed steps to reverse many of the misguided policies that led to inefficiencies and inequities. In addition, the President has returned to the go-to, cure-all solution: adding immigration court judges and support personnel[3] to help address the backlog, which now exceeds 1.5 million cases.[4]

No one could oppose additional resources, although a large infusion of immigration judges and the opening of new courtrooms between 2017 and 2020 did little to halt the ever-growing number of pending court cases, which increased by more than 500,000 over that time period,[5] or the waiting times, which now average 905 days.[6]

Additional resources, though critical, are not enough. I propose a series of practical case management reforms that could expedite and professionalize the practice in immigration court. Linked with a more transparent and more inclusive process for selecting immigration judges, these changes would make the immigration courts more efficient, more accurate, and fairer, but not at

AILA Law Journal / April 2022, Vol. 4, No. 1, pp. 39–63.

ISSN 2642-8598 (print) / ISSN 2642-8601 (online)

the expense of the compelling humanitarian stakes in the daily work of the court. While these reforms do not require legislation, they do require the will to transform the practice and culture of the court. They would be a major step forward in improving the experiences, the professionalism, and the outcomes in immigration court.

Changes to the Practices and the Culture of the Immigration Court

Immigration hearings are adversarial. While the stakes are very high and often punitive—removal, ongoing detention, family separation—the proceedings are considered civil matters. Yet little attention has been paid to their deviations from standard civil procedures. Immigration court bears little resemblance to typical civil litigation settings in both the pretrial and trial context. Most of the characteristic judicial tools regulating litigation are absent: pretrial discovery, pretrial settlement or status conferences to resolve or narrow issues, or enforcement tools that require government lawyers to participate in a meaningful way long before the merits hearing. Evidentiary stipulations are rare or occur only at the last minute, when they are unhelpful.

Generally, the prosecutors in immigration court, the Office of the Principal Legal Advisor (OPLA), a division of U.S. Immigration and Customs Enforcement (ICE), assign no trial attorney (TA) to a case until a few weeks prior to an individual hearing.[7] If a case is pending for several years, as so many are these days, it is impossible to have any kind of substantive discussion in advance to narrow issues or to talk over the conduct of the hearing, possible forms of settlement, or alternative relief. Years pass while proceedings stagnate, and individuals are in limbo. Delays can result in huge costs: the governing law might change,[8] personal circumstances might evolve, memories may fade, witnesses may become unavailable, evidentiary submissions might require updating, files might be misplaced.

The immigration court should adopt practices familiar in civil and criminal tribunals around the country. The court should not be reluctant to implement these strategies due to high TA caseloads. Indeed, better case management might reduce caseloads while also benefitting respondents. Accordingly, the immigration court should adopt the following common litigation supervision tools in order to expedite and rationalize proceedings.

Assign Trial Attorneys to Cases Promptly

A TA should be assigned to review a case at the earliest possible time following the initial master calendar appearance, where pleadings are entered. At a minimum, a TA should be assigned at the request of any respondent who wants to discuss a case, regardless of when the individual hearing is

scheduled. To foster meaningful discussions, TA conferences should occur at the latest as soon as the respondent has completed evidentiary filings. In the many affirmative asylum cases referred to court, there would be an extensive evidentiary record at the first master calendar appearance. Although the government lawyers in immigration court are busy, like prosecutors in any busy court in the nation, they can handle a large caseload without waiting until the last minute to review the claim.

The positive impact of a prompt TA assignment system will benefit everyone—respondents, TAs, and immigration judges (IJs). For example, although many cases require a credibility finding based on in-person testimony, some claims simply do not. If there is no basis for doubting credibility after considering the evidence, and the law is clear, a one-, two-, or three-year wait for a decision is unconscionable. Under the current system, the TA does not review the submissions until shortly before the merits hearing. Accordingly, when the TA finds a file in which credibility is not an issue, often the TA does not seriously contest the facts or the eligibility for relief. This results in half-hearted cross-examination, if any at all, and a quick grant of relief without opposition. Unfortunately, this relief occurs only after years of delay and anxiety, plus extensive unnecessary preparation that often involves logistical headaches and inconveniences to witnesses. Earlier, thorough case assessment could avoid the stress to respondents whose lives are on hold, could result in fewer or more focused hearings, and could accomplish the timeliness and efficiency goals of the Executive Office for Immigration Review (EOIR).

Require Prehearing Conferences

The EOIR Practice Manual provides for a prehearing conference.[9] This tool, commonplace in other kinds of courts, is rarely used. Neither IJs nor TAs routinely invite or encourage prehearing conferences. Following the lead of many civil and criminal courts, there should be a regularly scheduled in-court status conference in every case upon a simple request from either party, or on the IJ's initiative, conducted as expeditiously as possible after the pleadings at the master calendar hearing. In the alternative, if the attorneys have conferred, they could report the outcome of their discussions to the IJ, who could then take this into account when scheduling an individual hearing. This could achieve great efficiencies and fairer outcomes.

A mandatory prehearing conference, therefore, would necessitate assigning a specific TA to a case well in advance of the hearing. For a meaningful conference, a respondent's lawyer would generally need to submit evidence and even a memorandum of law. A process similar to a summary judgment motion might result. If the TA concedes that there are no factual disputes or lack of credibility, the judge could decide the legal basis for relief. This procedure might result in an abbreviated evidentiary hearing, might require only an oral argument, or even could be decided on written submissions.

A few prototypical cases illustrate how this might work. Imagine an asylum seeker who has suffered or who has a well-founded fear of persecution on account of sexual orientation and who comes from a country whose homophobic laws and oppression of LGBTQ people are undisputed. If the asylum seeker is credible, well-settled law would surely warrant a grant of asylum. Or suppose a woman who was subjected to genital circumcision has medical records confirming this condition. Again, under well-settled law she is likely to be granted asylum. Or a one-year filing deadline bar could be resolved without the need for testimony based on written submissions. These issues could be resolved at a prehearing conference. Another set of cases might involve requests for cancellation of removal. The prehearing conference could conclude that objective evidence satisfies most of the statutory factors. This could narrow the case so that the IJ would only hear evidence relevant to the hardship determination. If the TA reviewed the evidence and conceded that the hardship standard had been satisfied, this could eliminate the need for a hearing altogether.

Immigrants and their advocates shoulder the burden of multiyear delays and suffer from the resulting uncertainty and angst. Meanwhile, they build lives despite their unpredictable future, increasing the harsh impact of eventual deportation. During the interval, immigration advocates' caseloads multiply. Years later, when a hearing is finally held, the consequences of delay are substantial. Court submissions need to be updated. Legal claims may be affected by changes in the law. Witnesses may be unavailable. Memories may fade. This is particularly harsh for asylum seekers, whose credibility is at the heart of any immigration hearing but whose trauma may have affected their ability to recall events, particularly the persecution they would prefer to forget. Accelerating resolution through prehearing processes following a full presentation of the claim by the respondent and a full review of the evidence by the government would divert cases from the court's hearing dockets.

A serious and sincere discussion of the claims and the evidence might resolve many cases more expeditiously. Relief could be granted without a full hearing, which often takes hours and sometimes multiple adjournments. In some instances, TAs could choose to terminate the proceedings through an exercise of prosecutorial discretion. Good case management, effective communication, and open-mindedness are imperative to making the system work more smoothly and more quickly.

Make Greater Use of Prosecutorial Discretion as a Case Management Tool

Resolving a case through an exercise of prosecutorial discretion is another tool available to, but rarely employed by, the government. The new administration acted promptly to reinstate prosecutorial discretion as a tool for case resolution by issuing an interim guidance memo in May 2021[10] and additional

guidelines in September 2021.[11] These directives both incentivize TAs to use prosecutorial discretion as part of the holistic case-management reforms that will benefit the TAs, the immigration court, and the respondents. This guidance reestablishes priorities and encourages the resuscitation of vigorous prosecutorial discretion. The earlier guidance memo gives express permission to the TAs to consider prosecutorial discretion even in the absence of a request.[12] Its reference to "mutual interest" strives to break down the adversarial barriers that obstruct judiciously exercised discretion and encourages shared problem-solving.

Some OPLA offices have established protocols for submitting requests for prosecutorial discretion. It is too early to tell whether this change in policy will result in a change in culture in the field. In the past, requests were not very successful despite encouraging guidelines and priorities.[13] But even if the TAs do not take initiative, at the very least those offices with written protocols have created a structure in which to engage in serious discussions about the direction of a case on the court's docket. All OPLA offices should prepare and publicize similar protocols.

A commitment to exercising discretion at the ground level is even more urgent. In the past, despite policy guidance from above, TAs were reluctant to explore options for alternative outcomes, particularly when any kind of criminal conviction was involved. Discretion benefits from general guidelines but, by its nature, should not be constrained by absolute rules.

In reaction to the Department of Homeland Security (DHS) May directive, EOIR has encouraged its judges to inquire whether the matter is a removal priority for the government or if there can be a resolution through an exercise of prosecutorial discretion.[14] IJs cannot force TAs to take certain actions relating to the merits of a case, but they can review the evidence in a pretrial conference and make a strong suggestion about the best resolution at an in-court prehearing conference.

Enforce the Immigration Court Practice Manual Evenhandedly

After years without any standardized practices, the EOIR published its Immigration Court Practice Manual.[15] This guidance was a welcome development. On its face, it appears to govern all aspects of practice neutrally. A closer reading of the Manual, however, reveals how one-sided these rules and the practice they govern really are. The everyday reality is even more blatantly lopsided because only respondents' attorneys do the work that the Manual regulates. The power imbalance between the parties and the close relations between the immigration bench and the prosecutors is embedded in the contents, language, and impact of the Manual.

In most cases before IJs the burden of proof to secure relief is on the respondent, once removability is established.[16] This means that respondents, represented in only about 60 percent of all cases,[17] submit all the evidence

to support their application for relief. In the Manual, there are detailed rules relating to filings, motions, and the conduct of hearings down to the types of tabs, cover sheets, identifiers for motions, cover pages, tables of contents, proof of service, witness lists, and hole punching. Submissions must be filed and served at least 15 days in advance of the hearing.[18]

Because government lawyers rarely submit any evidence other than proof of removability, if the respondent does not concede, none of these rules affect their workload. On the rare occasion that the TAs do file a proposed exhibit, they often do so on the day of the hearing, and rarely 15 days in advance. Flagrant disregard of the rules is tolerated by IJs without prejudice to the government lawyer. If this happens, typically a Hobson's choice is given to the respondent: accept the late service or postpone the case. These days, postponement can mean years. The respondent, anxious and prepared for that day's testimony, is likely to opt for the former, letting the government ignore the rules with the IJs permission.

The IJs should behave more forcefully to enforce the rules. They should preclude the evidence. Or cite the government lawyer for contempt in an egregious case. Instead, acceptance of lazy lawyering encourages even less compliance with the rules. This, in turn, fosters an appearance that the IJs are aligned with the prosecutors.

Be Attentive to Professional Standards in the Courtroom

These practical manifestations of the imbalance of power—the reluctance to regulate, sanction, or discipline—and the very environment of the courtroom expose the cozy connection between the immigration bench and the prosecution. They undermine any fiction of independence. IJs preside in courts in which former colleagues (perhaps friends) appear. Respondents sit in the room, often in a cone of incomprehension due to language barriers, while government lawyers chat with IJs. But, even without understanding what is being said, the appearance of a friendly relationship is visible to any observer. The integrity and objectivity of the court is seriously damaged by these everyday departures from appropriate courtroom conduct. There is an obvious and easy remedy for the appearance of partiality inferred from the comradery between the prosecutor and the judge. The IJs and TAs must change the atmosphere inside these courtrooms to one of dignity and seriousness by maintaining a professional distance and refraining from one-sided conversations.

Apply Disciplinary Rules to Government Lawyers as Well as Immigration Advocates

Lawyer disciplinary rules must be applied equally to ICE attorneys as well as attorneys for respondents. This recommendation may seem obvious.

Yet the policy guidance promulgated by EOIR in 2018[19] raises serious concerns. It establishes policies and procedures for reporting ineffective assistance of counsel or other violations of rules of professional conduct identified by the EOIR. Of course, protecting immigrants against unscrupulous or incompetent lawyers is a worthy goal. But these disciplinary rules apply only to immigrant advocates and not government lawyers.[20] EOIR should promptly issue equivalent guidance that applies to ICE attorneys who might commit ethical violations. In the absence of attempts by EOIR to be evenhanded, the 2018 policy guidance is a troubling example of bias within the court system.

Changes to the Immigration Court Bench

Introduction

Attorney General Garland and new EOIR leadership have taken several significant steps to reverse many of the more controversial and harmful administrative policies inflicted by the prior administration that limited the ability of IJs to decide their cases carefully and fairly.[21] But more can be done. The Attorney General must rehabilitate the reputation of the immigration court, which suffered from appointments intended to instantiate government policy rather than adjudicate impartially.[22] The Attorney General and EOIR leadership must also continue to retract the damaging management directives of the former administration, a course of action they have started. Finally, they must institute some truly transformative initiatives.

Removing unrealistic performance metrics will improve morale and incentivize judges to be independent thinkers without fear of interference or reprisals.[23] As many commentators have suggested, the Attorney General should establish a system of logical adjudication priorities.[24] The Attorney General helpfully revoked the Damoclesean sword of quantitative performance metrics or quotas,[25] which encourage hasty outcomes that devalue the stakes involved in most hearings. As is true with the proposal to adopt standard civil litigation measures in immigration court, changing metrics and priorities does not require legislation or rulemaking. While a return to the "old normal" will not fully address the structural capture of this court by the Department of Justice (DOJ) and the widely divergent outcomes between courts,[26] it will be an important improvement.

The Past Decade of Immigration Court Growth

Injecting new resources into the immigration courts is a common prescription for a system that is overloaded, backlogged, and inefficient. This approach seems sensible and has indeed been tried. Surprisingly, it has not

had much success. The following table shows the exponential growth in judges over the past decade.

Fiscal Year	Total IJs Hired	Total IJs on Board
2010	17	245
2011	39	273
2012	4	267
2013	8	262
2014	0	249
2015	20	254
2016	56	289
2017	64	338
2018	81	395
2019	92	442
2020	99	517
2021	65	559

Executive Office for Immigration Review Adjudication Statistics: Immigration Judge Hiring[27]

As the table shows, between 2017 and the end of 2020 almost 336 judges were added to the ranks, supposedly to clear up the considerable backlog that already existed at that time. Over that same period, almost 100 courtrooms were added, totaling 474 at the end of 2020.[28] As of fiscal year 2021, there were 559 immigration judges,[29] and as of February 2022, 66 immigration courts.[30]

Despite these additional resources, delays continue to increase. Although EOIR asserts, "The timely and efficient conclusion of cases serves the national interest,"[31] today many hearings are adjourned for as long as two or three years. Swift and certain justice after a full and fair removal proceeding eludes most people.

While some of this eye-popping number of pending matters is attributable to the influx of asylum seekers at the southern border,[32] ICE also has been filing new removal cases.[33] In addition, the pandemic shut most of the courts for more than a year. These external forces have intensified pressures, but they are not the root causes of the court's dysfunction. Adding more judges will not solve the well-recognized structural defects of the court itself.

An immigration bench that has been populated to serve political goals lacks genuine independence and is subject to political branch dictates. The Trump DOJ further diminished judicial independence (and morale) by imposing performance metrics,[34] limiting the exercise of discretion,[35] litigating to decertify the judges' union,[36] muzzling individual judges,[37] and radically changing long-standing legal principles.[38] On its own website, the stature of

this tribunal is downgraded to "quasi-judicial,"[39] dropping the pretense of independence and reducing its stature.

Mismanagement decisions and the almost total departure from normal litigation practices contribute to the dysfunction of the court. Judges were prevented from using sound judgment to supervise their caseloads and preside over life-altering removal proceedings. Administrative inefficiencies that have long plagued this court worsened under the policies adopted by the four-year, multi-faceted Trump assault on immigration. Old cases languished while new cases poured in.

Considering this grim reality, the time has come to rethink some embedded assumptions and practices, particularly those that do not have to wait for structural court reform.

Surveying the Trump-Era Appointed Immigration Judges

The job of IJ, as one IJ famously said, consists of hearing "death penalty cases in a traffic court setting."[40] Immigration court needs to be staffed by experienced judges committed to applying the law with both rigor and compassion. IJs need to be able to use the tools that judges normally employ in other settings to administer their courts effectively. Knowledgeable, fair-minded, even-tempered, confident, and courageous judges should be the norm.

The following collective profile of these IJs deserves detailed attention. It calls into question whether fair and impartial adjudication can be achieved if past practices remain the norm as more IJs are appointed.

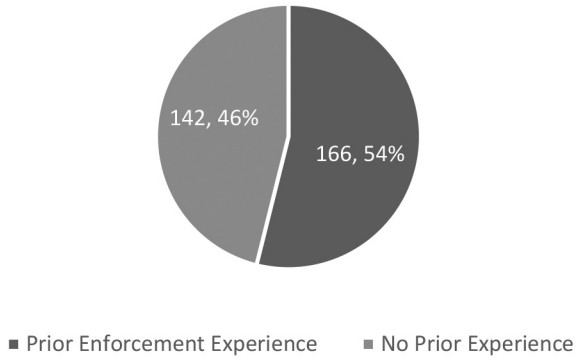
Government Enforcement Background

From 2017 to 2020, DOJ hired judges who were drawn predominantly from current or former employees of one or more government-side immigration prosecution, enforcement, or related agencies.[41] (See Figure 1.) Filling the bench with lawyers from this career path is not new, or particularly surprising, since these are candidates who actually do have a deep knowledge of the law and a familiarity with the court. But a career in enforcement risks distorting objectivity and impartiality.

Although a career in immigration practice is an obvious advantage, a review of the IJ biographies reveals that only a handful—about 10 or 11—worked in either private practice or public interest organizations representing immigrants. This represents a striking imbalance among the IJs with considerable immigration practice backgrounds. One of the two obvious sources of experienced immigration attorneys—immigrant advocates—is barely represented.

Furthermore, these numbers show not only that government-side lawyers are overly represented but also that close to half of new IJs appear to have

Figure 1. Prior Government Immigration Enforcement Experience



no discernable knowledge of immigration law or experience in immigration practice. This further highlights the absence of immigration advocates on the bench.

The credentials of newly installed judges sitting in the New York immigration court is representative of this distortion: eight previously worked for immigration enforcement agencies, three had represented immigrants at some point, and three had no prior immigration practice experience at all.[42]

Lawyers with government immigration careers are not the only former law enforcement employees sitting on the immigration court bench:

- Former prosecutors: 51 percent of new IJs' credentials include past positions as either federal and/or state prosecutors, or both. (See Figure 2.)
- Members or former members of the military: many have military records (often in combination with prosecutorial credentials), an advantage in the selection process. But generally, these IJs have no immigration law experience. (See Figure 3.)

Many individual biographies include a combination of these backgrounds; such as one or more government enforcement jobs, prior prosecutorial positions, and military service. At the risk of overgeneralizing, there are many common characteristics in these backgrounds that could discourage independence and critical or creative thinking, as well as produce intolerance for inefficiency, aggressive advocacy, or other perspectives.

Judicial Experience

At first blush, prior judicial experience would seem to be a plus for IJs. However, only a handful of the new IJs, 46, have sat on any bench, all of which were state-level tribunals or administrative courts with no obvious

Figure 2. Prior Prosecutorial Esperience

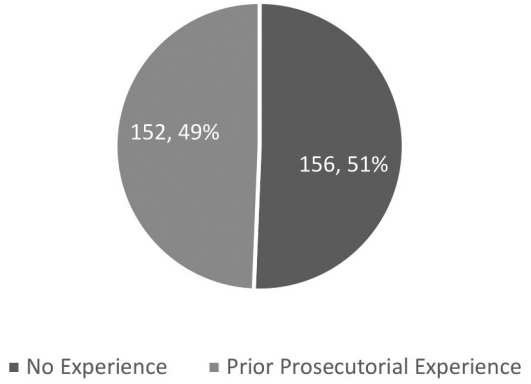
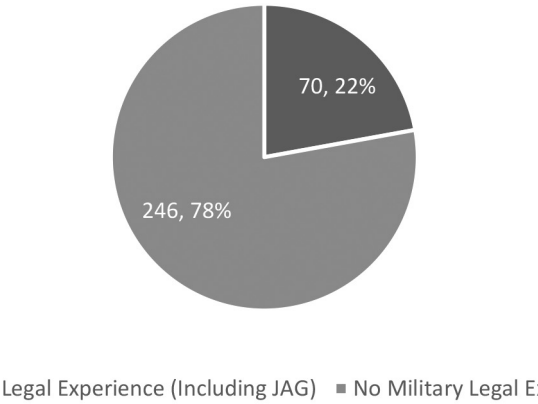


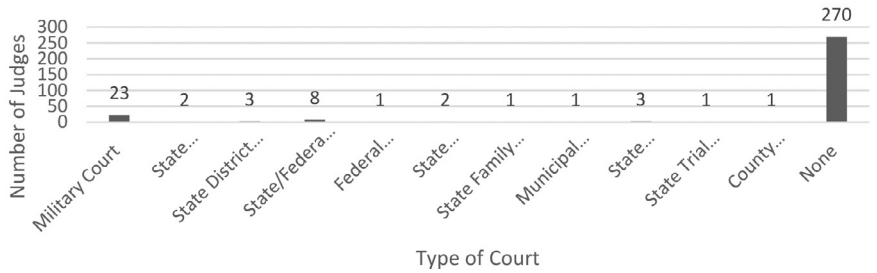
Figure 3. Military Legal Experience (Including JAG)



immigration jurisdiction. The skills acquired from judicial experience in town courts or at Social Security hearings may not be transferable to immigration court. (See Figure 4.)

In addition to prior judicial experience, judicial training has the potential to play a positive role in immigration court adjudication. The haste to seat these judges, however, resulted in IJ assignments after reduced training.[43] Even more worrisome, just as more judges were being added, veteran judges were leaving the bench, some in reaction to the new pressures to perform.[44] This diminished the opportunity for ongoing mentorship by experienced judges, as well as reduced the gains that were intended to result from the additional resources. Large caseloads, in conjunction with insufficient judicial training, incentivized new IJs to rush through hearings, and has predisposed them to deny applications in decisions replete with incomplete or sloppy reasoning.[45] The Round Table of Former Immigration Judges, "a group of 51 former Immigration Judges and Members of the Board of Immigration Appeals who

Figure 4. Prior Judicial Experience



are committed to the principles of due process, fairness, and transparency in our Immigration Court system,"[46] bears witness to the degrading of the court and, speaking with the voice of years of experience, has been an increasingly active and vocal critic of the recent developments at the court both before Congress and as *amicus curiae*.[47]

Legal Experience

Generally, ascent to the judiciary occurs after a lawyer acquires expertise in a legal field, and demonstrates maturity, judgment, and capacity. Knowledge of the law, an even temperament, impartiality, and the ability to make reasoned decisions are the basic qualities associated with judging. Lawyers usually spend many years acquiring and deepening these qualities. The EOIR requirement of seven years post-bar admission seems minimal.

The survey of the IJs appointed during the prior administration showed that most new IJs do have more than the minimum amount of experience. But when their years in practice are framed by the kind of experience the majority of them have, it presents a troubling picture. Whether criminal enforcement or government-side immigration lawyer, it is likely that they have spent their formative years and extensive careers opposing or obstructing relief and challenging credibility. These experiences inevitably shape their judicial outlook.

The Biden Appointments to Date

Between May and December 2021, the new administration installed 72 new immigration judges and one Board of Immigration Appeals (BIA) appellate IJ.[48] There was immediate skepticism about whether the earliest IJ appointments in May represented an improvement, since many had similar backgrounds to their immediate predecessors and most had been hired before

2021.[49] Since then, there have been three more rounds of appointments, adding 56 additional IJs. While it is impossible to draw definite conclusions based on such limited data, when contrasting the 2017–2020 appointments with those made by the new administration (the "2021 IJs"), some cautious optimism for long-term change is possible. These tables chart some of the key characteristics of all four rounds of installations in 2021, although only the last three cycles are entirely Biden-era appointments.

Government Enforcement Background

The most obvious imbalance represented by past appointments is the overrepresentation of IJs with immigration enforcement backgrounds at ICE, U.S. Citizenship and Immigration Services (USCIS), or other agencies. In contrast to the earlier raft of appointments where 54 percent of the new IJs worked in these positions, only 27, or 37 percent, of the 2021 IJs came with those credentials. (See Figure 5.)

- Former prosecutors: Another notable attribute of past appointments was the extensive state and/or federal prosecutorial background of those IJs. More than half, 51 percent, had worked in prosecutor's offices, many in combination with immigration enforcement and/or the military. In 2021, that number decreased to 37 percent. (See Figure 6.)
- Members or former members of the military: fewer of the 2021 IJs served in the military or in the military reserves, illustrated by a slight decrease from 22 percent to 17 percent. (See Figure 7.)

Figure 5. Prior Government Immigration Enforcement Experience

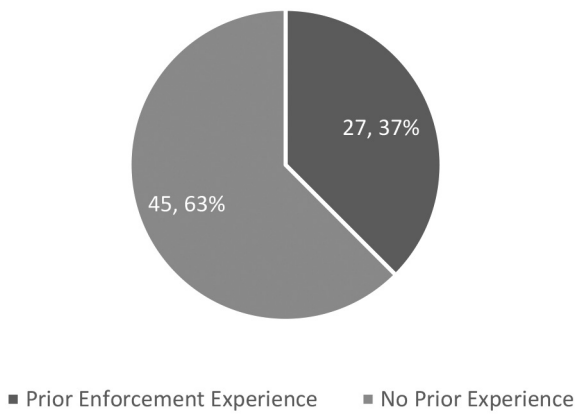


Figure 6. Prior Prosecutorial Experience

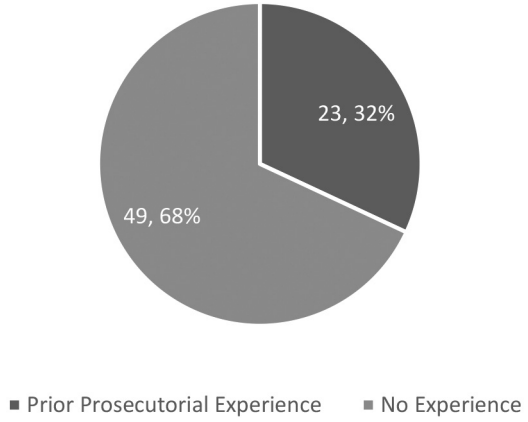
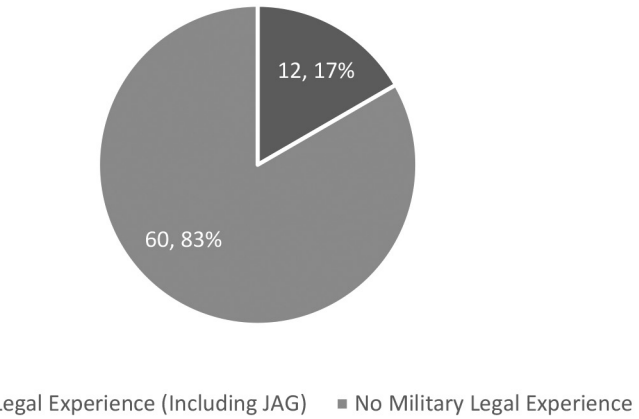


Figure 7. Military Legal Experience (Including JAG)



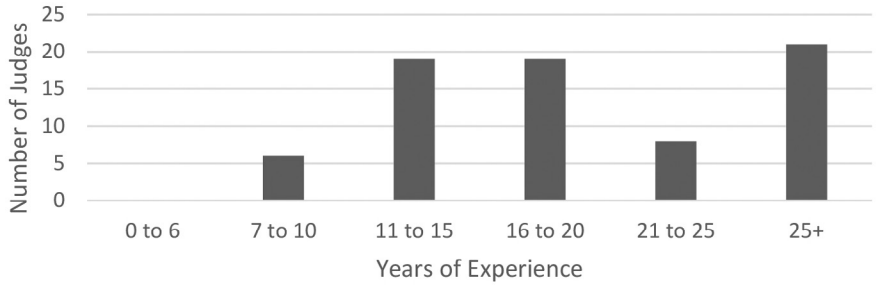
Immigrant Advocacy Background

An even more noticeable shift is taking place in the effort to diversify the bench. Of the IJs appointed during the Trump years, only 10 or 11 had any background as immigrant advocates in either the public or private sector. Of the 2021 IJ appointments, 14 of 72, or 19.4 percent, represented immigrants. Many of these IJs spent their entire careers at nonprofits in various parts of the country, while a few worked extensively at private immigration law firms.

Judicial Experience

Like the earlier appointments, few of the new IJs have much judicial experience. Only 18 percent (13), down from 27.7 percent, have sat on any kind of

Figure 8. Prior Legal Experience of Immigration Judges



bench, but, again, these were only state-level or administrative tribunals. This reduction may signify the recognition that unrelated judicial experience does not add very much to the qualifications required to be an effective IJ, since neither the law nor the procedures have much in common with municipal, county, or agency courts.

Legal Experience

Like the earlier appointments, most of the 2021 IJs have substantial practice experience, and presumably the promise of maturity and judicial disposition that these years generally bring. Again, how this translates to the bench may depend on the nature of their past experience and how it has shaped their values, biases, and beliefs. (See Figure 8.)

A more significant and positive development is the decrease in the number of IJs with no discernable immigration law background, knowledge, or experience. Thirty-two percent (23) of the 2021 IJs had no apparent immigration law background, in contrast to about 50 percent of the IJs appointed in the prior administration. Given the complexity of immigration laws, the intensity of immigration court practice, and the stakes involved, these inexpert IJs are faced with a steep, possibly intimidating, learning curve. Better and more training is imperative but starting with a more knowledgeable pool is important progress and a distinct advantage.

Bias in Results

The traditional selection process seems to yield IJs with questionable qualifications and possible biases. The data tend to confirm the prediction that the newly appointed IJs with these credentials have been granting fewer requests for asylum relief.[50] According to EOIR's own statistics, the asylum denial rate in all courts increased from a low of 20 percent to a high of 32 percent in 2018, to a range of 31.75 percent to 54.53 percent by 2020.[51]

The increasing number of negative asylum decisions is even more obvious when examining the decisions of individual IJs. Between 2013 and 2018, 58 judges denied asylum more than 90 percent of the time, and 69 judges denied asylum between 80 percent and 90 percent of the time.[52] Over the five-year period 2015-2020, the number of IJs who denied asylum more than 90 percent of the time rose to 109, and the number denying asylum between 80 percent and 90 percent of the time rose to 111.[53] While some toughening of legal standards imposed by the Trump administration might account for a portion of this surge in denials,[54] the coincidence between these dramatic numbers and the infusion of new IJs appointed by the Trump DOJ is hard to ignore.

The short time frame makes it hard to draw reliable comparisons between the first year of the Biden administration and the last several years under Trump. Multiple factors make it difficult to draw conclusions based on recent reports of asylum results. Courts have been closed due to COVID, so fewer asylum cases have been adjudicated. Many cases involving claims from the southern border experience lengthy delays. Yet one recent well-respected source concludes that asylum grant rates have risen from 29 percent to 37 percent over the past year alone.[55] This upward trend may continue as more cases are heard by the courts and as more IJs with less inclination to rubber-stamp denials take the bench.

A Better Judicial Selection Process

An infusion of new personnel provides an opportunity to scrutinize and reform the appointment process of IJs to make it less vulnerable to political influences. By many accounts, it was intensely politicized in the Trump years. Appointment to the court is governed by DOJ, allowing the country's chief prosecutor to unilaterally advance a frequently biased agenda.[56] This undeniable conflict is nothing new, but it demeans the integrity of the bench. Even worse, the opaqueness of the selection process shields an agenda that is suspect, based on the profile of the IJs appointed by the Trump administration.[57]

A cleaner, more transparent merit selection process, typical of most judicial systems, would enhance the reputation of the court. A recruitment process that is attractive to a wider range of applicants might invite a more diverse applicant pool. The work is very demanding, but it pays well.[58]

In addition, the criteria for the job are now absurdly undemanding. Aside from a law degree and licensure in any U.S. jurisdiction, an applicant must have

> a full seven (7) years of post-bar experience as a licensed attorney preparing for, participating in, and/or appealing formal hearings or trials involving litigation and/or administrative law at the Federal, State or local level. Qualifying litigation experience involves cases in which a complaint was filed with a court, or a charging document (e.g., indictment or information) was issued by a court, a grand jury, or appropriate military authority. Qualifying administrative law

> experience involves cases in which a formal procedure was initiated by a governmental administrative body.[59]

While knowledge of or experience in immigration law may be an advantage, it is not an expressed job qualification. Nor does lack of background in the field appear to pose any kind of barrier to selection, as is evident from the number of IJs with no demonstrable professional experience in the field.

Change is in the air. EOIR has added language to the announcement of new IJs that for the first time publicly solicits a more varied pool of applicants. It states, "EOIR recognizes that a diverse and inclusive bench reflects the public we serve, and the agency encourages qualified candidates from all backgrounds to join our corps of dedicated adjudicators."[60] Whether this call will be heeded is unknown, but it is a start.[61]

Without the need for legislative reform, DOJ and EOIR could improve the perception and reality of the immigration court selection process. Simple improvements include the following steps to elevate the selection standards: (1) requiring a minimum of 10 years' experience, (2) requiring more direct knowledge of immigration law, (3) assuring a neutral merit-selection process that incentivizes applications from immigrant advocates, (4) opening the selection process for more public input, (5) improving training and oversight that emphasizes competence more than productivity, (6) restoring morale by recognizing and respecting the responsibility placed on IJs and treating them not as employees but as judicial officers, (7) overseeing and questioning the basis for abnormally high denial rates, and (8) instituting and implementing periodic recertification standards.

Conclusion

Is there a life preserver on this sinking ship? As immigration courts reopen following the pandemic, they are facing an unprecedented backlog. Cases are already postponed years into the future. Due to a now shared interest of the court and ICE to address the burdensome and shameful backlog, the new administration is in the position to institute real reform to the way business is conducted. It has started to steer in a positive direction. This is a potentially defining moment when change may actually begin to happen.

On a lifeboat, survival depends on a commitment to problem solving, trust, and collaboration until rescue arrives. The same is true with immigration court improvement. In tackling the crisis resulting from the backlog and the prior enforcement priorities, the Biden administration needs to have robust consultations with the immigrant advocates' bar and other stakeholders and incentivize everyone involved with the system to work collaboratively with each other. To make this happen, a true cultural change must occur at every level of immigration litigation.

The new administration is articulating goals to redress past mistakes, to ameliorate the backlog, and to seriously change enforcement priorities. A few significant steps have been taken. EOIR appears to be recruiting and appointing IJs from a more diverse pool. It also has repaired some damaging missteps and has issued a series of helpful guidance and policy memoranda reacting to the DHS prosecutorial discretion directive.[62] It has reinforced its commitment to supporting pro bono representation,[63] and has replaced the previous ill-advised, onerous case flow and filing deadline policies.[64] But the jury is still out on the buy-in to any kind of long-term genuine reform.

Someday structural reform may truly reshape the court enough to eliminate the qualifier *quasi*. IJs may become full-fledged judges capable of making legally sound decisions in courtrooms where dignity, respect, patience, and compassion are the norm without fear of retribution.

Until then, even without legislative structural reform, immigration court can be dramatically improved. Directives from the top are an important first step. Positive changes in the field also must be encouraged, monitored, and supported so that the reality reflects the aspirations.

The new administration can bring immigration court into conformity with general adjudication norms and practices. Recognize the demands of presiding over life-altering matters on the judges' well-being by giving them the resources, the power, and the trust to be *full-fledged* judges. These steps would help the immigration court emerge from the current crisis as a body that applies the law consistently and efficiently, without sacrificing fairness and humanitarian considerations.

Notes

* Stacy Caplow teaches Immigration Law at Brooklyn Law School, where she also has codirected the Safe Harbor Project since 1997. An earlier version of this article was published on August 1, 2021, in *The Insightful Immigration Blog*, http://blog.cyrusmehta.com/2021/08/the-sinking-immigration-court-change-course-save-the-ship.html. Many thanks to Brooklyn Law School student Benjamin Kaplan for his research assistance and to Professor Maryellen Fullerton for her unending support.

1. *See, e.g.*, American Bar Association Commission on Immigration, 2019 Update Report: Reforming the Immigration System: Proposals to Create Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases, https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf (containing more than 100 specific recommendations); AILA, *Featured Issue: Immigration Courts*, AILA Doc. No. 21041931; Hearing before House Committee on the Judiciary, Courts in Crisis: The State of Judicial Independence and Due Process in U.S. immigration courts, Jan. 29, 2020, https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2757; New York City Bar Association, Report on the Independence of the Immigration Courts (2020), https://www.nycbar.org/member-and-career-services/committees/reports-listing/

reports/detail/independence-of-us-immigration-courts. Statement of Immigration Judge A. Ashley Tabbador on behalf of National Association of Immigration Judges before House Committee on the Judiciary, Jan. 29, 2020, https://docs.house.gov/meetings/JU/JU01/20200129/110402/HHRG-116-JU01-Wstate-TabaddorA-20200129.pdf; Letter from AILA, et al. to members of Congress (July 11, 2019), AILA Doc. No. 19070802.

Other voices include the Round Table of Former Immigration Judges and law professors. *See, e.g.*, Letter to Attorney General Merrick Garland from law professors, AILA Doc. No. 21050334; Julia Preston, *Is It Time to Remove Immigration Courts from Presidential Control?* (Aug. 28, 2019), https://www.themarshallproject.org/2019/08/28/is-it-time-to-remove-immigration-courts-from-presidential-control; Federal Bar Ass'n, *Congress Should Establish an Article I Immigration Court*, https://www.fedbar.org/government-relations/policy-priorities/article-i-immigration-court/; Mimi Tsankov, *Human Rights Are at Risk*, ABA Human Rts. Mag., Apr. 27, 2020, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/immigration/human-rights-at-risk/. *See also* Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13-1 Bender's Immig. Bull. 3, 5 (2008) (the author was an immigration judge); Maurice Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 San Diego L. Rev. 1, 18 (1980) (the author was the retired Chair of the Board of Immigration Appeals).

For more recent voices, see N.Y. Times Editorial Board, *Immigration Courts Aren't Real Courts. Time to Change That*, N.Y. Times, May 8, 2021, https://www.nytimes.com/2021/05/08/opinion/sunday/immigration-courts-trump-biden.html; Allison Peck, *Biden Should Call for Article I Immigration Courts*, The Hill, Apr. 28, 2021, https://thehill.com/opinion/immigration/550693-biden-should-call-for-article-i-immigration-courts (Prof. Peck is the author of the newly published book *The Accidental History of the U.S. Immigration Courts: War, Fear, and the Roots of Dysfunction*).

2. Creating an Article I court requires legislation and major reorganization. Federal Judicial Center, *Courts: A Brief Overview*, https://www.fjc.gov/history/courts/courts-brief-overview. On February 3, 2021, just as this article was being finalized, Representatives Zoe Lofgren (D-CA), Jerrold Nadler (D-NY), and Hank Johnson (D-GA) introduced the Real Courts, Rule of Law Act of 2022, legislation that would "establish, under Article 1 of the Constitution of the United States, a court of record to be known as the United States Immigration Courts." *See* https://lofgren.house.gov/sites/lofgren.house.gov/files/2.3.22%20-%20The%20Real%20Courts%2C%20Rule%20of%20Law%20Act%20of%202022%20Full%20Text.pdf.

3. President Biden's proposal is part of his overall budget planning:

> *Supports Efforts to Reduce the Immigration Court Backlog*. In order to address the nearly 1.3 million outstanding cases before the immigration courts, the discretionary request makes an investment of $891 million, an increase of $157 million or 21 percent over the 2021 enacted level, in the Executive Office for Immigration Review. This funding supports 100 new immigration judges, including support personnel, as well as other efficiency measures to reduce the backlog.

Letter from Executive Office of the President, Apr. 9, 2021, enclosure 2, at 22, https://www.whitehouse.gov/wp-content/uploads/2021/04/FY2022-Discretionary-Request.pdf. *See also Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize Our Immigration System*, Jan. 20, 2021, https://www

.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/.

4. TRAC Immigration, *Immigration Court Backlog Tool*, https://trac.syr.edu/phptools/immigration/court_backlog/. This statistic is complicated and does not fully account for all matters, because some have been "inactive" and thus excluded from the final figure. The Executive Office for Immigration Review (EOIR) reports 1,399,680 pending cases as of the end of FY2021 (Oct. 31). *Executive Office for Immigration Review Adjudication Statistics: Pending Cases, New Cases, and Total Completions*, https://www.justice.gov/eoir/page/file/1242166/download.

5. *Executive Office for Immigration Review Adjudication Statistics: Pending Cases, New Cases, and Total Completions*.

6. TRAC Immigration, *Immigration Court Backlog Tool*.

7. "The Office of the Principal Legal Advisor (OPLA) is the largest legal program in DHS, with over 1,250 attorneys and 290 support personnel. By statute, OPLA serves as the exclusive representative of DHS in immigration removal proceedings before the Executive Office for Immigration Review, litigating all removal cases including those against criminal aliens, terrorists, and human rights abusers." https://www.ice.gov/about-ice/opla.

8. A particularly pointed example of this is the double reversal of the interpretation of "particular social group" as applied to survivors of domestic violence. Before the Trump years, claims would be heard under the standard set forth in *Matter of A–R–C–G–*, 26 I&N Dec. 388 (BIA 2014). Then came *Matter of A–B–*, 27 I&N Dec. 316 (AG 2018), which virtually disqualified victims of domestic violence and gang violence from gaining asylum, followed by a lame-duck AG decision, *Matter of A–B–* (II), 28 I&N Dec. 199 (AG 2021). The Biden administration then vacated *A–B–*, 28 I&N Dec. 307 (AG 2021), and restored *A–R–C–G–*.

9. "Pre-hearing conferences are held between the parties and the immigration judge to narrow issues, obtain stipulations between the parties, exchange information voluntarily, and otherwise simplify and organize the proceeding." Immigration Court Practice Manual ch. 4.18.

10. Memorandum from John D. Trasviña, ICE Principal Legal Advisor, to all OPLA attorneys, *Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities* (May 27, 2021), AILA Doc. No. 21060499.

11. Memorandum from Alejandro N. Mayorkas, DHS Secretary, *Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021), AILA Doc. No. 21093010.

12. Memorandum from John D. Trasviña, at 7-8.

13. For an example of the policies for the exercise of prosecutorial discretion during the Obama administration, see Memorandum from John Morton, Director of ICE, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011), AILA Doc. No. 11061734.

14. Memorandum from Jean King, EOIR Acting Director, *Effect of Department of Homeland Security Enforcement Priorities* (June 11, 2021), AILA Doc. No. 21061133.

15. The Manual is available online at https://www.justice.gov/eoir/eoir-policy-manual/part-ii-ocij-practice-manual.

16. INA § 240(c)(4).

17. Interestingly, while there is consensus that representation makes a huge difference to positive outcomes, the denial rate for asylum increased 12% between 2018 and 2020 notwithstanding representation. *Executive Office for Immigration Review Adjudication Statistics: Current Representation Rates*, https://www.justice.gov/eoir/page/file/1062991/download.

18. One of the more onerous changes imposed on advocates was the advancing of the filing deadline in nondetained cases from the long-standing rule of 15 days before an individual hearing to 30 days before the hearing. This revision was rescinded, and the 15-day default filing deadline reinstated on December 16, 2021. Memorandum from David Neal, EOIR Director, *Filing Deadlines in Non-Detained Cases* (Dec. 16, 2021), AILA Doc. No. 21121605; Immigration Court Practice Manual ch. 3.1(b)(2)(A).

19. Memorandum from James R. McHenry III, EOIR Director, *Internal Reporting of Suspected Ineffective Assistance of Counsel and Professional Misconduct* (Dec. 18, 2018), AILA Doc. No. 18121938.

20. *See* AILA Letter to EOIR Director James McHenry, Feb. 15, 2019, AILA Doc. No. 19021549.

21. Attorney General Garland has been actively withdrawing decisions issues by his predecessors. *See, e.g.*, *Matter of A–C–A–A–*, 28 I&N Dec. 351 (AG 2021), vacating in its entirety *Matter of A–C–A–A–*, I&N Dec. 84 (AG 2020), and restoring discretion to IJs in case management; *Matter of Cruz Valdez*, 28 I&N Dec. 326 (AG 2021), overruling *Matter of Castro-Tum*, 27 I&N Dec. 271 (AG 2018), and restoring ability of IJs to administratively close cases. These decisions also free up TAs to exercise prosecutorial discretion.

22. Tanvi Misra, *DOJ Changed Hiring to Promote Restrictive Immigration Judges*, Roll Call, Oct. 29, 2019, https://www.rollcall.com/2019/10/29/doj-changed-hiring-to-promote-restrictive-immigration-judges/; Tom Dart, *Jeff Sessions Accused of Political Bias in Hiring Immigration Judges*, The Guardian, June 16, 2018, https://www.theguardian.com/us-news/2018/jun/16/jeff-sessions-political-bias-hiring-immigration-judges; Patt Morrison, *How the Trump Administration Is Turning Judges into "Prosecutors in a Judge's Robe*," L.A. Times, Aug. 29, 2018, https://www.latimes.com/opinion/op-ed/la-ol-patt-morrison-judge-ashley-tabaddor-20180829-htmlstory.html/.

23. This article does not address the long-standing arguments advanced for an independent Article I court. For a selection of perspectives on that, see the sources cited in note 1, *supra*.

24. *See, e.g.*, Gregory Chen and Peter Markowitz, *Recommendations for DOJ and EOIR Leadership to Systematically Remove Non-Priority Cases From the Immigration Court Backlog* (updated Feb. 11, 2021), AILA Doc. No. 21050301.

25. *See* Memorandum from James R. McHenry III, EOIR Director, *Case Priorities and Immigration Court Performance Measures* (Jan. 17, 2018), AILA Doc. No. 18011834. IJs were required to complete 700 cases per year. A completion record of less than 560 cases was considered unsatisfactory. *EOIR Performance Plan: Adjudicative Employees*, https://cdn.cnn.com/cnn/2018/images/04/02/immigration-judges-memo.pdf. These highly unpopular metrics, which caused many experienced IJs to resign, were withdrawn by the EOIR in October 2021. Debra Cassens Weiss, *DOJ Lifts Trump-Era Case Quotas for Immigration Judges*, ABA Journal, Oct. 21, 2021, https://www.abajournal.com/news/article/justice-department-lifts-trump-era-case-quotas-for-immigration-judges.

26. Philip G. Schrag, et al., Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform (2009). For example, in the Atlanta immigration court, every

judge's denial rate exceeds 90%, in contrast to the New York immigration court, where 29 judges deny in less than 30% of cases. TRAC Immigration, *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2015–2020*, https://trac.syr.edu/immigration/reports/judge2020/denialrates.html.

27. https://www.justice.gov/eoir/page/file/1242156/download.

28. *Executive Office for Immigration Review Adjudication Statistics: Number of Courtrooms*, https://www.justice.gov/eoir/page/file/1248526/download.

29. *Executive Office for Immigration Review Adjudication Statistics: Immigration Judge Hiring*, https://www.justice.gov/eoir/page/file/1242156/download.

30. *EOIR Immigration Court Listing*, https://www.justice.gov/eoir/immigration-court-administrative-control-list.

31. Memorandum from the Attorney General for the Executive Office of Immigration Review, *Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest* (Dec. 5, 2017), AILA Doc. No. 17120633.

32. At the beginning of January 2021, the total number of pending cases from El Salvador, Guatemala, and Honduras was 715,557. TRAC Immigration, *The State of the Immigration Courts: Trump Leaves Biden 1.3 Million Case Backlog in Immigration Courts*, https://trac.syr.edu/immigration/reports/637/. An additional 212,849 cases from Mexico raised the total to 928,406. *Id.*

33. Austin Kocher, *ICE Filed Over 100,000 New Cases and Clogged the Courts at the Peak of the Pandemic* (Sept. 16, 2020), https://documentedny.com/2020/09/16/ice-filed-over-100000-new-cases-and-clogged-the-courts-in-the-peak-of-the-pandemic/.

34. Memorandum from James R. McHenry III, EOIR Director, *Case Priorities and Immigration Court Performance Measures* (Jan. 17, 2018), AILA Doc. No. 18011834.

35. *Matter of Castro-Tum*, 27 I&N Dec. 271, 272 (AG 2018).

36. *Matter of EOIR*, 71 FLRA No. 207 (FLRA 2020). In December 2021, the Biden administration formally recognized the judge's union after months of indecision. *See* Settlement Agreement Between the U.S. Department of Justice, Executive Office of Immigration Review and the National Association of Immigration Judges, https://www.aila.org/File/Related/19081303l.pdf; Eric Katz, *Biden Administration Recognizes Immigration Judge Union, Reversing Trump Decision*, Dec. 7, 2021, https://www.govexec.com/workforce/2021/12/biden-administration-recognizes-immigration-judge-union-reversing-trump-decision/187358/.

37. Amiena Khan and Dorothy Harbeck, *DOJ Tries to Silence the Voice of the Immigration Judges—Again!* The Federal Lawyer (Mar.-Apr. 2020), https://immigrationcourtside.com/wp-content/uploads/2020/04/Immigration-TFL_Mar-Apr2020.pdf; Allison Frankel, *Immigration Judges' Union Sues to Block DOJ Speech Restrictions* (July 1, 2020), https://www.reuters.com/article/us-otc-immigration/immigration-judges-union-sues-to-block-doj-speech-restrictions-idUSKBN24277N; Laila L. Hlass et al., *Let Immigration Judges Speak* (Oct. 24, 2019), https://slate.com/news-and-politics/2019/10/immigration-judges-gag-rule.html.

38. *Matter of A–B–*, 27 I&N Dec. 316 (AG 2018) (virtually disqualifying victims of domestic violence and gang violence for asylum). *See also* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80274 (effective Jan. 11, 2021).

39. EOIR, *Immigration Judge*, https://www.justice.gov/legal-careers/job/immigration-judge-16.

40. IJ Dana Marks provided this unforgettable description on immigration courts on an episode of *Last Week Tonight with John Oliver* (HBO). The segment is available on YouTube at https://www.youtube.com/watch?v=9fB0GBwJ2QA&t=11s (Judge Marks's quote at 2:36).

41. The charts that follow were prepared from the biographical information contained in EOIR announcements of new IJs appointed by an attorney general serving in the Trump administration between May 2017 and January 2021. The government agencies include OPLA, which is the prosecution branch of ICE, which in turn is a branch of the Department of Homeland Security (DHS). The Office of Immigration Litigation (OIL) is a division of DOJ that represents the government in federal court.

42. *Presiding Under Pressure* (May 21, 2019), https://www.wnyc.org/story/presiding-under-pressure.

43. Training now is only a few weeks rather than months. Reade Levinson, et al., *Special Report: How Trump Administration Left Indelible Mark on U.S. Immigration Courts* (Mar. 8, 2021), https://www.reuters.com/article/us-usa-immigration-trump-court-special-r/special-report-how-trump-administration-left-indelible-mark-on-u-s-immigration-courts-idUSKBN2B0179 (describing inter alia the selection and abbreviated training processes).

44. Eighty-two experienced immigration judges resigned in fiscal years 2017–2019. TRAC Immigration, *More Immigration Judges Leaving the Bench*, https://trac.syr.edu/immigration/reports/617/. *See also* Tal Kopan, *Outgoing SF Immigration Judge Blasts Immigration Court as "Soul Crushing," Too Close to ICE*, S.F. Chronicle, May 18, 2021, https://www.sfchronicle.com/politics/article/Exclusive-Outgoing-SF-immigration-judge-blasts-16183235.php; Molly Hennessey-Fiske, *Immigration Judges Are Quitting or Retiring Early Because of Trump*, L.A. Times, Jan. 27, 2020, https://www.latimes.com/world-nation/story/2020-01-27/immigration-judges-are-quitting-or-retiring-early-because-of-trump; Ben Schamisso, *Why This Burned-Out Immigration Judge Quit Her Job* (Feb. 25, 2020), https://www.newsy.com/stories/why-this-burned-out-immigration-judge-quit-her-job/; Katie Benner, *Top Immigration Judge Departs Amid Broader Discontent Over Trump Policies*, N.Y. Times, Sept. 13, 2019, https://www.nytimes.com/2019/09/13/us/politics/immigration-courts-judge.html; Hamed Aleaziz, *Being an Immigration Judge Was Their Dream. Under Trump, It Became Untenable* (Feb. 13, 2019), https://www.buzzfeednews.com/article/hamedaleaziz/immigration-policy-judge-resign-trump; Ilyce Shugall, Op-Ed, *Why I Resigned as an Immigration Judge*, L.A. Times, Aug. 4, 2019, https://www.latimes.com/opinion/story/2019-08-03/immigration-court-judge-asylum-trump-policies.

45. This is not necessarily a new criticism. For example, more than 15 years ago, Judge Richard A. Posner decried "the systematic failure by the judicial officers of the immigration service to provide reasoned analysis for the denial of applications for asylum." *Guchshenkov v. Ashcroft*, 366 F.3d 554, 560 (7th Cir. 2004).

46. *See* Jeffrey S. Chase, *Round Table of Former Immigration Judges on the Restarting of MPP* (Dec. 6, 2021), https://www.jeffreyschase.com/blog/2021/12/6/round-table-of-former-immigration-judges-on-the-restarting-of-mpp.

47. *See, e.g.*, Statement of the Round Table of Former Immigration Judges to the House Judiciary Committee on Immigration Court Reform, Jan. 29, 2020, https://docs.house.gov/meetings/JU/JU01/20200129/110402/HHRG-116-JU01-20200129-SD022.pdf (36 signers); Brief for *Amici Curiae* Former Immigration Judges in Support of Petitioner, *Barton v. Barr*, No. 18-725 (filed July 2, 2019), https://www

.supremecourt.gov/DocketPDF/18/18-725/104750/20190702122304670_18-725%20tsac%20Immigration%20Law%20Professors%20Brief.pdf.

48. *EOIR Announces 17 New Immigration Judges* (May 6, 2021), https://www.justice.gov/eoir/file/1392116/download; *EOIR Announces 10 New Immigration Judges* (July 16, 2021), https://www.justice.gov/eoir/page/file/1412741/download; *EOIR Announces 24 New Immigration Judges* (Oct. 27, 2021), https://www.justice.gov/eoir/page/file/1444911/download; *EOIR Announces 22 New Immigration Judges* (Dec. 17, 2021), https://www.justice.gov/eoir/page/file/1457171/download. The BIA member, appointed in October 2021, is Andrea Saenz, whose background includes substantial teaching and leadership positions in immigrant advocacy organizations as well as several years as a clerk in the immigration court and as a staff attorney at the Second Circuit Court of Appeals. *See EOIR Announces New Appellate Immigration Judge* (Oct. 14, 2021), https://www.justice.gov/eoir/page/file/1442001/download.

49. Andrew Cohen, *Biden's New Immigration Judges Are More of the Same* (May 10, 2021), https://www.brennancenter.org/our-work/analysis-opinion/bidens-new-immigration-judges-are-more-same; Alyssa Aquino, *17 New Immigration Judges Largely Held Prior Gov't Roles* (May 6, 2021), https://www.law360.com/articles/1382143.

50. In FY 2020, the denial rate for asylum, withholding or removal, or Convention Against Torture (CAT) relief increased to 71.6 percent, up from 54.6 percent in FY 2016 (73.7 percent of immigration judge decisions denied asylum). TRAC Immigration, *Asylum Denial Rates Continue to Climb*, https://trac.syr.edu/immigration/reports/630/; *see also* Paul Moses and Tim Healy, *Here's Why the Rejection Rate for Asylum Seekers Has Exploded in America's Largest Immigration Court in NYC* (Dec. 2, 2019), https://www.thedailybeast.com/heres-why-the-rejection-rate-for-asylum-seekers-has-exploded-in-americas-largest-immigration-court-in-nyc.

51. *Executive Office for Immigration Review Adjudication Statistics: Asylum Decision Rates*, https://www.justice.gov/eoir/page/file/1248491/download.

52. TRAC Immigration, *Judge-by-Judge Asylum Decisions in Immigration Courts* FY 2013–2018, https://trac.syr.edu/immigration/reports/judge2018/denialrates.html.

53. TRAC Immigration, *Judge-by-Judge Asylum Decisions in Immigration Courts* FY 2015–2020, https://trac.syr.edu/immigration/reports/judge2020/denialrates.html.

54. *Matter of A–B–*, 27 I&N Dec. 316 (AG 2018).

55. TRAC Immigration, *Asylum Grant Rates Climb Under Biden*, https://trac.syr.edu/immigration/reports/667/.

56. The Attorney General has the power to certify matters for their review. 8 CFR § 1003.1(h).

57. Reade Levinson, et al., *Special Report: How Trump Administration Left Indelible Mark on U.S. Immigration Courts* (Mar. 8, 2021), https://www.reuters.com/article/us-usa-immigration-trump-court-special-r/special-report-how-trump-administration-left-indelible-mark-on-u-s-immigration-courts-idUSKBN2B0179; Tanvi Misra, *DOJ Hiring Changes May Help Trump's Plan to Curb Immigration* (May 4, 2020), https://www.rollcall.com/2020/05/04/doj-hiring-changes-may-help-trumps-plan-to-curb-immigration; Tanvi Misra, *DOJ Changed Hiring to Promote Restrictive Immigration Judges*, Roll Call, Oct. 29, 2019, https://www.rollcall.com/2019/10/29/doj-changed-hiring-to-promote-restrictive-immigration-judges/; *see* Memorandum from James R. McHenry III, Director EOIR, for the Attorney General, *Immigration Judge and Appellate Immigration Judge Hiring Process* (Feb. 19, 2019), https://www.justice.gov/oip/foia-library/general_topics/eoir_hiring_procedures_for_aij/download. The DOJ also had been called out for

making political appointments during the George W. Bush administration. *See* DOJ, An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General (July 28, 2008), ch. 6, https://oig.justice.gov/sites/default/files/legacy/special/s0807/final.pdf.

58. As of January 2020, the lowest starting salary is $138,630 and ultimately caps at $181,500. EOIR, *2020 Immigration Judge Pay Rates*, https://www.justice.gov/eoir/page/file/1236526/download.

59. EOIR, *Immigration Judge*, https://www.justice.gov/legal-careers/job/immigration-judge-7. This web page refers to a section called "How You Will Be Evaluated," which appears nowhere. Military service assures a strong preference.

60. *EOIR Announces 24 New Immigration Judges* (Oct. 27, 2021), https://www.justice.gov/eoir/page/file/1444911/download.

61. Section 602 of The Real Courts, Rule of Law Act of 2022 explicitly recognizes the importance of prior legal experience in immigration law and the need to draw a judiciary that "to the extent practicable, reflects a balance of individuals with prior legal experience in the public sector and private sector" without regard to political affiliation.

62. *See, e.g.*, Memorandum from Alejandro N. Mayorkas, DHS Secretary, *Guidelines for the Enforcement of Civil Immigration Law* (Sept. 30, 2021), AILA Doc. No. 21093010.

63. Memorandum from David Neal, EOIR Director, *Encouraging and Facilitating Pro Bono Legal Services* (Nov. 5, 2021), AILA Doc. No. 21110804.

64. Memorandum from Tracy Short, EOIR Chief Immigration Judge, *Revised Case Flow Processing Before the Immigration Courts* (Apr. 2, 2021), AILA Doc. No. 21040237; Memorandum from David Neal, EOIR Director, *Filing Deadlines in Non-Detained Cases* (Dec. 16, 2021), AILA Doc. No. 21121605.