

May 2015

## **EMPTY BENCHES: Underfunding of Immigration Courts Undermines Justice**

Among many longstanding problems plaguing the U.S. immigration system is the shortage of immigration judges. Over the past decade, Congress has increased immigration enforcement funding exponentially, yet has not provided the immigration courts commensurate funding to handle the hundreds of thousands of new removal cases they receive each year. The resulting backlog has led to average hearing delays of over a year and a half, with serious adverse consequences. Backlogs and delays benefit neither immigrants nor the government—keeping those with valid claims in limbo and often in detention, delaying removal of those without valid claims, and calling into question the integrity of the immigration justice system.

### **Dramatic Immigration Enforcement Spending Increases, Without Commensurate Court Resource Increases, Have Placed Extraordinary Burdens on the Courts**

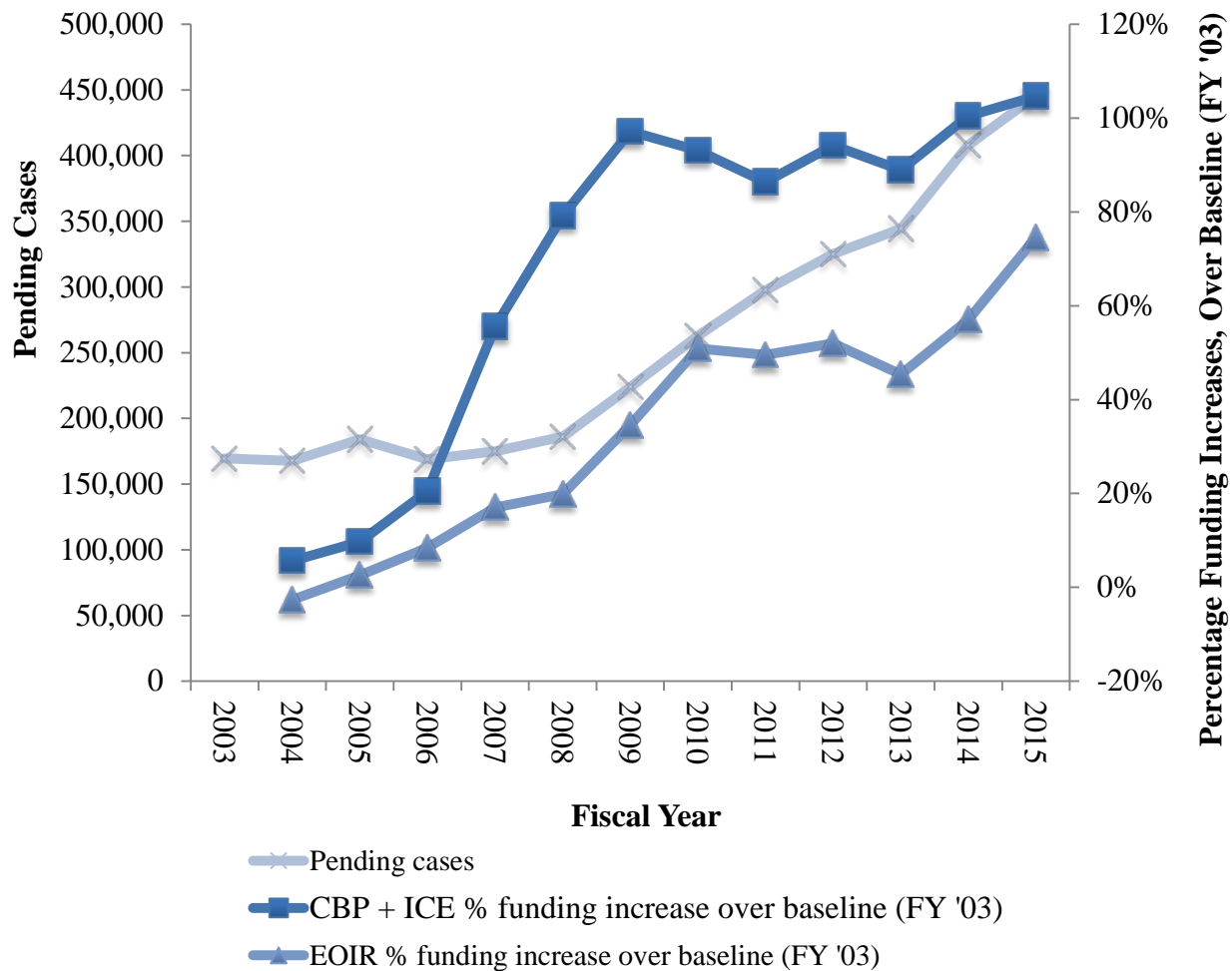
Over the last decade, the Department of Homeland Security's (DHS) immigration enforcement resources have increased dramatically (Figure 1):<sup>1</sup>

- Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) combined spending increased **105 percent** from Fiscal Year (FY) 2003 to FY 2015, from \$9.1 billion to approximately \$18.7 billion.<sup>2</sup>
- Moreover, the federal government increasingly leveraged state law-enforcement resources for immigration enforcement through programs like Secure Communities<sup>3</sup> and 287(g).<sup>4</sup>

In contrast, as increased enforcement has contributed to immigration court backlogs,<sup>5</sup> court funding has not kept pace (Figure 1):

- Immigration court **backlogs** increased **163%** from FY 2003 to April 2015.<sup>6</sup>
- Immigration court spending increased more modestly—**74 percent** from FY 2003 to FY 2015, from \$199 million to \$347.2 million.<sup>7</sup>
  - Congress increased funding by \$35 million in FY 2015.<sup>8</sup>
  - The Administration has requested an additional \$64 million for immigration courts in FY 2016.<sup>9</sup>
  - Bipartisan calls are emerging for further increases.<sup>10</sup> Immigration Judge Dana Leigh Marks, President of the National Association of Immigration Judges, argues that it is necessary to double or even triple the size of the immigration courts.<sup>11</sup>

**Figure 1: CBP & ICE Enforcement Funding vs. EOIR Court Funding, Case Backlog**



Source: See endnotes 2, 6, 7 and 8.

### High Caseloads, Low Staffing Shape the Courts' Current Condition

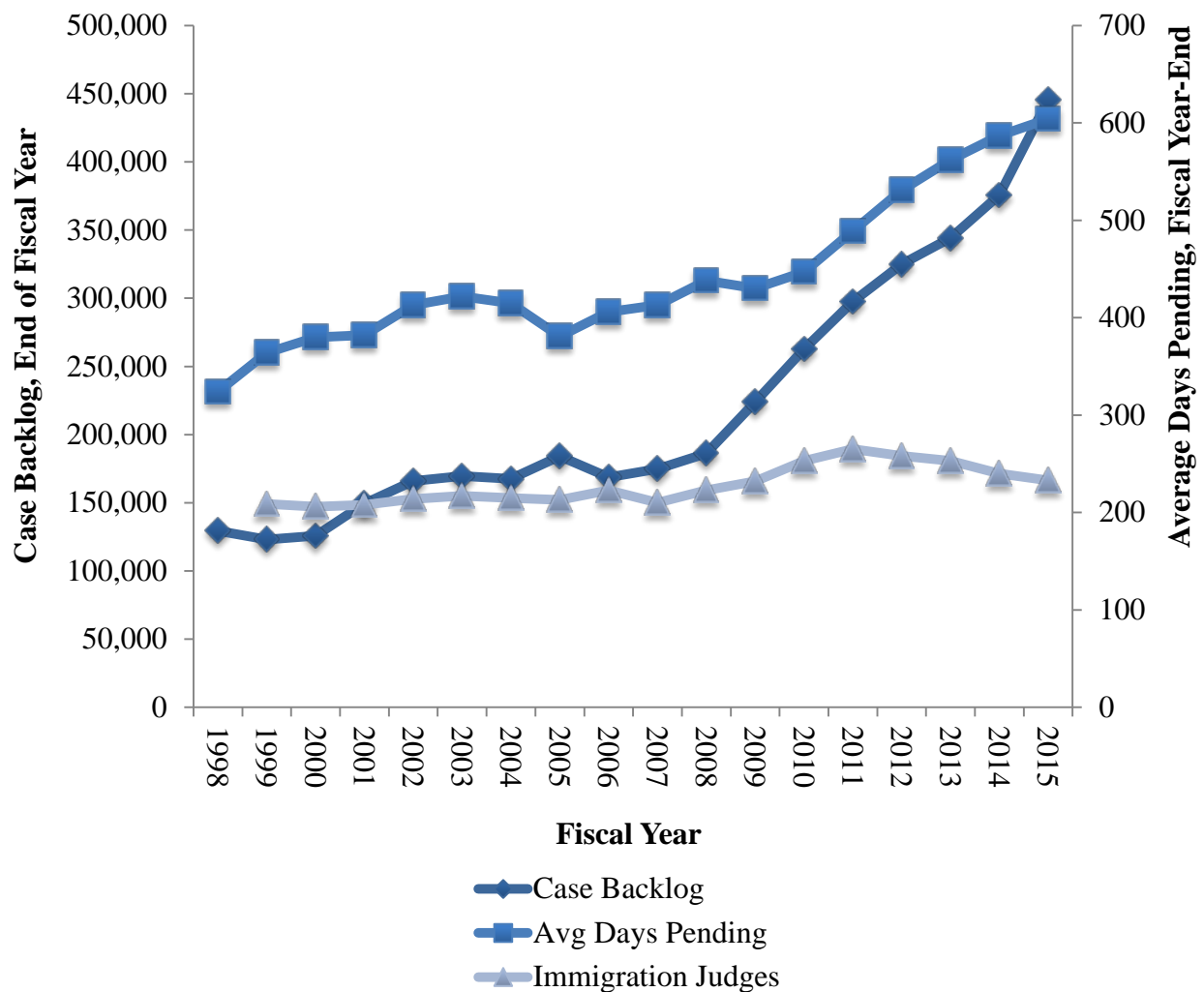
Immigration judges are employees of the Executive Office for Immigration Review (EOIR), an agency within the Department of Justice (DOJ).

- Attrition, budget cuts, and burn-out have led to a reduction in judges from 270 in April 2011 to 233 today,<sup>12</sup> with only about 212 judges serving full-time,<sup>13</sup> in 58 immigration courts nationwide. At least 100 judges are eligible to retire in 2015.<sup>14</sup>
- Each immigration judge was handling over 1,400 “matters”/year on average at the end of FY 2014<sup>15</sup>—far more than federal judges (566 cases/year in 2011) or Social Security administrative law judges (544 hearings/year in 2007).<sup>16</sup> Some judges reportedly have over 3,000 cases on their docket.<sup>17</sup>
- In FY 2014, immigration judges received 306,045 matters overall—225,896 removal cases (73.8 percent of all matters), 60,446 bond hearing requests (19.8 percent), and 19,703 motions (6.4 percent).<sup>18</sup>

## Growing Court Backlogs Lead to Long Delays

There have been rising immigration court backlogs and case delays since at least 1998 (Figure 2).<sup>19</sup>

**Figure 2: Rising Immigration Court Backlogs & Rising Case Delays While Judges Remain Flat**



Source: TRAC, Immigration Court Backlog Tool (FY 2015 data through April 30, 2015); Bipartisan Policy Center, May 20, 2015; Los Angeles Times, May 16, 2015.

- More cases are filed than can be completed. For instance, in FY 2014, courts received 23 percent more matters than they completed (306,045 versus 248,078).<sup>20</sup>
  - Accordingly, court backlogs have more than doubled since 2006, reaching **445,607 cases** in April 2015—an all-time high, and nearly 30 percent higher than the beginning of FY 2014.<sup>21</sup>
  - The average removal case as of April 2015 has been pending for **604 days**—nearly a year and eight months.<sup>22</sup>

- Backlogs in large cities are even worse—over two years in Los Angeles (768 days), Chicago (782 days), Denver (819 days), and Phoenix (806 days). Backlogs in Houston (636 days) and New York (605 days) are above-average as well.<sup>23</sup>

### **“Rocket Dockets” for Children and Families Have Increased Backlogs Across the System**

- On July 9, 2014, DOJ issued new guidelines prioritizing the cases of recently-arriving unaccompanied children and families above other cases in the immigration courts.<sup>24</sup> The American Immigration Council and others have criticized these “rocket dockets” for the most vulnerable,<sup>25</sup> and criticized the quick adjudication of cases against unaccompanied children who may have lacked adequate notice of their proceedings or may not have understood the process.<sup>26</sup>
- In any event, these “rocket dockets” neither caused, nor have solved, court backlog problems:
  - Backlogs long predate recent Central American arrivals of children and families, as shown above.<sup>27</sup>
  - Only 15.7 percent of the current backlog consists of unaccompanied children’s cases.<sup>28</sup>
  - Meanwhile, backlogs have increased for everyone else—including many with humanitarian claims, including individuals who cannot obtain work authorization while their immigration court case is pending.<sup>29</sup>
    - In fact, since October 1, 2014, backlogs have increased 9.2 percent.<sup>30</sup>
  - Indeed, EOIR has essentially taken many “non-priority” cases off the calendar—giving them a “parking date” for a hearing in four years (Nov. 29, 2019), but with the understanding that the court date may move again.<sup>31</sup>

### **Extreme Immigration Court Backlogs and Delays Benefit No One**

Long delays keep applicants with meritorious claims in limbo, restricting their integration into society.

- Immigration Judge Marks pointed out that “with long delays, people whose cases will eventually be granted relief suffer.”<sup>32</sup> For those without valid claims, backlogs simply delay their departure.<sup>33</sup>
- Long delays cause family separation.<sup>34</sup> Applicants also are often unable to work and contribute financially, due to lack of work authorization.<sup>35</sup>
- Many immigrants remain detained during their hearings,<sup>36</sup> including families and children fleeing persecution,<sup>37</sup> with serious negative health impacts.<sup>38</sup> Some detainees with valid claims to stay simply give up.<sup>39</sup>

Pressure on judges to accelerate hearings undermines the overall integrity of the system:

- Overburdened judges are more likely to make wrong decisions when making “split-second decisions regarding complex legal issues.”<sup>40</sup>

- Some immigration judges have reported seven minutes on average to decide a case, if they decided each case schedule for a hearing before them that day.<sup>41</sup>
- Accelerated proceedings put at risk children, whose cases require particular sensitivity,<sup>42</sup> and asylum seekers, for whom “hasty decisions [in cases] could result in loss of lives.”<sup>43</sup>
- Moreover, “haste makes waste,” leading to more appeals and higher fiscal costs overall, as Marks noted.<sup>44</sup>

## **Conclusion**

Problems plaguing the immigration courts will not be addressed by funding alone. Numerous other reforms are necessary to create a more efficient and fair judicial process—most significantly, a meaningful right to counsel.<sup>45</sup> In the short term, however, addressing the basic lack of resources for immigration courts is a necessary step forward. Additional immigration judges would help ensure that all noncitizens have a meaningful and timely day in court, and would help restore the integrity of the system.

## Endnotes

<sup>1</sup> American Immigration Council, *The Growth of the U.S. Deportation Machine* (Washington, DC: April 9, 2014). The U.S. government now spends \$18 billion on immigration enforcement yearly, more than all other criminal federal law enforcement agencies combined—with inflation, 15 times INS’ enforcement spending in 1986. Doris Meissner, et al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery* (Washington, DC: Migration Policy Institute, January 2013), p. 2.

<sup>2</sup> See U.S. DHS Budgets-in-Brief, FY 2003-2016. For FY 2003 through FY 2014, CBP and ICE budget amounts reflect final numbers, while FY 2015 is an estimated final number. More technically, from FY 2003 through FY 2014, total budget authority, revised enacted, including supplemental funding, is provided for CBP and ICE. Total CBP budget amount for FY 2015 is the requested total budgetary authority, including Customs unclaimed goods and mandatory fees. U.S. DHS Budget-in-Brief, FY 2016, p. 38.. Congress ultimately granted most of the Administration’s discretionary request (\$10.837 billion, compared to \$10.972 billion). Total ICE budget amount for FY 2015 is the allocated discretionary amount. See P.L. 114-4 (Mar. 4, 2015); William L. Painter, “Homeland Security Appropriations: FY2015 Action in the 114th Congress,” Congressional Research Service (Mar. 16, 2015). (This amount may ultimately be higher, as the Administration also anticipated \$345 million in mandatory fees in its FY ‘15 budget request, not reflected here). U.S. DHS Budget-in-Brief, FY 2016, p. 54.

<sup>3</sup> Michele Waslin, *The Secure Communities Program: Unanswered Questions and Continuing Concerns* (Washington, DC: American Immigration Council, November 2011). A bipartisan government report found that the “growth in DHS’s controversial ‘Secure Communities’ program may produce more” cases, and interviewed EOIR officials who expressed those fears. Lenni B. Benson and Russell R. Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication*, Administrative Conference of the United States (June 2012), p. 30.

<sup>4</sup> American Immigration Council, *The 287(g) Program: A Flawed and Obsolete Method of Immigration Enforcement* (Washington, DC: November 2012),

<sup>5</sup> Seth Robbins, “Immigrants see court dates cancelled as Justice Department is overwhelmed with cases,” *Associated Press* (Feb. 1, 2015) (quoting David Martin, former DHS general counsel: “You fund more investigators, more detention space, more border patrol, almost all of these are going to produce some kind of immigration court case... It’s just going to be a big bottleneck unless you increase the size of that pipeline.”).

<sup>6</sup> TRAC, *Immigration Court Backlog Tool*.

<sup>7</sup> See EOIR Budget Requests, FY 2009-15, and previous appropriations bills passed by Congress. Notably, EOIR budgets for FY 2007 and earlier include funding for DOJ’s Office of the Pardon Attorney, which is historically small—\$2.8 million in FY 2014. Compare Executive Office for Immigration Review, *FY 2015 Budget Request At A Glance*, to H. Rpt. 113-448 (May 15, 2014), p. 42.

<sup>8</sup> U.S. DOJ, Administrative Review and Appeals, Executive Office for Immigration Review (EOIR), FY 2016 Budget Request at a Glance (February 2015), U.S. DOJ, Administrative Review and Appeals, Executive Office for Immigration Review (EOIR), FY 2015 Budget Request at a Glance (February 2014).

<sup>9</sup> U.S. DOJ, Administrative Review and Appeals, Executive Office for Immigration Review (EOIR), FY 2016 Budget Request at a Glance (February 2015).

<sup>10</sup> Congressman Henry Cuellar, “Congressman Cuellar Works to Fund 55 New Immigration Judges” (May 15, 2015) (quoting Rep. John Culberson (R-TX): “Processing and adjudicating immigration cases is an important part of upholding our nation’s laws. The funding in this bill will help reduce the growing backlog of cases that are holding up our courts and compromising the rule of law.”); Julie Myers Wood, “Courts could be a step forward in immigration debate,” *Houston Chronicle* (Apr. 30, 2015) (former ICE Director under President George W. Bush); Matt Graham, “Funding Immigration Courts Should Not be Controversial,” *Bipartisan Policy Center* (May 20, 2015), Fig. 1; Marshall Fitz and Philip E. Wolgin, “Enforcement Overdrive Has Overloaded the Immigration Courts,” *Center for American Progress* (Nov. 18, 2014).

<sup>11</sup> Molly Hennessy-Fiske, “Immigration: 445,000 awaiting a court date, which might not come for 4 years,” *L.A. Times* (May 16, 2015).

<sup>12</sup> *Ibid.*; Benson and Wheeler, note 3, p. 29; Stuart L. Lustig, et al., “Inside the Judges’ Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey,” *Georgetown Immigration Law Journal* 23:57-83 (2008), p. 57.

<sup>13</sup> Lomi Kriel, “Immigration courts backlog worsens,” *Houston Chronicle* (May 15, 2015) (National Association of Immigration Judges President Dana Leigh Marks estimate).

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- <sup>14</sup> Hennessy-Fiske, note 11; Laura Wides-Munoz, “Nearly half immigration judges eligible to retire,” *Associated Press* (December 23, 2013).
- <sup>15</sup> A “matter” includes either a removal case, bond redetermination request, or a motion. U.S. Department of Justice, Executive Office for Immigration Review, “FY 2014 Statistics Yearbook” (March 2015), p. A7. This number is derived from dividing the matters received by immigration courts in FY 2014 by the number of immigration judges at the end of FY 2014. *Ibid.*, p. A2; Matt Graham, “Funding Immigration Courts Should Not be Controversial,” *Bipartisan Policy Center* (May 20, 2015), Fig. 1. A prominent report used similar methodology. Charles Roth and Raia Stoicheva, *Order in the Court: Commonsense Solutions to Improve Efficiency and Fairness in the Immigration Court* (Chicago: National Immigrant Justice Center, October 2014).  
P. 6 & fns. 42-44,
- <sup>16</sup> Benson and Wheeler, note 3, p. 27.
- <sup>17</sup> Hennessy-Fiske, note 11.
- <sup>18</sup> EOIR, “FY 2014 Statistics Yearbook,” note 15, p. A7.
- <sup>19</sup> TRAC, *Immigration Court Backlog Tool* (FY 2015 data is through April 2015).
- <sup>20</sup> FY 2014 Statistics Yearbook, note 15, p. A2.
- <sup>21</sup> TRAC Immigration, “Immigration Court Backlog Keeps Rising” (May 15, 2015).
- <sup>22</sup> TRAC, *Immigration Court Backlog Tool*.
- <sup>23</sup> *Ibid.*
- <sup>24</sup> Department of Justice, “EOIR Factsheet on New Priorities to Address Migrants Crossing into the U.S.” (July 9, 2014); Department of Justice, “EOIR Announcement of New Priorities to Address Migrants Crossing into the U.S.” (July 9, 2014).
- <sup>25</sup> Walter Ewing, “Why More Immigration Judges Are Needed,” *Immigration Impact* (May 11, 2015); Hennessy-Fiske, note 1 (quoting Jonathan Ryan, executive director of the San Antonio-based legal advocacy group Raices, calling the prioritization “backwards”: “The people being prioritized in the backlog are the most vulnerable children and mothers who are essentially getting railroaded.”).
- <sup>26</sup> Wendy Feliz, “Immigration courts Are Ordering Unrepresented Children Deported,” *Immigration Impact* (Mar. 10, 2015).
- <sup>27</sup> American Immigration Council, *Children in Danger: A Guide to the Humanitarian Challenge at the Border* (Washington, DC: July 2014); TRAC, *Immigration Court Backlog Tool*, note 7.
- <sup>28</sup> TRAC Immigration, “Immigration Court Backlog Keeps Rising” (May 15, 2015).
- <sup>29</sup> Hennessy-Fiske, note 11 (citing a Syrian family unable to work until their case is heard — which is not scheduled until 2019).
- <sup>30</sup> TRAC, *Immigration Court Backlog Tool*.
- <sup>31</sup> Seth Robbins, “Immigrants see court dates cancelled as Justice Department is overwhelmed with cases,” *Associated Press* (Feb. 1, 2015).
- <sup>32</sup> Dana Leigh Marks, President, National Association of Immigration Judges, “Letter to Senators Reid and McConnell. Special Concerns Relating to Juveniles in immigration courts,” July 22, 2014, p. 4 [hereinafter “Marks Letter”].
- <sup>33</sup> American Immigration Council, *Two Systems of Justice: How the Immigration System Falls Short of American Ideals of Justice* (Washington, DC: March 2013), p. 9.
- <sup>34</sup> Marks Letter, p. 4.
- <sup>35</sup> American Immigration Council, *Two Systems of Justice*, p. 9.
- <sup>36</sup> *Ibid.* (“immigrants who were wrongly placed in removal proceedings... remain stuck in legal limbo and may needlessly languish in detention until their cases are decided.”)
- <sup>37</sup> Human Rights First, *Detention of Families at the Border Not Consistent with American Ideals*, June 28, 2014.
- <sup>38</sup> Boston College Center on Human Rights, *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families: A Report for the Inter-American Human Rights Court*, August 2013.
- <sup>39</sup> Even detainees “with valid claims likely give up and accept deportation, simply to escape detention.” Oren Root, Vera Institute, Testimony Before The Committee on Immigration, New York City Council, *Regarding Examining Models for Providing Legal Services for Immigrants In Deportation Proceedings*, February 25, 2014, p. 6 (on file with authors).
- <sup>40</sup> American Immigration Council, *Two Systems of Justice*, p. 9, citing Benson and Wheeler, p. 29.
- <sup>41</sup> Eli Saslow, “In a crowded immigration court, seven minutes to decide a family’s future,” *Washington Post*, February 2, 2014.
- <sup>42</sup> Marks Letter, p. 2.

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<sup>43</sup> Ibid, p. 3.

<sup>44</sup> Ibid.

<sup>45</sup> American Immigration Council, *Two Systems of Justice*, p. 10; Marks Letter, p. 3 (“when noncitizens are represented by attorneys, Immigration Judges are able to conduct proceedings more expeditiously”).