

The U.S. Immigration Court

A Ballooning Backlog that Requires Action

THE BACKLOG in the U.S. immigration court system continues to grow, requiring immediate action. The number of cases pending before the court will soon exceed 500,000, far too many for a court staffed with only 254 immigration judges—a fraction of the number needed to timely address removal cases.

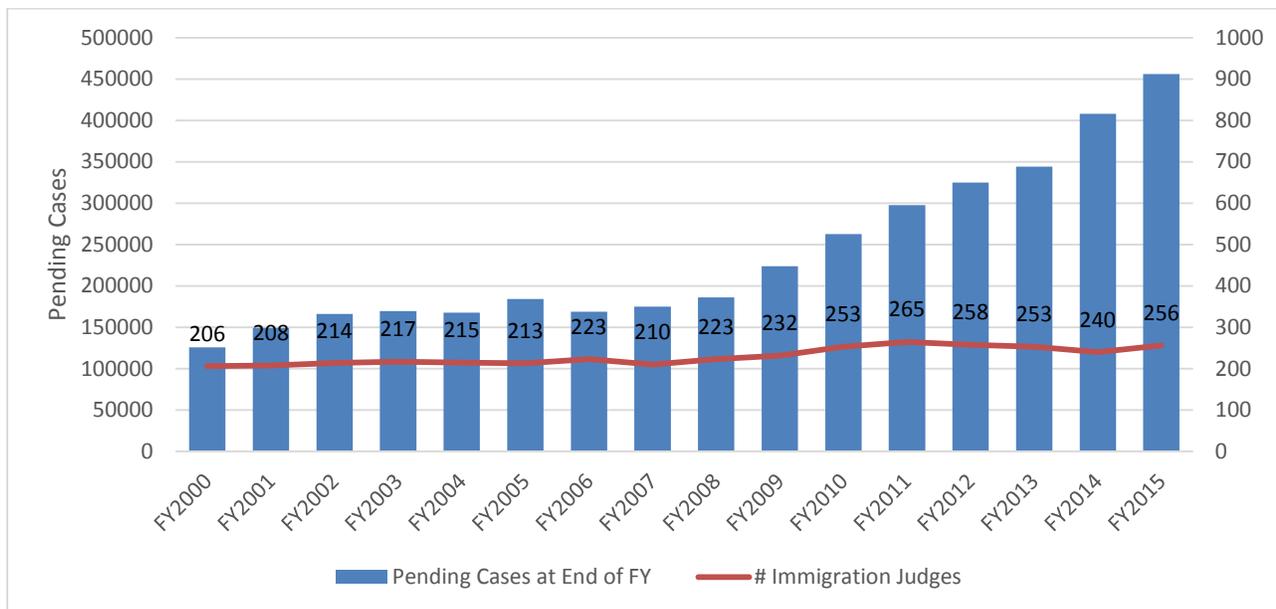
Year after year, as the courts have lacked sufficient numbers of immigration judges, the backlog has grown. In the last seven years, the number of cases pending before the courts has more than doubled—with the greatest spikes in FY 2014 and 2015.

The immigration courts in Texas and California have the largest caseloads, with 89,000 and 81,000 pending

cases respectively. With only six immigration judges on the bench in Houston, that court will see its number of pending cases double by FY 2019 without the addition of necessary judges and staff.

As a result of the ballooning backlogs at the immigration courts, hundreds of thousands of immigrants will be left in a state of legal limbo for over three years on average—some much longer. The most delayed courts experience wait times of five to six years. Most immigrants in removal proceedings in Texas, Georgia, Alabama, and Arizona will wait longer than three years for their cases to be resolved. These wait times leave families of asylum seekers stranded

Figure 1: Ballooning Backlog without Increase in Immigration Judges



for years in dangerous or difficult situations, and undermine the recruitment of pro bono counsel.

Backlogs and delays can also undercut the integrity of the immigration enforcement system. Yet, the Obama Administration did not request funding to increase the number of immigration judges and support staff for fiscal year 2017. In the coming weeks, Congress will have the opportunity to rectify this omission.

Without immediate action to grow the corps of immigration judges, the court's caseload will continue to swell and wait times will worsen. Recognizing the problem, leaders from both parties, including Senators Richard Shelby (R-AL) and Barbara Mikulski (D-MA), and Congressmen John Culberson (R-TX) and Michael Honda (D-CA), undertook measures to increase the court's capacity by funding an additional 55 immigration judge teams in the FY 2016 budget.

A range of experts, from the American Bar Association's Commission on Immigration to former George W. Bush administration ICE Assistant Secretary Julie Myers Wood, have called for increased funding for the immigration courts to address the backlog and maintain the integrity and fairness of the immigration system. To address the ballooning backlog, Congress should allocate funding for 75 immigration judge teams in FY 2017 and another 75 judge teams in FY 2018, in addition to supporting the President's budget request for an infrastructure expansion that will facilitate the onboarding of new immigration judges.

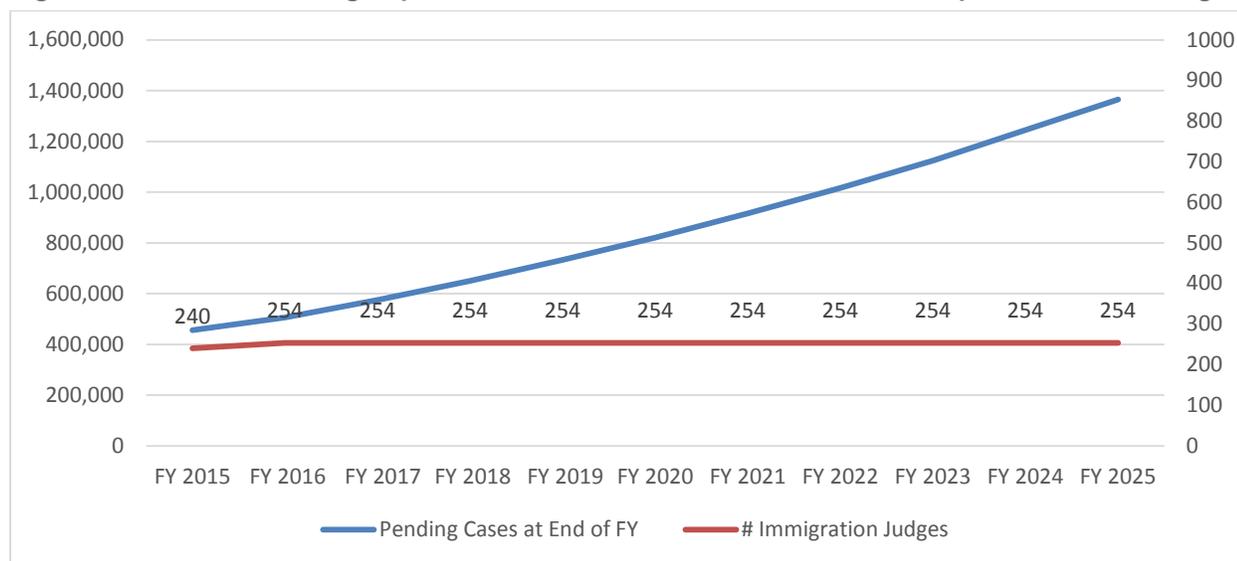
The Department of Justice should immediately direct the necessary resources and staff towards hiring so that immigration judges are hired in a timely manner, and in particular it should fill all currently funded immigration judge positions promptly, maintaining safeguards to assure the integrity and fairness of the hiring process. The next administration must request the necessary appropriations and prioritize the hiring of immigration judges.

The Backlog by the Numbers

As of January 2016, 474,025 cases were pending before the immigration courts within the Department of Justice's Executive Office of Immigration Review (EOIR). The court's caseload hovered between 150,000 and 200,000 from FY 2001 to FY 2006, according to government data obtained by the Transactional Records Access Clearinghouse (TRAC) of Syracuse University. In FY 2007, the number of pending cases began to rise, but the number of immigration judges on the bench increased only slightly, from 210 in FY 2007 to 256 at the end of FY 2015. Even after increasing capacity to 265 judges in FY 2011, the backlog has continued to grow steadily, as illustrated in Figure 1.¹

Caseloads at individual immigration courts across the country vary, with some experiencing more extreme growth in their backlogs than others. The number of cases pending in the Houston court grew from 6,423 to 36,136 between 2010 and 2016. In Baltimore, pending cases nearly tripled between 2013 and 2016. The Atlanta court, which hears nearly all cases of immigrants residing in Georgia and Alabama, has experienced over 100 percent growth, from 6,297 to 12,408 cases, in the past four years. Six judges in Atlanta currently handle 12,408 cases. In Phoenix, only four immigration judges handle nearly 10,000 cases.

Without additional judges, the immigration court will see their caseloads grow, immigrants will see wait times lengthen, and policy makers will see a growing hole in the integrity of the U.S. immigration removal system. As shown in Figure 2, if the corps of immigration judges remains at its current size, the number of pending cases would reach over 1 million in FY 2022. At current prosecutorial, case completion, and staffing levels, the number of pending cases will increase to 504,394 by the end of FY 2016 and will continue to expand unless Congress and the Department of Justice take action.

Figure 2: Predicted Backlog Expansion at Current Prosecutorial, Case Completion, and Staffing Rates

Increasing Removal Hearing Wait Times across the Country

The growing backlog means that immigrants are waiting longer to have their cases resolved. On average, cases currently before the immigration courts can expect to wait over three years in total to have their cases heard, in many courts, the wait time could be much longer.

For example, it will take the Newark court over five additional years to hear currently pending cases.² In Texas, immigrants and asylum seekers must now wait on average over 1,700 days—nearly five years—to get a hearing and have their cases resolved. In Maryland, they now wait nearly two years, in Georgia and Alabama three and a half years, in Arizona over three years, and in California nearly three years. Since 2014, wait times have grown by 34 percent in Houston, 28 percent in Dallas, 20 percent in Newark, and 15 percent in Baltimore. Immigrants in New York can expect to wait at least two and a half years for the court to consider their case.

How did we get here? Funding Imbalance, Border Response, and Hiring Challenges

There are a number of factors that have contributed to the growing backlog in the immigration courts. Over the past 14 years, Congress has increased immigration enforcement budgets, but has not proportionately increased the budget of the systems charged with handling the resulting cases. In 2010 a report issued by the American Bar Association’s Commission on Immigration, authored by pro bono attorneys at the law firm of Arnold & Porter LLP, concluded: “the EOIR is underfunded and this resource deficiency has resulted in too few judges and insufficient support staff to competently handle the caseload of the immigration courts.”

Over the last five years, resources for immigration enforcement, including Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE), have more than quadrupled— from \$4.5 billion in 2002 to \$18.7 billion in fiscal year 2015. Funding and staffing for the immigration courts lagged far behind, increasing by only 74 percent.³ The most recent DHS appropriations legislation increased immigration

enforcement funding to a record high of over \$20.1 billion.⁴

As David Martin, a law professor at the University of Virginia and former general counsel for the Department of Homeland Security and the INS under both the Clinton and Obama administrations, explained last year: “You fund more investigators, more detention space, more border patrol, almost all of these are going to produce some kind of immigration court case.” He pointed out, “You are putting a lot more people into the system. It’s just going to be a big bottleneck unless you increase the size of that pipeline.” The effects of sequestration further exacerbated the backlogs created by this funding imbalance.⁵

The prioritization of cases of children and families from Central America has led to the further escalation of wait times for the many immigration court cases that have not been prioritized. Beginning in July 2014, EOIR re-prioritized its dockets to more quickly hear cases of unaccompanied children and families who recently crossed the border.⁶ Some judges were moved entirely from their typical caseload to hear only cases of recently arrived children and families. As a result, other removal cases that had already been calendared for a final merits hearing were postponed.

Press reports indicate that thousands of asylum seekers had their hearing rescheduled for Nov. 29, 2019. However, EOIR indicates this date is merely a placeholder on the docket, and cases could be rescheduled for even later dates.⁷

EOIR also faces hiring and staff turnover challenges. Hiring freezes in 2011 further undercut EOIR’s ability to add needed judges. In July 2014 EOIR’s Director told Congress, “Funding constraints that resulted in a hiring freeze beginning in January 2011 had a negative and worsening impact upon EOIR’s core mission, and increased the number of cases pending adjudication and extending court dockets further into the future.”⁸ On February 1, 2015, EOIR swore in nine new immigration judges, bringing the total number of judges to 254—there were 253 judges on the bench in 2010.⁹

Working conditions for judges have reportedly worsened as they grapple with huge caseloads, which, according to recently retired judges and the National Association of Immigration Judges, leads many to opt for retirement. At the end of FY 2015 some 130 immigration judges were eligible for retirement.¹⁰

Impact on Asylum Seekers

Long wait times have harmful effects on asylum seekers and their families. Delays prolong the separation of refugee families—by years—leaving the children and spouses of some refugees stranded in difficult and dangerous situations abroad. For example, Human Rights First has several Syrian refugee clients who have children stranded in unsafe or precarious locations in Syria. Mental health experts warn that the extended anxiety of the unknown hinders asylum seekers’ ability to recover from past trauma. And, limited access to employment and educational opportunities impede asylum seekers’ ability to move forward and rebuild their lives during their time in legal limbo.

- **Jonathan, a Christian pastor in Dallas, Texas**, has had his immigration court case delayed for three years due to the backlog. During this time, security forces continue to terrorize his wife and children in the Democratic Republic of Congo. Jonathan cannot petition to bring his wife and child to safety in the United States until the immigration court grants his request for asylum.¹¹
- **Ibrahim, a comedian and political activist from the Ivory Coast** had his immigration court hearings canceled twice due to the court backlogs, resulting in a five year delay. Imprisoned and tortured in his home country for his political beliefs, Ibrahim explains, “Every time I wake up all I think about is my situation with immigration [] I feel like I am in prison waiting for my sentence.”¹²

- **Diana, a mother from Honduras** was subjected to years of violent domestic abuse in front of her young daughter. One beating resulted in a miscarriage. Diana fled to the United States where her case has been pending for over three years. In 2015, the court cancelled her latest hearing and gave her a new date in 2017. Diana waits in desperation to be reunited with her daughter. “She cries a lot and I tell her that I will bring her but I thought I would be able to bring her faster.” Threatened by Diana’s violent ex-partner, her daughter remains in hiding as she awaits a decision in her mother’s case.¹³

Impact on Pro Bono Representation

The growing immigration court backlogs and long delays have impaired the ability of pro bono attorneys and pro bono organizations to take on cases for legal representation, and are having broader impacts on the pro bono model of representation.

In a February 2016 survey conducted by Human Rights First of 24 pro bono coordinators at many of the nation’s major law firms, nearly 75 percent of pro bono professionals indicated that delays at the immigration court are a significant or very significant negative factor in their ability to take on a pro bono case for legal representation before the court.¹⁴

The Association of Pro Bono Counsel (APBCo), which consists of the pro bono leaders of many of the nation’s leading law firms, has explained that multi-year delays “make these cases difficult to place with pro bono counsel, as they are typically wary of committing to a matter that will not be heard for several years.”¹⁵ In September 2015, APBCo wrote to the Office of Management and Budget (OMB) to urge the Obama Administration to include a request of \$75 million for an additional 75 immigration judge teams in its fiscal year 2017 budget request. However, the Obama Administration did not request the addition of any

immigration judge teams beyond those funded in fiscal year 2016.¹⁶

Impact on System Integrity

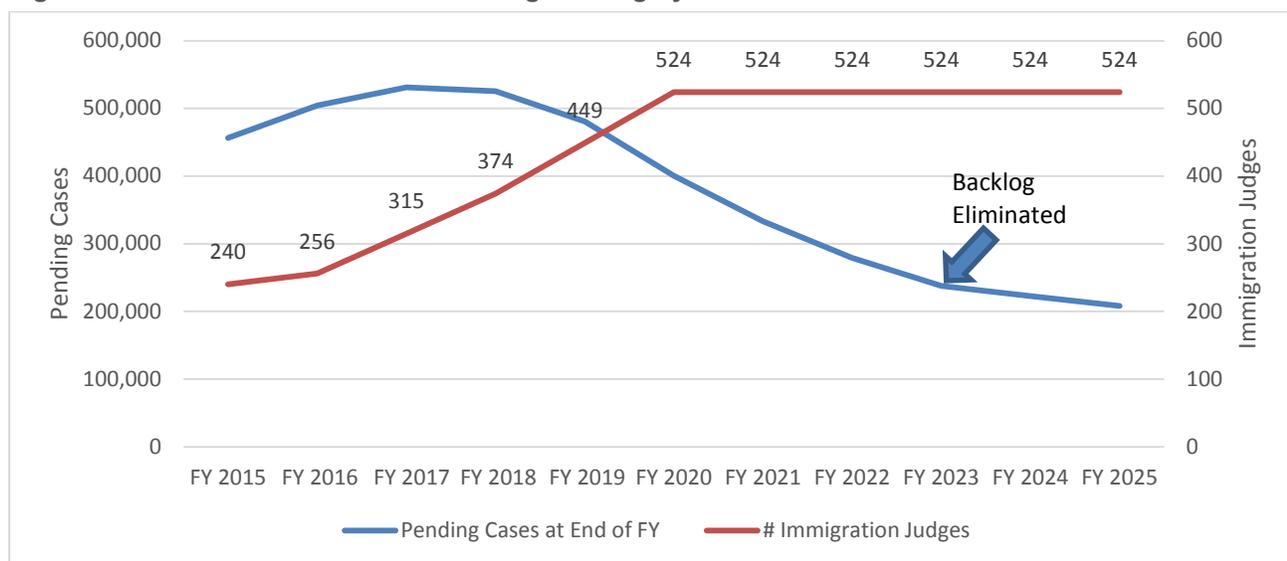
The backlogs resulting from insufficient staffing can also undermine the integrity of the system by allowing individuals who have no claim to relief to stay in the country for years while awaiting a court date, exposing the system to potential abuse.

In a 2015 article the Bipartisan Policy Center concluded, “more judges would reduce the backlog, which would allow the enforcement system to function more efficiently and help migrants receive a fairer hearing.”¹⁷ A 2014 report issued by the Georgetown Institute for the Study of International Migration identified the immigration court backlog as a challenge for the removal system, stating: “Some unauthorized migrants may benefit from the delays and remain longer in the country than they should, but those with legitimate grounds for relief from removal, such as many asylum seekers, remain in limbo for unnecessarily long periods.”¹⁸

In a 2015 op-ed that appeared in the *Houston Chronicle*, former ICE Assistant Secretary Julie Myers Wood wrote, “People who have no legitimate claim for relief languish in the system—and in the country—at taxpayer expense. At the same time, people with strong claims—including those fleeing persecution—now often wait years for their day in court.”¹⁹

Steps to Address the Backlog

Human Rights First estimates that 524 immigration judges are necessary to eliminate the current backlog and timely adjudicate new cases—defined as within an average of one year. As shown in Figure 3, even if EOIR succeeds in filling the 120 currently vacant positions over the next two years, the backlog will continue to grow.²⁰ If Human Rights First’s recommendation to fund 75 more immigration judge teams in FY 2017 and an additional 75 the following year for a total court size of 524 judges is implemented, the backlog will begin to decrease in FY 2018 and will

Figure 3: Recommendation for eliminating backlog by FY 2023

be eliminated by FY 2023, leaving the court with a corps of immigration judges able to adjudicate incoming cases in an average of one year.²¹

This brief focuses on the staffing levels necessary to operate the immigration courts in a fair and timely manner. Certainly other measures—such as pre-trial conferences—could also improve the efficiency of immigration court proceedings.²² If enacted, other reforms—such as elimination of the one-year asylum filing deadline—would also reduce the number of cases unnecessarily referred into the immigration courts.²³ The American Bar Association and National Association of Immigration Judges have also recommended major reforms to create an independent immigration Article 1 court system.²⁴

But the lack of sufficient judges and support staff for the immigration courts cannot be left unaddressed for any longer. It must be addressed now—starting with fiscal year 2017 appropriations. In particular:

- The Department of Justice and EOIR should immediately direct the necessary resources and staffing towards hiring all currently funded immigration judge positions as quickly as possible—while ensuring the integrity and

fairness of the hiring process—by the end of FY 2017 at the very latest.

- Congress should support the President's budget request for \$5.7 million for EOIR's infrastructure expansion. This expansion will facilitate EOIR's capacity to house newly hired judges.
- Congress should authorize and appropriate funds for an additional 150 judges—over two years—in order to reach the recommended level of 524 immigration judges. To do so, Congress should fund 75 immigration judge teams for fiscal year 2017, and an additional 75 for fiscal year 2018. ■

Endnotes

¹ Immigration Court Backlog Tool, Transactional Records Access Clearinghouse (TRAC) of Syracuse University, available at http://trac.syr.edu/phptools/immigration/court_backlog/

² In August 2015, TRAC calculated that the average case had already been pending for 635 days. Therefore, given current pending caseloads and case completion levels, Human Rights First calculates that the immigration court will likely complete the nearly 500,000 cases currently pending in approximately three years and six months from the time they were filed. These averages are likely significantly lowered by the inclusion of

detained cases, which have quicker case completion goals. TRAC predicts the longest wait time for the immigration court in Newark, NJ, where its five judges handled some 27,000 cases in FY 2015. At current case completion rates, the court will take five additional years to complete the cases that were pending at the end of FY 2015. To timely handle its caseload the Newark court would need to grow to 29 judges.

³ See Mark Noferi, DHS Funding Controversy Over, but Enforcement-First Approach Remains, March 6, 2015 (The DHS appropriations legislation appropriates an additional \$1 billion combined for Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) salaries and expenses—a \$314 million increase to CBP, to \$8.460 billion, and a \$703 million increase to ICE, to \$5.932 billion), available at <http://immigrationimpact.com/2015/03/06/dhs-funding-controversy-enforcement-first-approach-remains/#sthash.kVkimM3X.dpuf>; see also EMPTY BENCHES: Underfunding of Immigration Courts Undermines Justice, American Immigration Council, May 2015, available at http://www.immigrationpolicy.org/sites/default/files/docs/fact_sheet_-_immigration_court_backlogs_final.pdf.

⁴ See Department of Homeland Security, Budget in Brief Fiscal Year 2017, p. 25, 24, available at https://www.dhs.gov/sites/default/files/publications/FY2017_BIB-MASTER.pdf

⁵ Georgetown University, Institute for the Study of International Migration, Detention and Removal: What now and What Next?, Report on expert's roundtable held in October 2014 available at <https://isim.georgetown.edu/sites/isim/files/files/upload/Detention%26Removal%20%28%29.pdf>. The roundtable discussion included current and former government officials as well as academic and non-governmental experts. See Seth Robbins, Associated Press, Immigrants See Court Dates Canceled as Justice Department is Overwhelmed with Cases, Christian Science Monitor, Feb. 1, 2015 (quoting Professor David Martin), available at <http://www.csmonitor.com/USA/Latest-News-Wires/2015/0201/Immigrants-see-court-dates-cancelled-as-Justice-Department-is-overwhelmed-with-cases>; See also EOIR/AILA Liaison Meeting Minutes, April 11, 2013, available at <https://www.justice.gov/sites/default/files/eoir/legacy/2013/09/26/EOIR-AILA%20LiaisonMeetingMinutesSpring2013Agenda.pdf> (“EOIR is very worried about the effects of sequestration. It is unclear whether furloughs will be necessary, but if so, it will affect hearing times.”).

⁶ U.S. Department of Justice, “Department of Justice Announces New Priorities to Address Surge of Migrants Crossing into the U.S.,” press release, July 9, 2014, available at <http://www.justice.gov/opa/pr/department-justice-announces-new-priorities-address-surge-migrants-crossing-us>.

⁷ “US government cancels thousands of immigration hearings; delays could extend past 2019,” *Associated Press*, February 1, 2015, available at

http://www.syracuse.com/news/index.ssf/2015/02/us_government_cancels_thousand.html.

⁸ See also EOIR/AILA Liaison Meeting Minutes, April 11, 2013, available at <https://www.justice.gov/sites/default/files/eoir/legacy/2013/09/26/EOIR-AILA%20LiaisonMeetingMinutesSpring2013Agenda.pdf> (“At the November 2012 AILA/EOIR liaison meeting, EOIR said that the hiring freeze announced on January 21, 2011 was still in effect and explained the consequences of the freeze on EOIR headquarters and immigration courts around the country.”); see also Statement of Juan P. Osuna, Director, Executive Office for Immigration Review, DOJ, for the Senate Committee on Homeland Security and Governmental Affairs, July 9, 2014, available at <http://www.justice.gov/sites/default/files/testimonies/witnesses/attachments/2015/02/05/07-09-14-eoir-osuna-testimony-re-challenges-at-the-border-examining-the-.pdf>

⁹ Press release, “Executive Office for Immigration Review Swears in Nine Immigration Judges,” Department of Justice Executive Office of Immigration Review, available at <http://www.justice.gov/eoir/pr/executive-office-immigration-review-swears-nine-immigration-judges>.

¹⁰ Molly Hennessy-Fiske, “As immigration judges’ working conditions worsen, more may choose retirement” available at <http://www.latimes.com/nation/la-na-immigration-judges-20150818-story.html>; see Statement of Juan P. Osuna, *supra* note 8 (“And more than 100 immigration judges – more than one third of the immigration judge force – are eligible to retire in FY 2014 alone); TRAC has reported that “[t]he annual attrition rate for immigration judges due to retirement or other turnover has been estimated to be 5%.” See TRAC, Improving the Immigration Courts: Effort to Hire More Judges Falls Short July 28, 2009, available at <http://trac.syr.edu/immigration/reports/189/>.

¹¹ Human Rights First Interview, November 13, 2015.

¹² Human Rights First Interview, November 04, 2015.

¹³ Human Rights First Interview, October 15, 2015

¹⁴ Twenty-four pro-bono professionals responded to the survey circulated by Human Rights First. Respondents included pro-bono partners at major law firms across the country, as well as pro-bono directors at some of the nation’s largest law firms. Respondents practice in immigration courts and asylum offices across the country, ranging from New York City to Seattle.

¹⁵ Association of Pro Bono Counsel, Letter to Senators, June 4, 2013, available at <http://www.endthedeathline.org/uploads/pdfs/APBCo-Letter.pdf>.

¹⁶ Association of Pro Bono Counsel (APBCo), Letter to The Honorable Shaun Donovan, Director of Office of Management and Budget, Re: Fiscal Year201 Appropriations Request – Department of Justice, September 25, 2015, on file at Human Rights First.

¹⁷ Bipartisan Policy Center, Funding Immigration Courts Should Not be Controversial, May 20, 2015, available at

<http://bipartisanpolicy.org/blog/funding-immigration-courts-should-not-be-controversial/>.

¹⁸ Institute for the Study of International Migration, *Detention and Removal: What now and What Next?* (Washington, D.C.: Institute for the Study of International Migration, Georgetown University, Oct. 2014), p. 13.

¹⁹ Julie Myers Wood, "Courts could be a step forward in immigration debate," *Houston Chronical*, April 30, 2015, available at <http://www.chron.com/opinion/outlook/article/Wood-Courts-could-be-a-step-forward-in-6234283.php>.

²⁰ While currently funded judge teams are hired, the backlog will continue to grow well above half a million pending cases in the next two years. EOIR currently has funding to fill 118 immigration judge positions on top of the 256 positions filled at the end of FY 2015. If it takes FY 2016 and FY 2017 to fill those 118 positions, the number of pending cases will increase to almost 531,000 by the end of FY 2017. To stem the ballooning backlog and eliminate it by FY 2023, EOIR must undertake an aggressive hiring effort and Congress must allocate additional funds for 150 more immigration judge teams.

²¹ Human Rights First considered the backlog to be eliminated when the number of pending cases drops below the number of cases received in a given year. All calculations regarding the number of required immigration judges are based on data from the Transactional Records Access Clearinghouse (TRAC) of Syracuse University, which publishes immigration court data received through Freedom of Information Act (FOIA) requests. For purposes of this calculation Human Rights First utilized TRAC national averages and extrapolated based on current trends to predict the current growth of the backlog and when the backlog will be eliminated, based on recommended increases in immigration judges. The calculation also assumes that immigration courts should have an average case completion time of one year. Therefore, at any given time the immigration court should not have more cases pending than it receives each year. Thus, any cases pending at the end of a given fiscal year over the number of cases the court received that year are considered backlogged cases. For example, in 2015, the immigration court received some 247,000 cases, and 456,000 cases were pending at the end of FY 2015. Therefore, FY 2015 resulted in a backlog of 209,000 cases. Human Rights First calculates that since FY 2000 the immigration court has averaged approximately 238,000 new cases per year. Human Rights First found that in FY 2014 and FY 2015 the court received over 247,000 cases per year. Given the stability of incoming caseloads over the past 15 years, Human Rights First predictions utilize the number of new cases in FY 2015 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 required to handle the court's caseload. The number of cases completed per immigration judge each year has a dramatic effect on backlog predictions. Human Rights First calculates national average case completion rates per judge by

dividing the number of cases completed in a given year by the number of immigration judges that year. Case completion rates have fluctuated significantly over the past 15 years. An encouraging trend has emerged in the last ten years as average case completion rates went from over 1,300 per judge in FY 2005 to 777 per judge in FY 2015. This is a positive trend, because immigration judges handle and complete more cases than any other federal judge, causing immense pressure on judges and undermining the due process rights of immigrants subject to removal proceedings. Experts indicate 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, while imposing a manageable workload on each immigration judge. Therefore, Human Rights First's predictions for eliminating the backlog incorporate a slow trend toward a case completion rate of 500 case per judge by FY 2024.

²² See Human Rights First, Summary of Recommendations Relating to Comprehensive Review of the Immigration Courts and Board of Immigration Appeals, available at <http://www.rcusa.org/uploads/pdfs/recs-doj.pdf>; See also Charles Roth and Raia Stoicheva, Order in the Court: Common Sense Solutions to Improve Efficiency and Fairness in the Immigration Court (Chicago: National Immigrant Justice Center, October 2014).

<https://www.immigrantjustice.org/publications/orderinthecourt>

²³ Human Rights First, The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Governmental Efficiency, September 2010, available at <https://www.humanrightsfirst.org/wp-content/uploads/pdf/afd.pdf>

²⁴ See Lisa R. Bliss, ABA Supports Retooling Immigration Court System, April 19, 2010, available at https://apps.americanbar.org/litigation/litigationnews/top_stories/041910-immigration-court-removal-cases.html; see also Erin Kelly, Immigration judges call for reform, USA Today, August 27, 2014, available at <http://www.usatoday.com/story/news/politics/2014/08/27/immigration-judges-reform/14704039/>