

# Reimagining the Immigration Court Assembly Line:

Transformative Change for the  
Immigration Justice System



**Betsy Cavendish**, Appleseed Executive Director

**Steven Schulman**, Pro Bono Partner, Akin Gump Strauss Hauer & Feld LLP





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***Fairness, Impartiality, Accuracy, Efficiency, Transparency, Wisdom, Practicality, Courtesy, Modernization, Prioritization, Due Process.***

The United States takes particular pride in our justice system. Acknowledging it's not perfect, we rely on this system to give people a day in court, a fair shot to explain their cases before a judge who is genuinely open-minded. We expect both sides to have access to the basic facts and an opportunity to develop additional evidence; we expect that the judge will rule based on the facts and the law; and we expect the disappointed party to have the right to appeal before another impartial tribunal, where errors can be undone. We expect the government to seek justice for all and to use its prosecutorial resources wisely, to address the cases of truly public import. We value courts so highly as an alternative to cruder, more violent and far more unjust means of solving disputes that the United States advocates around the world for countries to empower independent courts to function legitimately as critical components of systems of justice.

Our 2009 report, *Assembly Line Injustice*, found that U.S. Immigration Courts all too often, and in many, many categories, fell far short of being just, efficient places where personal dramas and dreams of belonging in the United States could be resolved. The Immigration Courts were often perceived as illegitimate, and people returned to home countries with a sense of having been dealt an injustice under the name of United States law. The losers in any case are bound to be disappointed, but it's inexcusable to give them reason to feel that they endured a sham process carried out in the name of the law. Too often, we in the U.S. gave people reason to feel wronged.

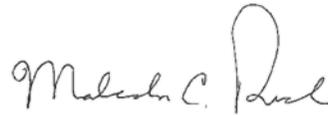
Through this update report, Appleseed and Chicago Appleseed Fund for Justice, together with our pro bono partners at Akin Gump Strauss Hauer & Feld, Latham & Watkins and the law schools at George Washington University and IIT Kent, are demonstrating that we are staying on the case of ensuring that our immigration justice system is just that: a system of justice. In updating our 2009 report, we note some significant improvements—and certainly a desire on the part of many government officials—to ensure a fair process, to promote prioritization of cases and modernization of recordings and systems. We also note some areas, as for instance in the patently unfair use of videoconferencing, where the government barely even nods in the direction of trying to ensure fair treatment for all.

Appleseed and our network of public interest justice centers in the U.S. and Mexico address tough issues, with an aim to secure genuine opportunity and justice for all. Through research and advocacy, we tackle problems at a systemic or structural level, and we take on issues where success is possible in the short, medium or long term. Trying to fix the immigration courts is one such project—in 2009, we identified issues that are **fixable**, not intractable. Here, we note some improvements, but much more opportunity to achieve accurate results—efficiently and legitimately—remains.

Appleseed calls upon officials of good will to make both the simple changes we seek, as well as to take on the more transformational efforts that are necessary to ensure that our process for resolving immigration cases is worthy of being called a system of justice. The debates over immigration are pressing and divisive, but we seek to craft an achievable agenda where leaders at the Department of Homeland Security, the Department of Justice, and the White House should be able to find agreement, prioritize cases and ensure fair treatment for those who seek a better life in the United States.



Betsy Cavendish  
Executive Director  
Appleseed



Malcolm Rich  
Executive Director  
Chicago Appleseed

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## TABLE OF CONTENTS

<b>INTRODUCTION</b>	<b>1</b>
How is the Immigration Justice System Doing and What Needs to be Done?	4
<b>STOP THE ASSEMBLY LINE: A Call For Leadership At Every Level</b>	<b>11</b>
Methodology	12
Acknowledgements	13
<b>BASIC STRUCTURE OF THE IMMIGRATION COURT SYSTEM</b>	<b>15</b>
<b>REIMAGINING THE IMMIGRATION COURT ASSEMBLY LINE</b>	<b>17</b>
<b>1</b> Reforming the Selection Process for Immigration Judges and the Board of Immigration Appeals to Promote Impartiality	19
<b>2</b> Empowering Immigration Judges to Achieve Justice	27
<b>3</b> Cultivating a Culture of Professionalism in the Immigration Courts	33
<b>4</b> Empowering DHS Trial Attorneys to Handle Cases More Professionally and More Efficiently	39
<b>5</b> Enhancing the Accuracy of Proceedings Through Effective Language Interpretation	49
<b>6</b> Reducing the Unfairness of Videoconferencing	55
<b>7</b> Improving the Reliability and Availability of Court Records	63
<b>8</b> Helping the Unrepresented	67
<b>9</b> Getting It Right On Appeal	77
<b>APPENDIX</b>	
<b>EXHIBIT 1:</b> Practitioner Survey	<b>A-1</b>
<b>EXHIBIT 2:</b> BIA Decisions vs. Federal Court Reversals (2006 – 2011)	<b>A-13</b>



## INTRODUCTION

In May 2009, Appleseed and Chicago Appleseed (together, “Appleseed”) issued *Assembly Line Injustice*, a report documenting the failures of the U.S. Immigration Courts to provide an accurate, legitimate, and efficient judicial process for immigrants trying to remain in the United States. Three years later, several of that report’s recommendations have come to fruition. The Department of Justice (DOJ) has hired more—and more diverse—Immigration Judges, improved the training for judges, and increased its focus on professionalism by accepting more complaints and disciplining judges who merit punishment. In some areas, representation has improved, particularly for asylum seekers. For its part, the Department of Homeland Security (DHS) recently took a major step forward in the fair use of its power to prosecute the removal of immigrants by issuing a far-reaching prosecutorial discretion policy, one of the steps recommended in *Assembly Line Injustice*. Though it is too early to evaluate its success, this new policy instructs DHS employees at all levels to focus removal resources on high-priority cases rather than to try to deport any immigrant against whom a case can be made. The implementation of these Appleseed recommendations is welcome, and shows that leaders at both DOJ and DHS take seriously their obligations to provide an accurate, legitimate, and efficient court system.

Nevertheless, all along the assembly line key actors continue to permit the Immigration Court process to delay or deny justice for too many immigrants. Immigration Courts are so backlogged that in some places half-day hearings are being scheduled for 2015. Many hearings that do go forward are translated poorly, and even then only in part, denying immigrants the ability to understand what is being said in court except when they themselves are testifying. Immigration Judges allow their courtrooms to be turned over to video monitors that broadcast immigrants (often in poor quality) from remote detention centers, limiting immigrants’ ability to confer with their counsel and to appear in person before their decision-maker. Additionally, far too many immigrants still appear in court without an attorney of their own to counter a hostile DHS Trial Attorney, a mismatch that inevitably tilts the outcome against the immigrant. The lack of representation in these life-altering cases is still viewed as inevitable, if unfortunate.

DHS Trial Attorneys too often continue to focus on removal as the only acceptable outcome after a case is initiated, rather than try to reach the right outcome. Even with DHS's new prosecutorial discretion policy, too many DHS Trial Attorneys are stuck in old habits, routinely refusing to engage in pre-hearing discussions that could resolve or narrow the issues before the court. DHS Trial Attorneys are notorious for failing to return phone calls from immigrants' counsel, typically limiting their interactions with immigrants' counsel to the courtroom, an unproductive environment for compromise.

One fundamental and underlying problem is that the Immigration Court assembly line cannot come close to handling the load placed upon it, due to the failure of the agencies to balance DHS's enforcement efforts with the Immigration Courts' capacity. Both DHS Trial Attorneys and Immigration Judges acknowledge that the system is overloaded, but no one is taking responsibility for fixing this problem in a transformative way. One substantial obstacle is structural: the split of responsibility across agencies (caused when DHS was created in 2003, and took over immigration enforcement from DOJ) has created serious dysfunction in the immigration adjudication system. DHS forces too many cases into DOJ's Immigration Courts, knowing that it is not accountable for another agency's resources. Nonetheless, the crushing caseload is a problem for DHS: one Chief Counsel told us that the caseload is unsustainable, such that "it feels like we are dodging bullets." DOJ unsurprisingly also finds this situation untenable: Immigration Judge Dana Marks, President of the National Association of Immigration Judges, told Congress that "the stress on judges has reached unbearable levels, contributing greatly to questionable conduct in court and arguably fostering ill-conceived decision making." When DHS admits that its attorneys are "dodging bullets" and a sitting judge testifies before Congress that her court system is broken, it is time for a transformative fix.

Transformation of this broken system must be driven by leadership and accountability all across the system, including at the White House and in Congress. The first step toward an accurate, legitimate, and efficient system is to align Immigration Court resources with enforcement efforts. Congress has given DHS the resources to initiate approximately 230,000 removal proceedings in Immigration Court each year, but has stopped providing DOJ commensurate funding for the Immigration Courts. Accordingly, immigrants facing removal are being shoved onto an assembly line that cannot possibly keep pace.

Two obvious fixes to this imbalance are to increase the resources for Immigration Courts to match current enforcement demands, or to decrease enforcement to meet the current capacity of the Immigration Courts. Comprehensive immigration reform is the most transformative answer, but that is both beyond the scope of this report and apparently unachievable in our current political environment.

Because the Immigration Court process is handled by co-equal agencies that sometimes deadlock, the White House must take leadership of this issue. The White House should task an individual in the Executive Branch to ensure that the immigration adjudication system can fairly accommodate the cases brought by DHS, the power to demand solutions from DOJ and DHS, and the authority to force solutions on the agencies in the absence of consensus between them.

Both DOJ and DHS also need to make sure that every person at every level—from DHS Attorneys to Chief Counsels, from Immigration Judges to BIA members—feels responsible and accountable for making the system work. For far too long many actors in

this broken system have simply pushed the cases along the assembly line, hardly stopping to make sure that it produces fair outcomes for the immigrants facing extraordinarily serious consequences. The Executive Office for Immigration Review (EOIR), the agency within DOJ responsible for the Immigration Courts, needs to empower Immigration Judges, who too often refuse to exercise strict control over their dockets to force the prioritization of the case load brought by DHS. A proactive, empowered and “judicial” message must come from the top of the agency. Many judges have taken a hands-off approach to the exercise of prosecutorial discretion by DHS, though EOIR has told us that it is encouraging Immigration Judges to demand answers to why limited Immigration Court resources are being used to pursue cases that do not meet the enforcement priorities articulated by DHS management. Likewise, most Immigration Judges refuse to ask tough questions of DHS Trial Attorneys who are unprepared for hearings or refuse to concede even obvious issues. Accordingly, DHS Trial Attorneys have little incentive to help manage the Immigration Court docket efficiently or fairly; neither the Immigration Judges nor their own leadership hold them accountable for backlogged case loads.

DOJ and DHS, aided by the Executive Branch, must develop and implement transformative solutions. Everyone in the system must step away from their spots on the assembly line, assume leadership, and be held accountable for turning the Immigration Courts into an accurate, legitimate, and efficient judicial system that provides justice without compromising fair enforcement.

Reimagining the  
Immigration Court  
Assembly Line

*Introduction*

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## How is the Immigration Justice System Doing and What Needs to be Done?

In 2009, we developed a series of practical, achievable recommendations, several of which have been followed by DHS and DOJ. As we drafted this report, we reviewed the agencies' performance against what we had found in 2009. This report provides detailed findings, but we also found it useful to assign grades for performance in the nine broad categories for both 2009, as a baseline, and for 2012. These grades take into account effort, but are primarily based on achievement. Below we summarize the 2009 grade in each of these nine categories, followed by our 2009 recommendation and the 2012 status. We believe that the recommendations of *Assembly Line Injustice* remain relevant today, but this report does not simply repeat those recommendations. Instead, we found it more useful to present action items for DOJ and DHS (and personnel within those agencies), as well as for the private bar, to make those recommendations work in practice and to bring the Immigration Courts in line with the United States' concepts of fairness and justice.

### 1 | Reform the Selection Process for Immigration Judges and the Board of Immigration Appeals to Promote Impartiality

- **2009 RECOMMENDATION:** Ensure that the hiring process for Immigration Judges and BIA members has been fully de-politicized.

*2012 Status: EOIR has eliminated political influence from the hiring process, focusing instead on candidates' judicial temperament.*

Report Card	
2009	2012
D	B-

» **Action Items:**

- ◆ **EOIR:** Continue to keep politics out of the Immigration Judge hiring process.



- **2009 RECOMMENDATION:** Broaden the candidate pool for Immigration Judges and BIA members.

*2012 Status: EOIR is advertising vacancies more widely, and its hiring from diverse backgrounds has improved, but overall the Immigration Judge corps and BIA are no more diverse today than in 2009.*

» **Action Items:**

- ◆ **EOIR:** Focus not just on process, but on the results to diversify the bench.
- ◆ **EOIR:** Ensure that new Immigration Judges have sufficient knowledge of immigration law.



- **2009 RECOMMENDATION:** Increase the transparency of the BIA candidate nomination process.

*2012 Status: EOIR has not improved the transparency of the BIA hiring process.*

» **Action Items:**

- ◆ **DOJ:** Adopt a notice and comment period for BIA appointments.

## 2 | Empower Immigration Judges to Achieve Justice

- **2009 RECOMMENDATION:** Increase the number of Immigration Judges.

*2012 Status: The courts still have far fewer judges than needed: the number of Immigration Judges has increased, but new appointments have failed to keep up with rising case loads.*

» **Action Items:**

- ◆ **Congress:** Fund enough Immigration Judges to handle the cases brought by DHS.



- **2009 RECOMMENDATION:** Provide additional clerks to assist Immigration Judges in writing opinions.

*2012 Status: EOIR has paired a proposed new law clerk position with each new proposed Immigration Judge position, but law clerks remain in short supply.*

» **Action Items:**

- ◆ **EOIR:** Determine whether more current funding should be directed to law clerk positions.



- **2009 RECOMMENDATION:** Expand Immigration Judges' sanctioning authority to include the ability to sanction DHS Trial Attorneys.

*2012 Status: While DOJ has attempted to implement regulations to give Immigration Judges sanctioning authority, DHS has blocked all efforts.*

» **Action Items:**

- ◆ **White House:** Step in and require DHS to accept the sanctioning authority that Congress has authorized.
- ◆ **EOIR:** Instruct Immigration Judges to hold DHS Trial Attorneys to the same standard of preparation, diligence and decorum as immigrants' counsel.

## 3 | Cultivate a Culture of Professionalism in the Immigration Courts

- **2009 RECOMMENDATION:** Enhance and implement DOJ's proposed code of conduct for Immigration Judges.

*2012 Status: EOIR has released the Ethics and Professionalism Guide for Judges.*

» **Action Items:**

- ◆ **EOIR:** Continue to train judges on Ethics and Professionalism Guide and enforce its mandates.



- **2009 RECOMMENDATION:** Fashion appropriate mechanisms to discipline judges for violations of the Code of Conduct.

*2012 Status: EOIR has implemented a complaint tracking database and has created a system for electronic filing of complaints. Nonetheless, practitioners are still reporting violations of the Code of Conduct by Immigration Judges.*

» **Action Items:**

- ◆ **EOIR:** Publicize the complaint process and ensure anonymity of complainants.
- ◆ **EOIR:** Publish notices of Immigration Judge discipline.



Report Card	
2009	2012
D	D+

- **2009 RECOMMENDATION:** Supplement the training of Immigration Judges via periodic and mandatory training sessions.

*2012 Status: EOIR has enhanced its training programs and devised creative solutions to continue Immigration Judge training programs, even with minimal funding; more funding is needed to fully implement training programs.*

» **Action Items:**

- ◆ **EOIR:** Prioritize funding for training programs.

**4 | Empower DHS Trial Attorneys to Handle Cases More Professionally and More Efficiently**

- **2009 RECOMMENDATION:** Remind Trial Attorneys that their mission is to enforce the law as written, not to deport every immigrant.

*2012 Status: Our field data and research show mixed results. It remains to be seen if the Morton Memo can shift ICE's focus away from a "deport at all costs" mentality.*

Report Card	
2009	2012
D	C+

» **Action Items:**

- ◆ **DHS:** Re-define the mission of Trial Attorneys to seek justice.



- **2009 RECOMMENDATION:** Enforce the DHS policy encouraging the use of prosecutorial discretion.

*2012 Status: Our field data show no real changes in the regional offices as of the first quarter 2012. It is still too early to tell whether the Morton Memo and subsequent DHS announcements will lead to a practical shift in the field.*

» **Action Items:**

- ◆ **DHS:** Hold Chief Counsel Offices accountable for implementation of prosecutorial discretion in every context.
- ◆ **DHS:** Analyze the ramifications of administrative closure and other means of exercising prosecutorial discretion.
- ◆ **Chief Counsels:** Ensure that Trial Attorneys understand how to use prosecutorial discretion to manage their dockets.
- ◆ **EOIR:** Instruct Immigration Judges to push DHS Trial Attorneys to justify deviations from the prosecutorial discretion policy.



- **2009 RECOMMENDATION:** Assign a Trial Attorney to each case through the practice of vertical prosecution.

*2012 Status: Our field data show some progress, but vertical prosecution and other mechanisms to improve docket management are still vastly underutilized.*

» **Action Items:**

- ◆ **Chief Counsels:** Assign each case to one Trial Attorney, or at least to a small team.



- **2009 RECOMMENDATION:** Mandate prehearing conferences at the request of either party.

2012 Status: *Our field data and research demonstrate no progress.*

» **Action Items:**

- ◆ **EOIR:** Require that counsel meet and confer before a hearing, and file a joint pre-hearing statement demonstrating how they have narrowed the issues.
- ◆ **Immigration Judges:** Hold pre-hearing conferences when the pre-hearing statement indicates that issues can still be narrowed with the court’s help.

5 | Enhance the Accuracy of Proceedings Through Effective Language Interpretation

- **2009 RECOMMENDATION:** Mandate simultaneous interpretation of everything said in Immigration Court.

2012 Status: *EOIR has advised that it is working on a language access plan, but to date most Immigration Courts do not use simultaneous or full interpretation.*

Report Card	
2009	2012
D	D+

» **Action Items:**

- ◆ **EOIR:** Require translation of everything said in Immigration Court, allowing immigrants to bring their own interpreters if EOIR cannot otherwise provide simultaneous interpretation.



- **2009 RECOMMENDATION:** Improve the certification system for interpreters.

2012 Status: *Our investigation indicates that EOIR has made no effort to improve the interpreters’ certification process and demonstrates that significant variances remain in the quality of interpreters in immigration proceedings.*

» **Action Items:**

- ◆ **ACIJ Weil:** Establish an interpreter review system that takes into account views of Immigration Judges, DHS Trial Attorneys, and counsel for immigrants.



- **2009 RECOMMENDATION:** Improve complaint-tracking procedure for interpreters.

2012 Status: *EOIR has improved the complaint procedures by adding a link to its website, but it appears that few practitioners are aware that this process exists and many expressed reluctance to use it for fear of retaliation by the court.*

» **Action Items:**

- ◆ **EOIR:** Publicize the interpretation complaint process and guarantee anonymity.



- **2009 RECOMMENDATION:** Enforce the prohibition on paraphrasing or opining and, if necessary, remove the interpreter when the interpretation appears to hinder an immigrant’s ability to testify fully and openly.

2012 Status: *Our field data and survey results indicate that practitioners still view paraphrasing and opining as an ongoing problem.*

» **Action Items:**

- ◆ **Immigration Judges:** Stop the hearing when the translator is causing problems, and report the translator to ACIJ Weil.

## 6 | Reduce the Unfairness of Videoconferencing

- **2009 RECOMMENDATION:** Return to in-person merits hearings.

*2012 Status: With one exception in the Chicago Immigration Court, Applesseed found that EOIR is increasing its reliance on videoconferencing, rather than trying to return to in-person merits hearings.*

### » **Action Items:**

- ◆ **EOIR:** Stop all video hearings until you know that video is not changing outcomes.
- ◆ **EOIR:** Adopt comprehensive regulations governing the use of video.
- ◆ **EOIR:** Require Immigration Judges to document and report all video or audio problems.



- **2009 RECOMMENDATION:** Restore confidential attorney-client communications.

*2012 Status: EOIR has made little progress toward guaranteeing confidential attorney-client communications during video hearings.*

### » **Action Items:**

- ◆ **EOIR:** Provide headsets for immigrants' counsel to communicate with clients appearing by video.
- ◆ **Immigration Judges:** Provide time for confidential communications between counsel and clients appearing by video.



- **2009 RECOMMENDATION:** Provide technical training to Immigration Court staff.

*2012 Status: Videoconferencing still suffers from a lack of training and the absence of full-time technical support staff at the Immigration Courts.*

### » **Action Items:**

- ◆ **EOIR:** Immediately hire and train staff on the use of video technology.
- ◆ **EOIR:** Replace outdated video equipment.



- **2009 RECOMMENDATION:** Provide the capability for real-time document transmissions.

*2012 Status: Even when Immigration Courts are equipped with technology that allows for real-time document transmission, Immigration Judges rarely use the technology available to them.*

### » **Action Items:**

- ◆ **Immigration Judges:** Prohibit video hearings from commencing without appropriate document transmission equipment and capabilities.

## Report Card

2009	2012
F	F

## 7 | Improve the Reliability and Availability of Court Records

- **2009 RECOMMENDATION:** Provide immediate access to records, filings and dockets.

*2012 Status: Our field data and research show halting progress has been made.*

### » **Action Items:**

- ◆ **DHS:** Give every immigrant his entire A-file (except classified information) at or before the master calendar.
- ◆ **Immigration Judges:** Make sure that immigrants have immediate access to all relevant documents, with no limitations on copying.
- ◆ **DOJ and DHS:** Eliminate all FOIA requirements for immigrants with cases in Immigration Court.



- **2009 RECOMMENDATION:** Create an electronic document filing system.

*2012 Status: Our field data and research show no progress has yet been made, but DOJ officials have indicated that the implementation of eWorld is a major priority for 2012.*

### » **Action Items:**

- ◆ **EOIR:** Prioritize the implementation of eWorld.



- **2009 RECOMMENDATION:** Continue the installation of digital recording systems and provide copies of recordings of Immigration Court hearings.

*2012 Status: Our field data and research show significant achievements with some room for improvement.*

### » **Action Items:**

- ◆ **Immigration Judges:** Provide a copy of the digital recording to the immigrant at the end of each hearing.

## 8 | Help the Unrepresented

- **2009 RECOMMENDATION:** Ensure that the 2008 Pro Bono Guidelines are faithfully implemented.

*2012 Status: Legal Orientation Programs have expanded, but there are still not enough pro bono attorneys available.*

### » **Action Items:**

- ◆ **EOIR:** Expand pro bono referral programs in Immigration Courts.
- ◆ **BIA:** Reward pro bono counsel with oral argument, if requested.
- ◆ **Bar:** Provide more pro bono representation, particularly to detained immigrants, children and those with special vulnerabilities.



Report Card	
2009	2012
F	C-

- **2009 RECOMMENDATION:** Use videoconferencing, even though flawed, to expand representation to immigrants in remote areas.

*2012 Status: The overwhelming majority of our field data show no progress. The court in Arlington, Virginia, is an exception that could serve as model for other Immigration Courts.*

» **Action Items:**

- ◆ **EOIR:** Partner with the private bar to investigate ways to use videoconferencing to expand pro bono representation.



- **2009 RECOMMENDATION:** Simplify the filing and pleading standards for unrepresented immigrants.

*2012 Status: Our field data primarily show no systemic progress, though the Kansas City Immigration Court has simplified some filing and pleading standards for unrepresented respondents.*

» **Action Items:**

- ◆ **EOIR:** Distribute the Kansas City Immigration Court's materials nationally.



- **2009 RECOMMENDATION:** Upgrade the Immigration Court hotline.

*2012 Status: Our field data show no progress.*

» **Action Items:**

- ◆ **EOIR:** Ensure that the hotline is working at all times, and is a credible source of useful information.



- **2009 RECOMMENDATION:** Produce a pamphlet explaining essential immigration law and Immigration Court procedure.

*2012 Status: Our field data show some progress, with some self-help materials distributed to Immigration Courts around April 2012.*

» **Action Items:**

- ◆ **Immigration Courts:** Provide space for self-help and other materials useful to immigrants, including information on protecting assets and custodial rights relating to their children.

9 | Get It Right On Appeal

- **2009 RECOMMENDATION:** Mandate the use of three-member panels except for purely procedural issues or motions that do not decide the outcome of a case.

*2012 Status: While the BIA's use of three-member panels has inched higher, DOJ has made no progress in mandating their use.*

Report Card	
2009	2012
D	C-

» **Action Items:**

- ◆ **DOJ:** Require three-member review of all decisions, except those that are purely procedural or not outcome-determinative.



- **2009 RECOMMENDATION:** Eliminate the use of affirmances without opinion and require reasoned opinions.

*2012 Status: The BIA's reliance on affirmances without opinion continues to wane, but the rules mandating affirmances without opinion remain on the books.*

» **Action Items:**

- ◆ **DOJ:** Require the BIA to issue full written opinions in all cases, providing the reasoning and addressing all relevant issues.
- ◆ **DOJ:** Increase the BIA to 25 members.
- ◆ **Congress:** Approve funding for more staff attorneys to assist BIA members.

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## **STOP THE ASSEMBLY LINE: A Call For Leadership At Every Level**

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The time has come for transformative solutions. The ideas below dramatize broader sections in this report that present ideas of how to stop the assembly line. These are intended to spur discussion, debate and creative thinking by all actors in the system, to make sure that the Immigration Courts are accurate, legitimate and efficient.

### **Legitimate Leaders Aren't Invisible: Make the Judge Corps More Visible**

- Both Immigration Judges and BIA Members suffer from bad public relations. EOIR should post the biographies of Immigration Judges on-line, and BIA Members should occasionally “ride circuit” as Immigration Judges.

### **Find New Ways to Resolve Cases**

- The number of Immigration Judges is clearly insufficient to reduce the backlog of cases. Retired judges or trained volunteers should mediate cases pre-hearing, and Immigration Judges should set aside calendar time for prosecutorial discretion cases.

### **Start Acting Like Judges**

- Many Immigration Judges are too passive in their courtrooms, and both immigrants and due process suffer. Immigration Judges should take control of their courtrooms and be more assertive, while maintaining proper judicial temperament.

### **Build Positive Relationships Between DHS Trial Attorneys and Immigrants' Counsel**

- DHS Trial Attorneys typically interact with immigrants' counsel only in the courtroom, often failing to return phone calls before hearings. DHS Trial Attorneys should devote efforts to relationship-building and hold office hours with immigrants and their counsel.

### **Investigate and Reform the Interpretation System**

- The Immigration Court interpretation system suffers from a substantial lack of quality and consistency. EOIR needs to conduct a top-to-bottom review of the Immigration Court interpretation system, with public findings and recommendations.

## Find Counsel for Unrepresented Immigrants

- More than half of all respondents in Immigration Court proceedings are unrepresented, an enduring crisis that threatens the legitimacy and fairness of the system. Immigration Judges, Chief Counsels, non-governmental organizations, and the private bar should work together to develop innovative pro bono models, like “attorney for the day” programs. Immigration Judges should also be held accountable for reducing the number of unrepresented immigrants on their dockets.

## Make the BIA More Transparent

- The BIA is a hidden court, which infrequently issues precedential decisions, rarely holds oral argument, and almost never interacts with practitioners. The BIA should focus on publishing more precedential decisions; making public all non-precedential “unpublished” decisions; holding more oral arguments; and occasionally moving out of Falls Church, Virginia, and out into the nation’s Immigration Courts.

## Methodology

As is Appleseed’s model, the publication of *Assembly Line Injustice* was just one step in our Immigration Court reform efforts. Immediately after we issued that report, Appleseed staff and volunteers met with officials at DOJ and DHS, and key stakeholders on Capitol Hill and in the advocacy community, to push for the adoption of the recommendations. Appleseed pro bono attorneys authored and submitted draft sections of the Immigration Judge Benchbook on the use of videoconferencing, proposed a document disclosure rule to DOJ and DHS, and engaged in other efforts to implement the recommendations of *Assembly Line Injustice*.

In 2011, it became obvious that we would need to update the report to keep our research and advocacy current and effective. We interviewed key stakeholders within the government, including Immigration Judges, DHS Trial Attorneys, Chief Counsels, and officials at both EOIR and DHS Headquarters. From EOIR, we participated in thoughtful, in-depth conversations with Director Juan Osuna, Assistant Chief Immigration Judges Mary Beth Keller and Jack Weil, and Office of Legal Access Programs Director Steven Lang. At DHS Headquarters, we met with Jim Stolley, Director of Field Legal Operations in the Office of the Principal Legal Advisor, and his colleagues, who were forthcoming and receptive to our ideas. In all these conversations, we continued to advocate for the recommendations outlined in *Assembly Line Injustice*.

We also interviewed more than two dozen practitioners from all parts of the country, both in the private bar and with legal services organizations. While we were conducting our interviews, teams of court watchers from Akin Gump and Latham & Watkins, as well as students from the George Washington University School of Law and the IIT Chicago-Kent College of Law, observed many hours of hearings in Immigration Courts in Arlington, Baltimore, and Chicago. The court watchers reported their observations, identifying issues related to hearing procedures and outcomes. These court-watching sessions confirmed findings from our follow-up interviews. We continued to read the work of other colleagues in the field and attended numerous conferences. Moreover, pro bono attorneys authoring this report also litigated in the Immigration Courts themselves.

Based on findings collected from interviews with practitioners and court observers, we designed a survey to elicit additional practitioners' views on any substantive improvements in the Immigration Courts that had occurred since our last publication. The survey garnered 49 responses from advocates across the United States. We used the survey to validate our results and to conduct additional interviews. The results of the survey are reported in Appendix A. We then shared a draft of this report with several immigration practitioners, who provided additional ideas and comments. This review team included Dree Collopy of Maggio & Kattar in Washington, D.C.; Kate Lincoln-Goldfinch of Hines Leigh in Austin, TX; Raed Gonzalez of Gonzalez Olivieri LLC in Houston, TX; and Lisa Palumbo of the Legal Assistance Foundation of Metropolitan Chicago.

Based on all this work, this report reflects our findings on the Administration's successes and failures in improving the dire shortcomings of our Immigration Court system since the publication of *Assembly Line Injustice* in May 2009.

## Acknowledgements

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Kevin Agnew	Daniel Glad	Natalie Brouwer Potts
Heather Ashour	Alex Harisiadis	Anna M. Rathbun
Sarah C. Chandrika	Kathleen Huggins	Manasi P. Shanghavi
Ellen C. Craig	Dean David M. Johnson	Megan A. Sindel
Mathew J. Cronin	John G. Kimble	Lyndsay D. Speece
Jonathon N. Fazzola	Katherine W. Knapp	Kenneth Suh
Raquel Frisardi	Raymond Y. Lin	Gary Thompson
Jessalyn R. Garvey	Domingo Llagostera	Kyle L. Wallace
Andrew T. Gehl	Dean Alan B. Morrison	Phyllis Yong
Thomas J. Giblin	Tanya C. Nair	Matthew Wendlandt
John Giouroukakis	Chelsea L. Osborne	



## **BASIC STRUCTURE OF THE IMMIGRATION COURT SYSTEM**

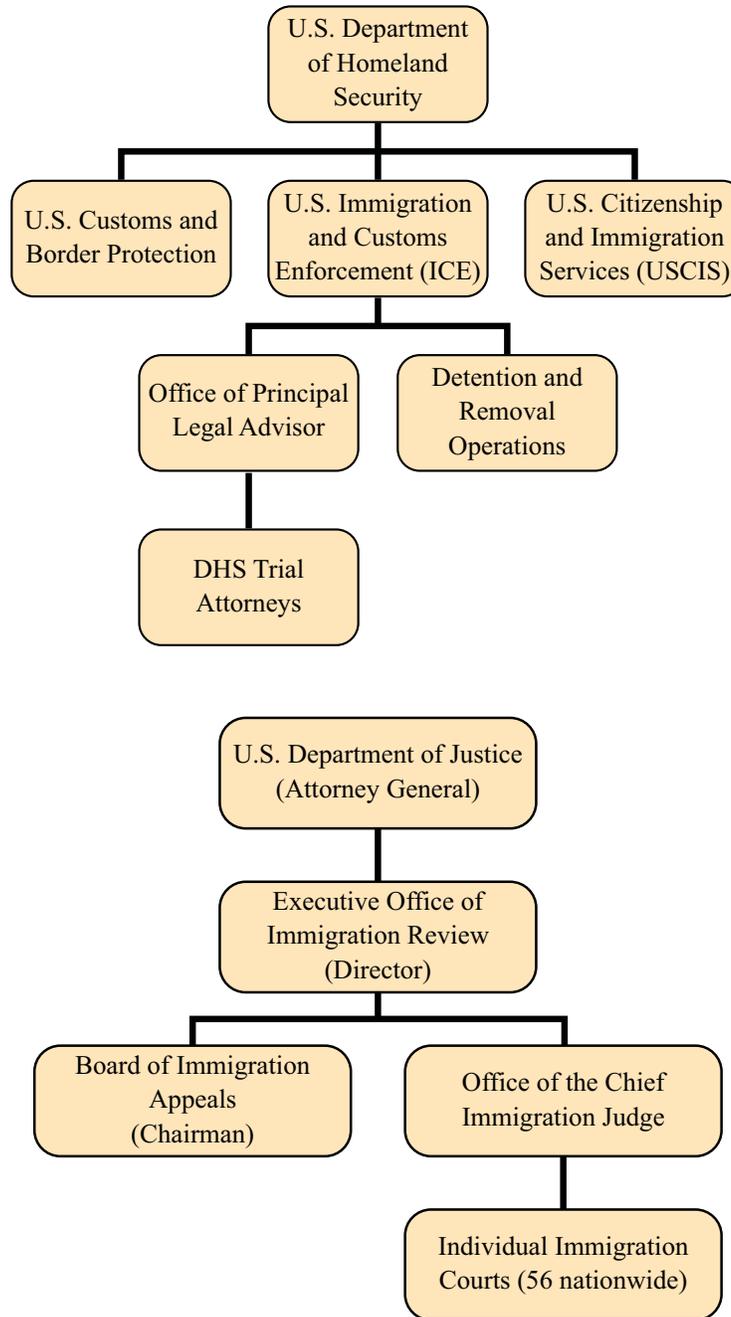
The Immigration Courts hear cases involving immigration status, the vast majority of which determine whether the immigrant should be removed from the United States. As we did in *Assembly Line Injustice*, we use the term “immigrant” throughout this report to refer to those who are processed by the Immigration Courts, but who may be termed “aliens” or “legal permanent residents” by statutes and “respondents” by regulations. We do not use the term “immigrant” in the technical legal sense to distinguish between “non-immigrant” visitors and “immigrants” who intend to stay in the United States.

Prior to the creation of the Department of Homeland Security, the Immigration and Naturalization Service (INS) held nearly exclusive dominion over immigration benefits and enforcement. INS was a part of the Department of Justice (DOJ) for the better part of the 20th Century. In 2003, the Homeland Security Act split the immigration-related functions that were traditionally associated with INS. DHS was given INS’s immigration enforcement and benefit-conferring functions. DOJ retained most adjudicatory functions, including the Immigration Courts within its agency the Executive Office for Immigration Review (EOIR).

The immigration adjudication process begins when DHS files “charges” against an immigrant by issuing a Notice to Appear (NTA). In many cases, DHS detains the immigrant in a prison-like detention center to prevent flight pending adjudication. The NTA initiates a removal proceeding in Immigration Court, where a government lawyer called a “DHS Trial Attorney” (or alternately Assistant Chief Counsel) attempts to convince an Immigration Judge that the immigrant should be “removed” (in other words, deported). DHS Trial Attorneys are supervised by the Office of the Principal Legal Advisor, which in turn is an arm of Immigration and Customs Enforcement (ICE).

EOIR houses the Board of Immigration Appeals (BIA), administers Immigration Courts, and manages Immigration Judges. In Immigration Court, the immigrant may offer reasons why he or she should not be deported, because, for example, he or she is eligible for asylum. After each side presents its evidence and arguments, the Immigration Judge decides whether the immigrant has a legal basis to remain in the United States. Either

party may appeal the Immigration Judge's decision to the BIA. Those BIA decisions unfavorable to immigrants may be reviewed by federal courts of appeals. The Attorney General may, on his own initiative, review BIA decisions as well; the Attorney General rarely exercises this authority.



**REIMAGINING THE IMMIGRATION  
COURT ASSEMBLY LINE**



# 1 | Reforming the Selection Process for Immigration Judges and the Board of Immigration Appeals to Promote Impartiality

Impartiality is an essential ingredient of any legitimate judicial system, yet *Assembly Line Injustice* found that biased judges littered the Immigration Courts. As a result, each immigrant who came before Immigration Court faced an unsavory game of chance in which winning or losing largely depended on which Immigration Judge the immigrant draws.

Report Card	
2009	2012
D	B-

Some of these biased judges were deliberately placed on the Immigration Courts by the prior Administration in an effort to pack the courts with “good Republicans” who were “completely on the team,” to quote the DOJ Inspector General. Many more biased judges simply have not kicked the habit of opposing immigrants, which is what most Immigration Judges have done in their prior jobs. Immigration Judges with prior positions adversarial to immigrants are 24 percent less likely to grant asylum than their counterparts with no such history, according to the study *Refugee Roulette: Disparities in Asylum Adjudication*. Indeed, the longer a judge held a position adversarial to immigrants, the more ingrained the habit of opposing asylum claims tended to be. That same study also found that Immigration

Judges with prior non-military government experience are 19 percent more likely to render outcomes in favor of the government, and that male Immigration Judges are 44 percent less likely to grant asylum than female judges.

***EOIR has successfully eliminated politics from Immigration Judge hiring.***

This bias did not stop with the Immigration Courts. The previous Administration similarly tried to stack the BIA in the government’s favor by removing five members who had come from private immigration practice, advocacy or

academia as part of its “streamlining reforms.” *Refugee Roulette* found that the success rate of asylum seekers at the BIA dropped precipitously by 70 percent in the wake of this streamlining. Moreover, nearly two-thirds of the BIA members in 2008 had previous

positions that were adversarial to immigrants, while all but one had significant government work experience, mostly at DOJ.

With an overwhelming number of Immigration Judges and BIA members falling into these pro-government categories, we concluded in 2009 that the composition of the Immigration Court system was stacked against immigrants. EOIR has made good strides since 2009 to depoliticize the hiring process, to expand the pool of candidates, and to put more women on the bench. But because of the size of the Immigration Judge corps, these efforts have yet to effect a significant change in the system overall. Unfortunately, today immigrants still face a system tilted against them. On the other hand, EOIR hears criticism from DHS and some Republican lawmakers that Immigration Judges are too “pro-alien.” It is unsurprising that immigration attorneys and DHS have different views of the system, but the data shows that outcomes remain far too dependent on the identity of the judge rather than the merits of the immigrant’s case. Regardless of whether the outcome is “anti-immigrant” or “pro-alien,” the appearance of bias is a serious problem for the legitimacy of any system of justice.

**2009 Recommendation: Ensure that the hiring process for Immigration Judges and BIA members has been fully de-politicized.**

*2012 Status: EOIR has eliminated political influence from the hiring process, focusing instead on candidates’ judicial temperament.*

**» Action Items:**

- ◆ **EOIR:** Continue to keep politics out of the Immigration Judge hiring process.

Based on our discussions with EOIR and our review of the public biographies of the 72 Immigration Judges appointed since 2009, we can conclude that EOIR has successfully purged politics from its hiring process. EOIR has hired a number of Immigration Judges who have prior judicial experience and, according to EOIR, have exhibited the temperament necessary to be a successful Immigration Judge, even if they do not have substantial immigration law backgrounds. We see no evidence that political considerations influenced their hiring, and we applaud EOIR’s efforts to focus on the temperament of Immigration Judge applicants.

EOIR should continue to ensure that politics do not influence the selection of judges for the BIA or Immigration Courts.

**2009 Recommendation: Broaden the candidate pool for Immigration Judges and BIA members.**

*2012 Status: EOIR is advertising vacancies more widely, and its hiring from diverse backgrounds has improved, but overall the Immigration Judge corps and BIA are no more diverse today than in 2009.*

**» Action Items:**

- ◆ **EOIR:** Focus not just on process, but on the results to diversify the bench.
- ◆ **EOIR:** Ensure that new Immigration Judges have sufficient knowledge of immigration law.

EOIR has tried to reshape the Immigration Courts through its concerted and commendable effort to increase the number of Immigration Judges since 2009. To broaden the pool of candidates, EOIR has expanded its search by advertising vacancies not only on the DOJ website and [USAJobs.gov](https://www.usajobs.gov), but also by sending vacancy announcements to “more than 120 well-established legal organizations,” although EOIR has not made public the names of these organizations. EOIR told us that its hiring process now makes a particular effort to identify candidates who have an appropriate judicial temperament, rather than specific immigration expertise. In EOIR’s view, with proper training these non-traditional candidates can become effective Immigration Judges.

In interviews, the temperament issues deemed most critical by EOIR seemed to be grace under pressure and an ability to make decisions on facts and law. We urge EOIR also to include leadership, judgment and empathy among the qualifications for new Immigration Judges.

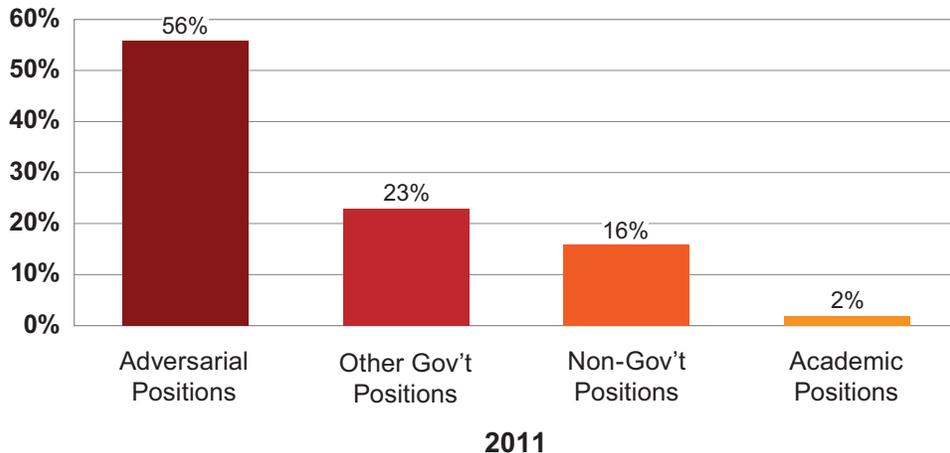
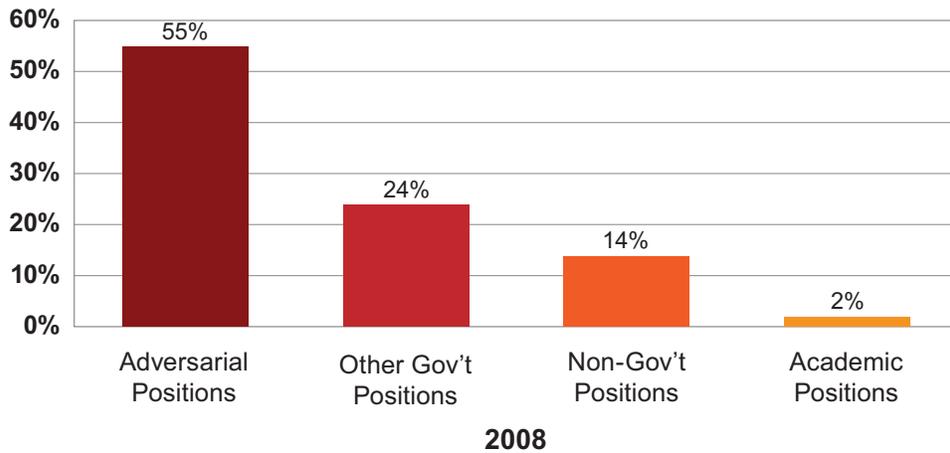
Practitioners have given mixed reactions to these new “non-traditional” hires. One experienced practitioner in Texas indicated that some new hires do not appear “to have proper training or very much experience in immigration law.” On the other hand, an attorney who practices in California and New York stated that “newer appointees seem more well-informed about [procedural] issues, though shakier on how to incorporate experts and other supporting witnesses.”

### ***What Do We Mean by Legitimacy?***

*Appleseed believes that the Immigration Courts must not only reach the right result under the law, and operate effectively, but that they must be perceived as legitimately holding power and operating fairly by those who come before the courts. This is an uphill burden, as the courts are part of the Department of Justice, which in most other cases is the prosecuting arm of government, and not part of an independent judiciary—a distinction that may be lost on many of those who come before the courts in any event. Still, it matters deeply to an American vision of justice that people coming before any court—even one located within the executive branch—know that their decision-maker will be open-minded, incorruptible, and will make decisions based on the law and evidence in that particular case. Passing the test of legitimacy will not be done by reaching a threshold level of satisfaction on a poll; rather it will turn on whether litigants and their counsel have every reason to believe that their decision-makers are unbiased, incorruptible and truly judicial in their mindset. We aren’t there yet—though we found no evidence of outright corruption, and much to praise in EOIR’s efforts to identify and reduce bias. The pipeline from DHS Trial Attorney to Immigration Judge is still wide open, and in many jurisdictions, the friendly dynamic between the Trial Attorney and the Immigration Judge is one of former colleagues, rather than attorney and fair-minded, impartial judge.*

Nonetheless, the results do not show increased diversity, aside from a slightly better proportion of female judges. As of 2009, 55 percent of the Immigration Judges had previously held positions adversarial to immigrants, and an additional 24 percent had held other government jobs. In contrast, only 14 percent had worked for a non-governmental organization, and a mere two percent had significant academic experience. The 72 new Immigration Judges hired since January 2009 have a similar profile to the judges who preceded them. Approximately 63 percent of the judges hired since 2009 previously worked in positions adversarial to immigrants, with 41 of the 72 new judges coming from the ranks of former DHS/INS Trial Attorneys. Despite its efforts, EOIR continues to use the pool of DHS Trial Attorneys as the farm team for the Immigration Judge corps, a trend that not only presents an appearance of anti-immigrant bias, but has also proven to be a strong indicator of pro-government outcomes. Simply relying on the traditional stream of DHS Trial Attorney applicants undermines the system's legitimacy. An additional 21 percent of these new judges held prior non-military government jobs, which means that a total of 83 percent of the new hires have backgrounds that strongly correlate with a bias in favor of the government in immigration cases. Only 17 percent of these new hires have worked in a non-governmental organization at some point in their careers, and three percent have been academics.

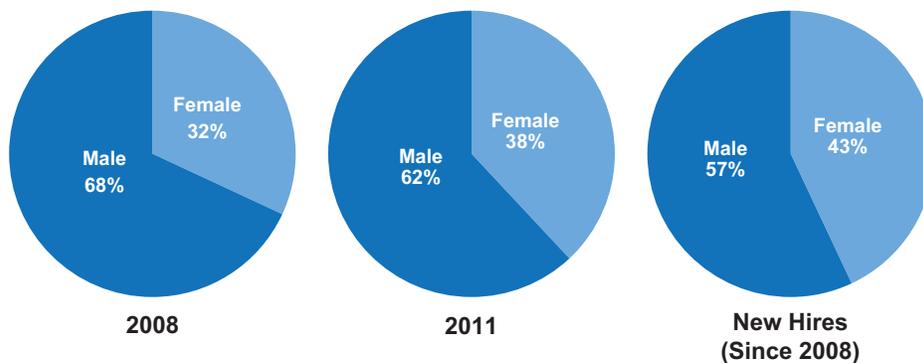
**Comparison of Immigration Judges' Professional Background  
(2008 vs. 2011)**



After factoring in the new judges and attrition, 56 percent of the 267 Immigration Judges as of January 2012 have worked in positions adversarial to immigrants (133 of whom were DHS/INS Trial Attorneys), an additional 23 percent have had prior non-military government jobs, 16 percent have worked in a non-governmental organization, and 2 percent have had academic experience.

In terms of gender, EOIR's recruiting efforts are more balanced than the bench as a whole, though the relatively limited number of vacancies to be filled has left the Immigration Courts still predominantly male. In 2008, only 32 percent of Immigration Judges were female. Of the 72 new Immigration Judges, 43 percent are female and 57 percent are male. The impact on the bench overall has been limited; male judges still constitute 62 percent of the Immigration Judge corps.

### Comparison of Gender Demographics of Immigration Judges



EOIR has had even less of an opportunity to improve the composition of the BIA, and, accordingly, that body still remains imbalanced. The three new members appointed since 2009 do not, demographically, represent much change to the status quo as of 2009. Two of the new members are male, and two have served in positions adversarial to immigrants; one new member has significant previous academic experience as an immigration law professor and worked for a state disability rights organization.

In 2009, 11 of the 14 BIA members were male, 9 had previously worked in positions adversarial to immigrants and all but one had worked for the government (mostly DOJ). Only two members had any experience working at any non-governmental organization, and none had significant academic experience.

The current BIA membership is not much different. Of the 14 currently sitting BIA members, 10 are male, 10 have held positions adversarial to immigrants and all 14 have at some time worked for the government (mostly DOJ). Three current members have experience working in a non-governmental organization, and one has significant academic experience. In addition, the BIA currently has five temporary members, who may serve six-month terms and have all the powers of permanent BIA members except that they may not vote on precedential cases or participate in en banc proceedings. Each of these five current temporary members is female, bringing the total active BIA membership near to gender parity. They all have very similar backgrounds, each having served in other attorney positions at the BIA for at least a decade.

EOIR's efforts cannot be limited to a depoliticized and open hiring process, but must be focused on creating a diverse bench, one with the imagination, leadership and vision to provide justice for all. With respect to the BIA in particular, EOIR still has an opportunity to improve the composition of the BIA, as it is not fully staffed to its authorized 15 permanent members. EOIR should take the opportunity to fill open positions in a way that improves the Board's professional diversity. Finally, while its efforts to focus on judicial temperament is welcome, EOIR needs to make sure that new Immigration Judges have the requisite immigration law experience and/or training before taking the bench. The importance of a judge's decisions demands a thorough knowledge of the relevant law.

**2009 Recommendation: Increase the transparency of the BIA candidate nomination process.**

**2012 Status:** *EOIR has not improved the transparency of the BIA hiring process.*

**» Action Items:**

◆ **DOJ:** Adopt a notice and comment period for BIA appointments.

Although the Attorney General has appointed three new BIA members since 2009, the public has been given no opportunity to comment on the finalists prior to their appointments. While we understand EOIR's reluctance to announce candidates before their appointments are final, given the importance of the BIA in forming immigration law, the limited number of judges appointed to the BIA, and the appearance that the BIA is still politicized, any confidentiality concerns should be outweighed by the benefits of transparency and wider input into the process. In any event, it is not unusual in Washington for candidates for important posts to be vetted before their appointments are confirmed, as with American Bar Association recommendations of judicial nominees. We continue to believe that groups such as the American Immigration Lawyers Association could provide EOIR with valuable insights into the suitability of a BIA candidate, which would improve the odds of selecting well-qualified members and increase the public's confidence in the BIA. We urge EOIR to explore this reform for future appointments.

Because the BIA wields significant influence over U.S. immigration policy, EOIR should provide for a public comment period for all finalists for BIA positions so that it can consider a diversity of views about their qualifications. This process should be formalized as a regulation, so that any future administration is bound to follow it, which should help keep the selection process depoliticized. Any such regulation should specify a reasonable time period in which EOIR will receive and consider any comments, both public and confidential, before any BIA appointments become final.

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## STOP THE ASSEMBLY LINE: *Make the Judge Corps More Visible*

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*Post Immigration Judge biographies on-line.*

*Require BIA Members to occasionally sit as Immigration Judges.*

The Immigration Judge corps continues to suffer from a lack of respect among practitioners. EOIR should investigate ways to improve the public relations of judges, and can start with posting their biographies on line, as is done for members of the Board of Immigration Appeals. Immigration Court websites are currently spartan, listing only the names of the judges and containing no other relevant information. In stark contrast, most federal court websites contain lengthy biographies of judges. Currently, the only reliable source of information on Immigration Judges is via TRAC (Transactional Records Access Clearinghouse, a data gathering, data research and data distribution organization at Syracuse University), which contains data that is often unflattering for the judges, such as low asylum grant rates. We certainly support TRAC's reporting, and do not advocate white-washed biographies of Immigration Judges, but personalizing judges on the court websites can help generate legitimacy in the community.

The biographies of BIA members are available on the EOIR website, but this is the only public persona of these cloistered judges, who are obscured from public view in an office building in Falls Church, Virginia. As discussed more fully in Chapter 9, BIA members would do well to build a more public persona. One way to do this would be by occasionally sitting in Immigration Court by designation. Hearing cases in Immigration Court would force BIA members to interact with Immigration Judges, DHS Trial Attorneys, the private bar, and immigrants. The BIA could benefit from having a more public presence.

Reimagining the  
Immigration Court  
Assembly Line

*Reforming the  
Selection Process*

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25



## 2 | Empowering Immigration Judges to Achieve Justice

*Assembly Line Injustice* identified three primary problems interfering with Immigration Judges' ability to provide fair outcomes in their courtrooms: a crushing caseload; a dearth of clerks to help research and write opinions; and an inability and unwillingness to sanction DHS Trial Attorneys who come unprepared or otherwise obstruct fair and efficient proceedings.

Report Card	
2009	2012
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Sadly, the Immigration Courts have become even more backlogged in the last several years as DHS has ramped up enforcement. While the number of Immigration Judges has increased 22 percent since 2008, DHS has increased the caseload by 48 percent, leaving the courts even further behind. As Immigration Judge Dana Marks told Congress, "With every case a priority, the stress on judges has reached unbearable levels, contributing greatly to questionable conduct in court and arguably fostering ill-conceived decision making." Adding to the pressure of a mounting case backlog, Immigration Judges still have limited flexibility to manage their courtrooms effectively. Not enough new clerks have been hired, and DHS has prevented any effort to allow Immigration Judges to sanction DHS Trial Attorneys.

### **2009 Recommendation:** Increase the number of Immigration Judges.

*2012 Status:* The courts still have far fewer judges than needed: the number of Immigration Judges has increased, but new appointments have failed to keep up with rising case loads.

#### » **Action Items:**

- ◆ **Congress:** Fund enough Immigration Judges to handle the cases brought by DHS.

Appleseed continues to believe that the single most practical way to help Immigration Judges achieve justice is to hire significantly more Immigration Judges. Based on 2008 figures, Appleseed estimated that 204 new judges would have to be hired, bringing the judicial corps to 424, in order to reduce from four to two the number of cases each judge considered each day.

*Assembly Line Injustice* documented that Immigration Judges face extreme demands in the courtroom, and that pressure has only increased in the past few years. In fiscal year 2008, approximately 220 Immigration Judges received 292,013 new cases—more than 1,327 new cases per judge. Three years later, EOIR has hired approximately 72 Immigration Judges, but has lost 24, yielding only 267 Immigration Judges on the bench. Congress authorized but did not fully fund 284 positions. These 267 Immigration Judges need to review more than 400,000 new cases annually—the equivalent of nearly 1,500 new cases per judge per year. Predictably, the Immigration Court backlog has reached an all-time high of 297,551 cases at the end of fiscal year 2011, an increase of 48 percent since the end of fiscal year 2008.

Due to the pace of the assembly line, Immigration Judges sit on the bench hearing cases for approximately 35 hours per week. This grueling schedule leaves little or no time for reflection and research, surely impairing the likelihood of a fair result in court.

According to TRAC, the average Immigration Court case is now taking 489 days to resolve. Some groups of immigrants (from Armenia, Indonesia, and Albania, for example) are now waiting nearly two years or more for their case to be resolved.

The backlog is so bad in New York City that the Immigration Court is scheduling individual hearings in asylum cases for 2015. These delays not only make immigrants wait unbearably long for their status to be resolved—and perhaps for their families to join them—but also reduces their chances of finding or keeping a lawyer. A New York public interest attorney commented that these extended delays make “it virtually impossible for us to place cases with pro bono lawyers who can’t reasonably guess whether they [will]

***Starting in late 2011, the Immigration Court in New York was scheduling half-day asylum hearings for 2015, leaving refugees in limbo for more than 3 years. This delay separates families and reduces the chance that a lawyer will take the case pro bono.***

be in a position to do a pro bono case in three or more years.” Likewise, law school immigration clinics are less likely to take cases that will not be resolved until after the students’ graduation.

This backlog is especially acute for immigrants who are not detained. EOIR has understandably prioritized the cases of detained immigrants, by ordering Immigration Judges to complete 85 percent of all detained cases within 60 days. This not only puts significant time pressure on Immigration Judges to decide these cases, but also substantially delays the cases of undetained immigrants. These immigrants, particularly asylum-seekers, may be separated from their families and be unable to work pending the outcome of their Immigration Court cases.

Despite this clear need for more Immigration Judges, hiring has ground to a halt. In fiscal year 2011, EOIR requested an additional 21 Immigration Judge positions, but Congress froze funding at 2010 levels, allocating no money for new Immigration Judges. In light of

the tight funding, DOJ has imposed a department-wide hiring freeze, preventing EOIR from filling authorized positions or even replacing judges who leave the bench. This situation is not getting better. In fiscal year 2012, EOIR again requested 21 additional Immigration Judges to help it keep up with the current caseload, a number woefully short of what is needed to provide due process in the growing number of cases. We worry that the hiring freeze may not only increase the backlog, but also reduce the willingness of those involved in the thoughtful disciplinary process to counsel out those judges who lack the temperament necessary to deal with the stresses and burdens of being an impartial Immigration Judge.

Appleaseed encourages DOJ to redouble its efforts with Congress to fund the number of Immigration Judges needed to provide due process to the immigrants who appear before these courts. In no event should the number of judges be used as an excuse to shortchange an immigrant's right to due process. The United States system of justice demands no less.

**2009 Recommendation: Provide additional clerks to assist Immigration Judges in writing opinions.**

*2012 Status: EOIR has paired a proposed new law clerk position with each new proposed Immigration Judge position, but law clerks remain in short supply.*

**» Action Items:**

- ◆ **EOIR: Determine whether more current funding should be directed to law clerk positions.**

Law clerks are one cost-effective way to make up for the shortage of Immigration Judges. Clerks perform the behind-the-scenes work, a particularly acute need because Immigration Judges spend about 35 hours per week in the courtroom, according to estimates by EOIR officials. Clerks can research and draft opinions—many of which follow a clear template that requires little or no new legal research—while judges are conducting hearings, allowing judges the time to evaluate the issues in each case. Accordingly, in 2009 Appleaseed recommended that each Immigration Judge be provided a dedicated clerk to help manage the crushing case loads.

EOIR followed this recommendation by pairing a request for a new clerk with each new Immigration Judge position for fiscal years 2011 and 2012. As a result, each Immigration Court judicial clerk now serves three judges, better than the ratio of one clerk per four judges when *Assembly Line Injustice* was published in 2009.

This modest improvement has not translated into readily apparent change across Immigration Courts. One practitioner we interviewed was unaware of any increased hiring of clerks in the last two years. Immigration Judge Dana Marks recently testified that Immigration Judges generally issue decisions without a clerk's help because of the scarcity of law clerks.

The shortage of law clerks is not due to low interest among potential candidates. EOIR's clerkship program is very popular with law students and is very competitive. Instead, the low number of law clerks staffing the Immigration Courts results from low EOIR hiring rates. EOIR has announced plans to hire an additional 21 law clerks by the beginning of fiscal year 2012, but the department-wide hiring freeze may preclude this step.

In sum, EOIR has a long way to go to reach Appleseed's recommendation of giving each Immigration Judge a dedicated law clerk. Appleseed encourages EOIR to engage in a cost-benefit analysis to determine whether current funding would better be utilized for Immigration Court judicial clerks than other hiring needs.

**2009 Recommendation: Expand Immigration Judges' sanctioning authority to include the ability to sanction DHS Trial Attorneys.**

**2012 Status:** *While DOJ has attempted to implement regulations to give Immigration Judges sanctioning authority, DHS has blocked all efforts.*

» **Action Items:**

- ◆ **White House:** Step in and require DHS to accept the sanctioning authority that Congress has authorized.
- ◆ **EOIR:** Instruct Immigration Judges to hold DHS Trial Attorneys to the same standard of preparation, diligence, and decorum as immigrants' counsel.

In *Assembly Line Injustice*, we noted that one of the most powerful tools given to judges is the ability to sanction attorneys who appear before them. Even if used sparingly, this sanctioning power allows judges to control their courtrooms by enforcing norms of fair play and decorum. By statute, Immigration Judges have this power—but can use it only to discipline immigrants' attorneys because DHS has refused to consent to regulations that would allow its attorneys to be subject to discipline by Immigration Judges, who are employed by DOJ.

Today's larger case loads and backlogs in Immigration Courts make it more important than ever for Immigration Judges to be able to run their courtrooms efficiently, and the power to impose sanctions evenhandedly is critical to advance the legitimacy of the Immigration Courts. Accordingly, Immigration Judges must be empowered to discipline attorneys on both sides if they come to court unprepared or under other circumstances warranting discipline. Clearly understanding this, EOIR strengthened its power to sanction immigrants' attorneys in 2009, and is looking to strengthen that power even more. Yet all its efforts to allow judges to discipline DHS Trial Attorneys have been stymied. According to EOIR, DOJ has prepared draft regulations to implement the Congressional contempt authority by giving Immigration Judges the power to sanction DHS Trial Attorneys. Unfortunately, DHS has refused to provide its consent to any such regulations, which it is able to do because these regulations require both agencies' approval.

DOJ is unwilling to press the issue with a sister agency and DHS clearly balks at the idea that a co-equal agency would have sanctioning power over its personnel. DHS asserts that sanctioning authority is not necessary because in the worst-case scenarios Immigration Judges can refer problems to local bar associations. We believe, however, that implementing the previously-authorized rule would go a long way to improving the dilatory and disrespectful conduct that so aggrieves immigration attorneys and their clients in many jurisdictions.

Because the agencies are deadlocked, Appleseed calls on the White House to intervene. The Office of Information and Regulatory Affairs, the Executive Branch body within the Office of Management and Budget charged with mediating inter-agency disputes over regulations, must bring an end to this stalemate. Congress has provided Immigration Judges

the power to sanction DHS Trial Attorneys, and this direction must be implemented. In the meantime, EOIR should instruct Immigration Judges that DHS Trial Attorneys are to be held to the same standard of preparation, diligence, and decorum as immigrants' counsel. The legitimacy of the Immigration Courts is degraded when it appears that DHS Trial Attorneys are accorded more favorable treatment.

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## **STOP THE ASSEMBLY LINE: Find New Ways to Resolve Cases**

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***Get retired judges or volunteers to mediate cases pre-hearing.  
Make calendar time for prosecutorial discretion cases.***

For the foreseeable future, there will not be enough judges or law clerks to alleviate the backlog in Immigration Courts. When half-day asylum hearings are being scheduled more than three years in the future, it is time to explore some creative ways to manage the docket and resolve cases.

The federal courts often use magistrate judges to resolve pre-trial matters, and in some cases to hold trials with the consent of both parties. The Immigration Courts could follow this model, allowing retired judges or trained volunteer lawyers to help administer cases. These "immigration magistrates" could help narrow issues and develop a set of recommendations for the Immigration Judge to review prior to a Merits Hearing, making these hearings more efficient or perhaps even unnecessary.

The Immigration Courts can also provide opportunities for DHS Trial Attorneys to resolve or narrow cases. Judges can hold some calendar time open for case resolution, calling DHS Trial Attorneys and immigrants' counsel into court to articulate whether and how cases on the docket should be resolved or narrowed.

These are only two ideas that arise out of Appleseed's review. Immigration Judges, immigrants' counsel, and DHS Trial Attorneys are in the best position to collaborate to develop mechanisms to alleviate the crushing burden of cases. The caseload crisis demands creative solutions.

Reimagining the  
Immigration Court  
Assembly Line

*Empowering  
Immigration Judges*

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31



### 3 | Cultivating a Culture of Professionalism in the Immigration Courts

*Assembly Line Injustice* described a poisoned Immigration Court culture that allowed judges to engage in shocking displays of temper and inappropriate fraternization with DHS attorneys that made immigrants feel as if the judge had already sided with the government. A significant change in attitude and attention to those judges displaying inappropriate conduct was sorely needed, as professionalism and proper judicial comportment are vital components of any legitimate court system.

Report Card	
2009	2012
D	B-

Accordingly, *Assembly Line Injustice* made three recommendations to cultivate a culture of professionalism in the Immigration Courts: (1) augment and implement DOJ's proposed Code of Conduct for Immigration Judges; (2) fashion appropriate mechanisms to discipline judges for violations of the Code of Conduct; and (3) supplement the training of Immigration Judges via periodic and mandatory training sessions.

Since 2009, EOIR has taken significant steps in each of these areas, by adopting a judicial code of conduct, improving the disciplinary process and its enforcement, and enhancing the training for new and sitting Immigration Judges. In particular, the Assistant Chief Immigration Judges responsible for training and professionalism deserve credit for their efforts to improve the Immigration Court culture. There is still, however, a strong perception among immigration advocates that too many Immigration Judges are not upholding the standards set by EOIR. This perception is based in part on the reality that some judges continue to behave without proper judicial comportment, and in part because the courts' reputation has yet to recover from the damage done by misdeeds of judges in the past.

**2009 Recommendation:** Enhance and implement DOJ's proposed code of conduct for Immigration Judges.

**2012 Status:** EOIR has released the *Ethics and Professionalism Guide for Judges*.

» **Action Items:**

- ◆ **EOIR:** Continue to train judges on Ethics and Professionalism Guide and enforce its mandates.

EOIR took a significant step toward increased professionalism with the April 2011 release of the Ethics and Professionalism Guide for Immigration Judges, which came nearly four years after EOIR proposed the initial Code of Conduct. The provisions in the Guide, which are binding on all Immigration Judges, address proper judicial temperament and demeanor to avoid impropriety and the appearance of impropriety, providing specific

### *You Can't Go Here*

*An anti-immigrant culture in Immigration Courts is sometimes reinforced by the facilities themselves. In both Boston and Arlington, Virginia, the Immigration Courts provide no bathrooms for immigrants or their attorneys appearing at multi-hour hearings. In Arlington, immigrants and their attorneys must first leave the court, take the elevator 13 floors down to the ground level, and then find a public bathroom in an adjoining mall. In Boston, the bathroom in the hall outside a courtroom is locked and available only for court personnel and DHS Trial Attorneys. Immigrants and their lawyers must pass by this bathroom and take the elevator down to the building's lobby to use a bathroom. A small inconvenience? Sure. But one that pointedly reinforces an "us vs. them" culture that some practitioners sense in Immigration Courts.*



examples of behavior that could indicate improper bias or prejudice. The Guide also focuses on professional competence, urging Immigration Judges to “strive to be knowledgeable about immigration law,” to be “skillful” in applying the law, and to prepare adequately for hearings. The Guide limits *ex parte* communications, provides for disciplinary actions for failure to follow the Guide, and creates a mechanism for continuing dialogue between EOIR and judges. The Guide has not yet been incorporated into the Ethics Manual, but is available online to judges and the public.

We encourage EOIR to continue to train judges on the requirements of the Ethics and Professionalism Guide and to ensure that judges are complying with it. The Guide should be amended when needed to ensure that Immigration Judges are abiding by the highest standards of professionalism.

**2009 Recommendation: Fashion appropriate mechanisms to discipline judges for violations of the Code of Conduct.**

*2012 Status: EOIR has implemented a complaint tracking database and has created a system for electronic filing of complaints. Nonetheless, practitioners are still reporting violations of the Code of Conduct by Immigration Judges.*

**» Action Items:**

- ◆ **EOIR: Publicize the complaint process and ensure anonymity of complainants.**
- ◆ **EOIR: Publish notices of Immigration Judge discipline.**

One of the most significant improvements since 2009 is EOIR’s effort to track complaints in a database. Under the leadership of Assistant Chief Immigration Judge Mary Beth Keller, who is responsible for conduct and professionalism, EOIR is publishing statistics on the number of complaints received, the general basis of the complaint (*e.g.*, court conduct, bias), the number of judges implicated, and generally how the complaints were resolved (*e.g.*, dismissed and on what basis, disciplinary action, informal action). The online complaints system adds a level of transparency and indicates that complaints are being addressed. In an interview with Appleseed, ACIJ Keller cautioned that the resolutions reflected in the statistics may under-report EOIR’s efforts to address unprofessional conduct, as the data do not include the number of judges who do not meet professionalism or other standards and are urged to retire or resign without any formal disciplinary proceeding. Appleseed applauds EOIR’s efforts to use its evaluation system to weed out those who may not be equipped with sufficient skills or sensitivity.

Additionally, EOIR has now made it possible to file a complaint through email at [EOIR.IJconduct@usdoj.gov](mailto:EOIR.IJconduct@usdoj.gov), though some practitioners are unaware of the new system, while others mistakenly believe that EOIR does not actually investigate complaints. To EOIR’s credit, however, “File a Complaint” is featured prominently on the front

*Complaints about the conduct of an Immigration Judge may now be made anonymously via email to [EOIR.IJconduct@usdoj.gov](mailto:EOIR.IJconduct@usdoj.gov).*

page of its website. Moreover, complaints may be filed anonymously, and they may be filed by individuals or groups of persons, according to the summary of procedure on the DOJ website, <http://www.justice.gov/eoir/sibpages/IJConduct/IJComplaintProcess.pdf>. Regrettably, the ability to file anonymously is confused by the instructions for filing a complaint, which states that the complainant should list “name, address, and phone number and any other contact information you wish to provide.” Moreover, many potential complainants may not wish to go through the trouble of establishing an anonymous email address to mask their identity. A number of attorneys expressed concerns about repercussions for making complaints, a fear confirmed by one practitioner who reported that a judge confronted the complaining attorney off-the-record in a retaliatory manner.

If a complaint is filed with EOIR, it will be addressed in some manner and the database/tracking system contributes to the transparency of this process. EOIR could improve the credibility of the Immigration Courts and its rapport with immigrants and practitioners by better publicizing to immigration law practitioners that complaints may be filed orally, in writing or by email; anonymously, individually, or from a group. Notices of the complaint procedure should be placed in conspicuous places in the Immigration Courts and on any document provided to an immigrant by the court as well.

Judge Keller, to her credit, appreciates that some judges simply may not be temperamentally suited to the high-stakes, high-stress nature of the position, and she is working with those judges who aren’t able to adapt to the rigors and emotional toll of the job to take an honorable exit before more drastic and involuntary disciplinary action is warranted. To the extent consistent with the Privacy Act, EOIR should also post on its website public reports on the disciplinary actions taken against Immigration Judges, the same way it reports sanctions against attorneys who represent immigrants.

**2009 Recommendation: Supplement the training of Immigration Judges via periodic and mandatory training sessions.**

*2012 Status: EOIR has enhanced its training programs and devised creative solutions to continue Immigration Judge training programs, even with minimal funding; more funding is needed to fully implement training programs.*

**» Action Items:**

- ◆ **EOIR: Prioritize funding for training programs.**

The most important change in the training of Immigration Judges since the publication of *Assembly Line Injustice* has been the December 2009 appointment of Jack Weil as the Assistant Chief Immigration Judge for training Immigration Judges, court administrators, interpreters, legal technicians, and judicial law clerks. Under Judge Weil’s leadership, EOIR has enhanced its training programs and established several new training initiatives, including a six-week training period for new judges, an assigned mentor, an immigration law exam, and formalized review process during the judge’s probationary period. Trainings emphasize conscious and unconscious bias in the courtroom. Additionally, EOIR is making training programs available remotely (via DVD programs) so that budget and travel constraints do not prevent Immigration Judges from receiving regular training.

Practitioners continue to complain about insufficient judicial legal competency. One Los Angeles immigrant advocate reported that “the quality of judges varies widely. Some are excellent and some are ridiculous,” a comment that reflected the sentiment of many other immigrant advocates with whom we spoke or surveyed. Practitioners reported that the overall quality of Immigration Judges is improving, but the lack of immigrant advocacy experience—or even general immigration law experience—in new judge hires may be hurting the quality of decision-making. Practitioners also cited the new online Immigration Judge Benchbook and annual training program as positive developments that could promote uniformity and accuracy of results.

Based on the training materials and schedule that EOIR shared with Appleseed, EOIR has good programs in place. Nevertheless, the effectiveness of these training programs is diluted by the lack of funding to implement them in full. Appleseed recommends that EOIR prioritize funding for training programs as a way to proactively address a host of other issues, such as professionalism and competency that arise when Immigration Judges do not receive adequate training.

### ***The BIA Delivers a Tool to Immigration Judges***

*In January 2012, the BIA issued an important decision that not only set an important legal precedent, but more vitally sent a clear message to Immigration Judges that they—not DHS—are in control in the courtroom. In Matter of Avetisyan, the BIA held that Immigration Judges have the power to close proceedings over the objection of DHS when the immigrant appears to have an alternative path to immigration status. DHS has reportedly complained about this decision, but the agency should instead recognize the obvious: Immigration Judges, not DHS Trial Attorneys, must command the courtroom.*

Reimagining the  
Immigration Court  
Assembly Line

*Cultivating Culture  
of Professionalism*

37

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## **STOP THE ASSEMBLY LINE: Start Acting Like Judges**

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### ***Take Control of the Courtroom.***

Providing more judges and clerks, allowing judges to have sanctioning power, and improving discipline and training will not provide the transformational cultural changes needed in the Immigration Courts. Immigration Judges must be empowered to take more control over their courtrooms and to break out of the assembly line mentality. Our call for an Article I Immigration Court in *Assembly Line Injustice* was in this vein, but did not quite articulate the most critical issue: regardless of where they are housed, Immigration Judges must act like judges. They should follow the model of their judicial colleagues in other venues, who would hardly sit idly by as their courtrooms became unmanageable.

The failure by Immigration Court judges to control their own courtrooms underlies nearly all the problems we have identified both in *Assembly Line Injustice* and in these pages. An

assertive judge—the kind of judge lawyers often encounter in Federal District Court—would not allow the government to refuse to turn over documents needed by the defense. She would not allow her courtroom to be turned over to a poor-quality videoconference. She would not chat idly with prosecutors, particularly not when the defendant is in the courtroom. She would force litigants to compromise on issues that wasted her court time, and would aggressively question the government’s decision to pursue cases that should be resolved by plea or stipulation. She would find a way to make sure that unrepresented litigants found a lawyer, or otherwise were empowered to represent themselves.

Some fine, assertive Immigration Court judges run their courtrooms efficiently and fairly. EOIR leadership wants Immigration Judges to put pressure on DHS to justify the use of scarce court resources, but not enough judges do so and they face a system that often tells them they cannot challenge the status quo. It needs to be clear to every Immigration Judge that they do not sit on the bench simply to hear the facts and apply the law, but that they can and should push for a just outcome. Every Immigration Judge must ensure that the courtroom is a place for equal justice under law, and do so assertively but respectfully and with appropriate judicial decorum. EOIR must make sure that its judges are empowered to force just resolutions, to challenge unfair practices, and to make clear to all parties that the courtroom is in the judge’s control. DHS Trial Attorneys must recognize that they are simply litigants before a neutral arbiter, that they must show deference to judicial authority, and that judges have the power to end practices that interfere with due process. Judges should be true neutral arbiters and run their courtrooms accordingly. Ultimately, everyone’s goal should be reaching a just outcome, not removing as many immigrants as possible.

No reform or recommendation can be entirely effective until all Immigration Judges are put in charge of their courtrooms, and are given the power to stop practices that denigrate the due process they are charged to protect. The time has come for Immigration Judges to be thought of—and to think of themselves—as every bit as important and powerful as federal Article III judges.

## 4 | Empowering DHS Trial Attorneys to Handle Cases More Professionally and More Efficiently

In 2009, *Assembly Line Injustice* highlighted the overly aggressive and inefficient ways that DHS Trial Attorneys handle cases in Immigration Courts. Applesseed found that DHS Trial Attorneys had fallen prey to a “deport-in-all-cases culture.” This attitude was exacerbated by the workload they are expected to carry, which allowed Trial Attorneys only 20 minutes to prepare for each case; and the lack of “vertical prosecution,” which meant that Trial Attorneys typically were not responsible for a case from inception to judgment. The agency’s failure to enforce its prosecutorial discretion policies and to encourage the use of pre-hearing conferences only magnified the problems, in combination providing Trial Attorneys neither the incentive nor the opportunity to manage their dockets and resolve cases without full evidentiary hearings.

Report Card	
2009	2012
D	C+

*One Chief Counsel remarked that he often “feels like we are dodging bullets.”*

The most significant change since 2009 in this area is the June 2011 memo issued by ICE Director John Morton detailing enforcement priorities and strongly encouraging the affirmative use of prosecutorial discretion to dismiss cases not in line with those priorities. This “Morton Memo” amended no fewer than six prosecutorial discretion directives from prior immigration officials, dating back to 1976, none of which had much impact on the exercise of prosecutorial discretion. This

effort is too new to have yielded significant results in the field, but initial results show that its implementation has not been consistent across Chief Counsel’s offices.

Aside from this latest prosecutorial discretion policy, DHS has not undertaken a broader re-thinking of how to manage the Immigration Court’s docket. This reluctance to address a key problem is unfortunate. In the past decade, the case burden on individual Trial Attorneys has become even heavier, with some Trial Attorneys required to litigate more

than 350 cases in a year. One Chief Counsel in charge of an ICE regional office remarked that the burden of an ever-increasing docket combined with insufficient resources is unsustainable; he often “feels like we are dodging bullets.” Unfortunately, only a few Offices of Chief Counsel have tested vertical prosecution or other approaches that would require a single attorney to be responsible for the duration of a case. Even though the regulations and the Immigration Court Practice Manual authorize the use of pre-hearing conferences as an efficient means to narrow or resolve cases, DHS and EOIR both resist using this mechanism in any systemic fashion.

**2009 Recommendation: Remind Trial Attorneys that their mission is to enforce the law as written, not to deport every immigrant.**

*2012 Status: Our field data and research show mixed results. It remains to be seen if the Morton Memo can shift ICE’s focus away from a “deport at all costs” mentality.*

**» Action Items:**

◆ **DHS: re-define the mission of Trial Attorneys to seek justice, not only removal.**

As documented in *Assembly Line Injustice*, the focus on national security in the wake of 9/11 has led DHS Trial Attorneys to adopt a “deport at all costs” mentality, despite the fact that only approximately one one-hundredth of one percent of immigration cases involve any national security concerns. Many Trial Attorneys still view their job through the lens of national security; indeed, ICE touts that its “primary mission is to

promote homeland security and public safety.” One Chief Counsel in charge of a regional office described himself as “a child of 9/11” and stated that the terrorist attack motivated him to become a government immigration attorney.

*Approximately one  
one-hundredth  
of one percent of  
immigration cases  
involve national  
security concerns.*

Increasing the emphasis on prosecutorial discretion cannot alone ensure that Trial Attorneys focus on reaching a fair result in Immigration Court rather than on “winning” removal of a non-citizen.

Despite the very few removal cases that involve national security issues, DHS still defines the role of its lawyers as “protect[ing] the homeland by diligently litigating cases.” Applesed recommends that, consistent with the Morton Memo, DHS re-define the mission of its lawyers to direct them to determine the appropriate outcome in each immigration case, consistent with the agency’s stated removal priorities. Changing mission is not just a matter of changing words on a website, of course. Every Chief Counsel should be held accountable for making sure that trial attorneys are honoring that mission through every part of their work.

**2009 Recommendation:** Enforce the DHS policy encouraging the use of prosecutorial discretion.

**2012 Status:** *Our field data show no real changes in the regional offices as of the first quarter 2012. It is still too early to tell whether the Morton Memo and subsequent DHS announcements will lead to a practical shift in the field.*

» **Action Items:**

- ◆ **DHS:** Hold Chief Counsel Offices accountable for implementation of prosecutorial discretion in every context.
- ◆ **DHS:** Analyze the ramifications of administrative closure and other means of exercising prosecutorial discretion.
- ◆ **Chief Counsels:** Ensure that Trial Attorneys understand how to use prosecutorial discretion to manage their dockets.
- ◆ **EOIR:** Instruct Immigration Judges to push Trial Attorneys to justify deviations from the DHS prosecutorial discretion policy.

The Morton Memo is a first step to rethinking what many practitioners view as an unduly hard line approach to deportation. ICE has candidly admitted that deportation will not resolve the status of the approximately 11 million undocumented immigrants living in the United States, as the agency has the resources to remove less than 4 percent of that estimated population. In light of this reality, the Morton Memo sets the top priorities for removal as individuals who (1) pose a public safety risk or danger to society, defined in part by a history of terrorist or criminal activity; (2) recently entered the United States through means other than a valid point of entry; and (3) have been identified by ICE with an outstanding order of removal or “otherwise obstruct immigration controls.”

The directives of the Morton Memo were supplemented by an August 2011 announcement by Secretary Napolitano that a joint DHS-DOJ committee would review nearly 300,000 cases currently in removal proceedings and determine which cases are low priority and can be subject to the exercise of prosecutorial discretion. The announcement also explained that agency-wide guidance will be issued to ICE, USCIS, and CBP officers to ensure that they appropriately exercise discretion when determining whether a low priority case should be referred to Immigration Court.

In November 2011, DHS Principal Legal Advisor Peter Vincent issued a directive expanding on the August 2011 announcement. That memo ordered Offices of Chief Counsel to review by January 13, 2012, for purposes of the exercise of prosecutorial discretion, all cases in which (1) the Notice to Appear had yet to be filed in Immigration

*DHS “must prioritize the use of its enforcement personnel, detention space, and removal assets to ensure that aliens it removes represent, as much as reasonably possible, the agency’s enforcement priorities, namely the promotion of national security, border security, public safety and the integrity of the immigration system.”*

**– Morton Memo,  
June 17, 2011**

Court; (2) all cases on the “master docket”—in other words, not yet scheduled for a full merits hearing; and (3) all cases of non-detained respondents with merits hearings scheduled before June 17, 2012. This “Vincent Memo” also required all Offices of Chief Counsel to draft and implement a standard operating procedure to establish a process for reviewing cases to determine whether the exercise of prosecutorial discretion is appropriate.

Two sets of guidelines accompanied the Vincent Memo. One is titled “Next Steps in the Implementation of the Prosecutorial Discretion Memorandum and the August 18th Announcement on Immigration Enforcement Priorities,” which announced a “comprehensive training program” for Trial Attorneys using “scenario-based training” on the use of prosecutorial discretion in accordance with the Morton Memo. The other guideline is called “Guidance to ICE Attorneys Reviewing the CBP, USCIS and ICE Cases Before the Executive Office of Immigration Review.” This document summarized the key components of the Morton Memo, including the criteria for the review of cases coming before the Immigration Courts, to focus on national security risks, persons with serious criminal records or otherwise pose a threat to safety, and individuals who entered the U.S. within the last three years.

Although these initiatives are encouraging, the initial response to the Morton Memo by DHS personnel in the field has been disappointing. News stories during the months following the Morton Memo suggested that this top-level change in tenor had not altered the mindset at the local level. One example is the DHS effort to remove a 55-year-old teacher who has no criminal history, is married to a U.S. citizen, and is undergoing treatment for prostate cancer. The teacher’s sole offense was that he had overstayed his visa 15 years ago; nonetheless, he had continually received work authorizations by the government. Valuable Immigration Court resources should not be squandered on cases like this, which fall squarely within the Morton Memo’s criteria for prosecutorial discretion.

***A court observer witnessed a hearing where a female immigrant was a victim of domestic violence by her fiancé. The woman, though battered, was still brought into court for deportation proceedings, even though she merited administrative relief under the Violence Against Women Act.***

In November 2011, the American Immigration Lawyers Association (AILA) issued a report that reached the “overwhelming conclusion ... that most ICE offices have not changed their practices” since the issuance of the Morton Memo. This report is filled with examples from across the country of Trial Attorneys intending to ignore this latest prosecutorial discretion effort. For instance, it was reported that “ICE attorneys and officers [in Atlanta] have both stated informally that they do not intend to comply” with the Morton Memo. In Dallas, the Office of Chief Counsel told an attorney that the office “does not need to change anything” in light of the Morton Memo. These

statements were made prior to the Vincent Memo, so perhaps the policy was only slow to take hold, but in light of the dismal record of DHS and subsequent developments, these indications were not promising. In January 2012, it was reported that approximately 1,300 of 7,900 cases reviewed in the Denver Immigration Court would be recommended for administrative closure under the new policy. Similarly, ICE Director Morton told Congress in March 2012 that after 150,000 cases had been reviewed, only 1,500 had been closed. Likewise, in April 2012 TRA reported reveals the closure of only 2609 cases, a backlog reduction of less than one percent of cases pending in Immigration Courts.

Even after training procedures are established by the Offices of Chief Counsel, the Morton Memo and the subsequent announcements still have significant shortcomings. Within DHS, there does not appear to be any system of accountability for the failure to exercise prosecutorial discretion and to prioritize cases. Indeed, these memos all take pains to make clear that no individual immigrant has the right to an exercise of prosecutorial discretion, therefore leaving no recourse for an individual treated unfairly.

Moreover, in many Chief Counsel's offices, the exercise of prosecutorial discretion appears to be strictly binary: either a case is prosecuted in full, or administratively closed, though the Morton Memo and the later guidance do not limit the exercise of prosecutorial discretion to case closure. Nonetheless, these guidelines do not adequately instruct Trial Attorneys on narrowing issues in cases, consenting to relief where warranted, or otherwise ensuring that a just result is achieved in Immigration Court. The current vision of prosecutorial discretion appears to be limited to deciding *who* to try to remove from the country, not *how* to adjudicate cases, particularly where the immigrant may be entitled to a form of immigration benefit. Unfortunately, the consequences of limiting prosecutorial discretion to case closure undermine the Morton Memo's efficacy. In many cases where an immigrant is subject to removal, he or she may have a legitimate claim to relief (for instance, battered women may have relief under the Violence Against Women Act, children may qualify for Special Immigrant Juvenile Status, and refugees may merit asylum). Closure will not help these individuals, and they therefore must litigate in the same highly adversarial system to secure relief.

Even in cases where case closure makes sense, DHS has not provided any mechanism for work authorization for immigrants who are allowed to remain in the United States after the exercise of prosecutorial discretion. One Washington State practitioner reported that the Office of the Chief Counsel disclaimed any responsibility for the impact of case closure on work authorization, and suggested that immigrants and their lawyers try to convince another DHS branch, USCIS, which has no involvement in the exercise of prosecutorial discretion, to change its work authorization policy.

DHS needs both to provide guidance and to require accountability to ensure that Chief Counsel's offices think more carefully about how prosecutorial discretion can be used in every context. The fair use of prosecutorial discretion should include not only for case closure, but also stipulations to relief or narrowing of issues. Some DHS attorneys do stipulate to asylum either immediately before or at hearings; this practice should be encouraged at earlier junctures. Even in cases in which it is not appropriate to stipulate to relief without a hearing, DHS attorneys can and should stipulate in advance to obvious issues, such as the human rights conditions in the applicant's country of origin. DHS also needs to analyze the ramifications of case closure and other mechanisms for case

resolution so that immigrants are not forced to choose between accepting a fair outcome and litigating solely so they can obtain permission to work in the United States. The current practice limits the effectiveness of the Morton Memo and encourages a new class of unauthorized workers as delays in Immigration Courts grow longer.

Chief Counsels can and should let their staff know that not every contention needs to be contested, not every adverse decision merits an appeal, and that a DHS Trial Attorney's time is best spent on doing justice under the law—working on removal of those who are dangerous to our society, and on securing relief for those entitled to it, so that they may be welcomed and integrated into the United States. DHS Trial Attorneys have the professionalism and leadership to analyze and prioritize their cases, and not just process them like an assembly line worker. By analogy, many U.S. Attorneys and litigating units of DOJ refuse some potential cases. They demand more evidence from agents or agencies, resolve cases on terms favorable to the opposing party, or simply drop matters falling outside priorities. This is the only way a system of prosecution can work efficiently and effectively.

Within Immigration Courts, the response to the Morton Memo has been far too passive, though EOIR reports that it wants Immigration Judges to question DHS Attorneys on the merits of cases it brings. Many Immigration Judges have disavowed any interest in questioning Trial Attorneys' refusal to exercise prosecutorial discretion and clear the Immigration Court dockets. Rather than push Trial Attorneys to use this power to make the system run better, Immigration Judges view themselves as simple observers of the prosecutorial discretion process. On the other hand, at least one federal court has not been shy about pushing DHS to explain whether it intends to follow the Morton Memo. In February 2012, the Ninth Circuit Court of Appeals asked the government to advise the court whether, in light of the Morton Memo, it planned to exercise prosecutorial discretion in five pending cases, four of which involved immigrants with long-term presence in the United States and U.S. citizen children.

EOIR should follow the lead of the Ninth Circuit and clearly instruct Immigration Judges to push DHS Trial Attorneys to justify deviations from the Morton Memo. Immigration Judges have the right to insist that limited court resources be used for the most meritorious cases that are consistent with DHS prosecutorial priorities.

**2009 Recommendation: Assign a Trial Attorney to each case through the practice of vertical prosecution.**

*2012 Status: Our field data show some progress, but vertical prosecution and other mechanisms to improve docket management are still vastly underutilized.*

**» Action Items:**

- ◆ **Chief Counsels:** Assign each case to one Trial Attorney, or to a small team.

Prosecutorial discretion should not be the only tool that DHS uses to manage the Immigration Court docket. *Assembly Line Injustice* reported that the typical DHS practice of assigning cases to Trial Attorneys shortly before merits hearings bogs down the Immigration Courts. As is typical for federal and state prosecutors, Trial Attorneys should be assigned to a case from the moment it appears in Immigration Court. The use of this practice, known as vertical prosecution, does not appear to have developed

significantly since 2009, though DHS is moving toward a better model. Jim Stolley, who recently left the post of Chief Counsel for Los Angeles to become the DHS Director of Field Legal Operations in the Office of the Principal Legal Advisor, implemented “unit prosecution” in Los Angeles—a version of vertical prosecution that assigns each case not to one attorney but to a team. Unit prosecution was part of Stolley’s efforts to transform one of the largest Chief Counsel’s offices, which had become notorious for lost files and failure to return phone calls from counsel for immigrants. According to Stolley, Chief Counsel Offices in Chicago, San Antonio, and San Francisco have already implemented unit prosecution, and he is aiming to have New York implement a similar process in 2012.

*In Los Angeles, unit prosecution was part of an effort to transform a flagship office notorious for lost files and failure to return calls from immigrants’ counsel.*

Still, the majority of Chief Counsel Offices instead assign an attorney or team of attorneys to an Immigration Judge’s court, rotating among judges over the course of a year. In these offices, a Trial Attorney is assigned to a particular case only when it gets close to the final merits hearing, limiting opportunities for immigrants’ counsel to discuss and possibly resolve or narrow the case with the responsible attorney. Throughout our interviews, Chief Counsels consistently stated that vertical prosecution is too cumbersome for the fast-paced Immigration Courts and would require far more manpower than their offices currently have available.

The need for vertical prosecution is made even more pressing with the agency’s new focus on prosecutorial discretion, which is not limited to any particular stage of a case. If one Trial Attorney, or a small team, is assigned to each case, each will be handled with more sophistication and care, and resolution will become the sole responsibility of that attorney, adding accountability to the prosecutorial discretion policy. The current “non-vertical” prosecution system creates an unproductive distance between the Trial Attorney and the case, posing a risk that the Trial Attorney will be less prepared for the particularities of the case and more disengaged from its outcome. Reassigning cases between Trial Attorneys also leads to increased delays as new attorneys struggle to get up to speed.

One Trial Attorney, or a small team of attorneys, should be responsible for each case from the issuance of the Notice To Appear until the case is resolved in Immigration Court. Most prosecutors’ offices outside the immigration context find that this system allows opposing counsel to establish a relationship with the attorney who will be handling the case throughout, to the benefit of both parties and the system as a whole. The new DHS prosecutorial discretion policy will be effective only when local DHS Trial Attorneys are given ownership and responsibility for resolving each case. Absent such a system, the assembly line will simply keep moving toward contested merits hearings, the most inefficient, and often unnecessary, means for resolving a case.

**2009 Recommendation:** Mandate prehearing conferences at the request of either party.

**2012 Status:** *Our field data and research demonstrate no progress.*

» **Action Items:**

- ◆ **EOIR:** Require that counsel meet and confer before a hearing, and file a joint pre-hearing statement demonstrating how they have narrowed the issues.
- ◆ **Immigration Judges:** Hold pre-hearing conferences when the pre-hearing statement indicates that issues can still be narrowed with the court's help.

*Assembly Line Injustice* recommended that pre-hearing conferences, which are authorized by regulation, be utilized at the request of either party as another way to resolve cases in lieu of full evidentiary hearings. Prehearing conferences are a critical tool used nearly

***Prehearing conferences are a critical tool used nearly universally by government attorneys outside the context of immigration, but are almost entirely absent from immigration proceedings.***

universally by government attorneys outside the context of immigration, but are almost entirely absent from immigration proceedings. Indeed, since 2008, the Immigration Court Practice Manual has provided for pre-hearing conferences “to narrow issues between the parties, to exchange information voluntarily, and otherwise simplify and organize the proceeding.” The Practice Manual provides that any party may request a pre-trial conference or the Immigration Judge can call

for a conference himself. Unfortunately, the Practice Manual does not mandate such conferences, even at a party's request, and this mechanism is underutilized—if not outright discouraged—by Immigration Judges.

The Immigration Court Practice Manual also “strongly encourage[s]” the parties to confer prior to the merits hearing, and to file a joint pre-hearing statement to “to narrow and reduce the factual and legal issues in advance” of the hearing. This encouragement is in most cases be limited to the text of the Practice Manual. Few if any Immigration Judges require such statements or otherwise mandate that the parties confer prior to a hearing. Likewise, many Chief Counsel Offices do not have a policy or practice on pre-hearing conferences with defense counsel, or even informal communications in advance of a hearing. The Los Angeles Chief Counsel instructed trial attorneys to return calls within 48 hours, but this approach appears to be the exception. One Chief Counsel said that she did not know whether she could even describe the level of communications between her office

*“[I]n twelve years of practice in this area, I have, one time, had a call returned from a [DHS Trial Attorney] before the hearing. One time.”*

***—Practitioner from  
New York area***

and immigrants’ attorneys. Another Chief Counsel told us that she had an “unwritten” policy that attorneys should try to respond to phone calls. Lack of communication with immigrants’ counsel appears to be endemic, with a clear majority of practitioners responding to our survey saying that they had frequent problems contacting trial attorneys. One veteran practitioner from the New York area said that “in twelve years of practice in this area, I have one time had a call returned from a [DHS Trial Attorney] before the hearing. One time.”

DHS has not seriously considered the opportunities presented by pretrial conferences or other mechanisms to encourage narrowing a case, even in the context of prosecutorial discretion. Indeed, a practitioner in Los Angeles told us that “in two recent cases our attempt to have a pre-hearing conference was flatly refused.” Moreover, the Immigration Courts have expressed no apparent willingness to embrace pre-trial conferences as a way to clear dockets or narrow issues. One judge stated that time allotted for merits hearings is “sacrosanct,” therefore no time could be made for pre-trial hearings. That judge also said that judges are encouraged to use the master calendar hearings to urge the parties to resolve issues, a statement echoed by a senior EOIR official. This view of the crowded master calendar docket—typically a “cattle call” of status hearings—is unrealistic. These short hearings typically happen at the very outset of a case when the parties have had little time to explore the merits. Master calendar is rarely a time to resolve serious issues, particularly since the DHS Trial Attorney appearing at the master calendar is unlikely to continue on the case absent a vertical prosecution system.

*“It is next to impossible to discuss a case in advance of a hearing with a [DHS Trial Attorney].”*

*–Practitioner in  
San Antonio*

The failure to use pre-trial hearings also limits the interaction between DHS Trial Attorneys and immigrants and their counsel to the most adversarial of settings—at the full merits hearing, in front of the Immigration Judge, when both parties are prepared for an evidentiary hearing and compromise is most difficult. A policy encouraging the use of pre-trial hearings, or other methods of forcing counsel to discuss and potentially narrow a case, could create a more civil and productive discourse between the parties in Immigration Court cases. These kinds of inter-counsel interactions, and the professional relationship that could develop as a result, are essential elements in making a determination of whether to exercise prosecutorial discretion. Without pre-hearing conferences, DHS Trial Attorneys have nothing to work with but the scant amount of information given to them in a pre-hearing file—files that are known for raising more questions than answers.

Applesed encourages DHS and EOIR to explore ways to facilitate the resolution of cases or the narrowing of issues, particularly in cases where prosecutorial discretion will not be used to close the case in its entirety. If pre-trial hearings are too difficult to schedule, EOIR should require that DHS Trial Attorneys and counsel for immigrants (or the immigrants themselves, if unrepresented) have made a good-faith effort to discuss, at least a week in advance of a merits hearing, which issues can be resolved without the court, and which need to be subjected to a contested hearing. In short, Immigration Judges should strictly enforce the pre-hearing statement mandates of the Practice Manual, and

add any other requirements that will make hearings more efficient. This type of “meet and confer” obligation, which is widely used in federal court litigation, would not only force a conversation between DHS Trial Attorneys and lawyers for immigrants, but also would help the court determine whether a pre-trial hearing would be an efficient use of time.

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## **STOP THE ASSEMBLY LINE: Build Positive Relationships Between DHS Trial Attorneys and Immigrants’ Counsel**

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### ***DHS Trial Attorneys should hold office hours.***

It is unsurprising that DHS Trial Attorneys and immigrants’ counsel have strained relationships. They do, after all, represent opposing sides in Immigration Court. But the sense among practitioners is that the relationships between the two sides is much worse than between opposing parties in other venues, like prosecutors and criminal defense attorneys, or plaintiffs’ and defense counsel. One cause is structural: the typical DHS Trial Attorney interacts with immigrants’ counsel and immigrants only at the Master Calendar, which is a frenzy of cases to be set for hearing, or at the Merits Hearing, when both sides have already prepared their cases to present to the judge. Any litigator will tell you that the courtroom is not a venue where lawyers are at their most relaxed and friendly. Unfortunately, the courtroom is typically the only place where DHS Trial Attorneys meet immigrants’ counsel.

Chief Counsels need to think of creative ways to develop better relationships between their corps of DHS Trial Attorneys and the private bar, including pro bono and legal services lawyers. Several of our recommendations above encourage DHS Trial Attorneys to break this mold by handling one case from beginning to end, returning phone calls, and engaging in pre-hearing meetings with immigrants’ counsel. Many Chief Counsels have regular “liaison” meetings with the American Immigration Lawyers Association and other groups, which is a good start.

Although they already have crushing case loads, all DHS Trial Attorneys should make time to meet with immigrants’ counsel outside of the courtroom. Holding regular office hours, where immigrants’ counsel could stop by and discuss active cases informally, would help build positive relationships between the two sides. When DHS Trial Attorneys know immigrants’ counsel, and vice versa, trust will develop, which can only help DHS Trial Attorneys decide which cases to pursue, and which merit an exercise of prosecutorial discretion.

## 5 | Enhancing the Accuracy of Proceedings Through Effective Language Interpretation

*Assembly Line Injustice* addressed the critical role that interpreters play in the Immigration Courts to ensure an accurate result and lend legitimacy to proceedings. More than eighty-five percent of the immigrants who come before the Immigration Courts rely on interpreters to tell their stories, but we found that this basic necessity for due process often fails to deliver accurate testimony from the immigrant to the court. Just as critically, the vast majority of Immigration Courts do not allow translation of all the proceedings, and instead use translation solely for instances when a non-English speaking immigrant or witness is testifying. Accordingly, immigrants are often left to guess what is being said in their own removal proceedings.

### Report Card

2009	2012
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*Assembly Line Injustice* accordingly offered five recommendations to address ineffective and inadequate language interpretation in the Immigration Courts: (1) Mandate simultaneous interpretation of everything said in Immigration Court; (2) Improve the certification system for interpreters to ensure that only qualified interpreters are permitted to assist litigants in the Immigration Courts; (3) Enhance the complaint tracking procedure for interpreters; (4) Enforce the existing prohibition on paraphrasing and opining by interpreters; and (5) Ensure that Immigration Judges question and, if necessary, remove interpreters when the interpretation appears to hinder an immigrant's ability to testify fully and openly.

Any accurate and legitimate judicial system must allow those appearing before it to understand the proceedings and to provide information to the decision maker—this is a fundamental tenet of justice in the United States. Yet our field data and survey results indicated that, apart from a few isolated exceptions, little progress has been made in the overall quality of interpreters in the Immigration Courts, leaving many immigrants unable to understand their proceedings and fully participate. EOIR cannot allow its Immigration Courts to hold hearings where the immigrant cannot provide accurate testimony or understand the entirety of the proceedings.

**2009 Recommendation:** Mandate simultaneous interpretation of everything said in Immigration Court.

**2012 Status:** EOIR has advised that it is working on a language access plan, but to date most Immigration Courts do not use simultaneous or full interpretation.

» **Action Items:**

- ◆ **EOIR:** Require translation of everything said in Immigration Court, allowing immigrants to bring their own interpreters if EOIR cannot otherwise provide simultaneous interpretation.

The majority of practitioners we interviewed or surveyed indicated that most Immigration Courts do not typically provide full or simultaneous interpretation of the entire proceeding. Rather, most interpreters continue to interpret only immigrants' testimony and any conversations directly between the judge and the immigrant. An overwhelming number of survey participants indicated that translation has not improved since we released *Assembly Line Injustice* in 2009. One attorney in Arkansas stated that in twenty-one years he had never seen a single full translation of Immigration Court proceedings. A survey participant commented that she was unable to secure an interpreter for her client despite filing several motions and calling the clerk to remind her about the need. Several others commented that interpreters are almost never present during Master Calendar Hearings. During Merits Hearings, communications among the attorneys and the judge, communications from opposing counsel to the judge, and decisions from the judge are typically not translated for non-English speaking respondents. In one case in Boston, the Immigration Judge refused to allow the interpreter to translate argument and expert testimony critical to the immigrant's case. Instead, the interpreter sat idle for several hours while proceedings were conducted in English, leaving the immigrant with no way of understanding what was happening in his case. Because the immigrant did not testify that day, the interpreter was never used.

At least some Immigration Judges recognize the need for full or simultaneous translation. A Minnesota practitioner reported that she has had a client receive full interpretation on at least one occasion, but only after she requested it. A practitioner experienced in the Chicago, Baltimore, and Arlington Immigration Courts indicated that he knows of only one Immigration Judge who consistently orders simultaneous interpretations, while other judges use it less consistently. However, another practitioner also experienced in the Arlington and Baltimore Immigration Courts expressed his belief that all Immigration Courts provided full interpretations of proceedings. Likewise, two of our court room observers witnessed simultaneous interpretations in the Arlington Immigration Court, though a third observer in that court on a different matter witnessed the interpretation of a respondent's name and the colloquy portion of the proceeding only, leaving the respondent in the dark as to all other communications in the court that day.

We recognize that simultaneous or full interpretation can lengthen proceedings if the respondent is not getting the translation via headphone, but fundamental fairness dictates that an immigrant be able to participate fully in his or her removal proceeding. Simultaneous interpretation services are used efficiently by other institutions, such as health care groups, school systems, and international aid organizations, and are a best practice for facilitating communication from one language into another.

EOIR should mandate that all proceedings other than confidential bench conferences with counsel be translated for non-English speaking respondents. The fairness of a hearing should not turn on the immigrant's country of origin: A French-speaking immigrant from Niger should be able to understand his hearing just as well as an English-speaking immigrant from Nigeria. There is no excuse for refusing to allow an immigrant to understand all that is being said in these critical hearings. An immigrant who cannot understand all the testimony and argument cannot be expected to be able to assist counsel or otherwise participate fully in a hearing. Due process requires no less.

**2009 Recommendation: Improve the certification system for interpreters.**

*2012 Status: Our investigation indicates that EOIR has made no effort to improve the interpreters' certification process and demonstrates that significant variances remain in the quality of interpreters in immigration proceedings.*

**» Action Items:**

- ◆ **ACIJ Weil:** Establish an interpreter review system that takes into account views of Immigration Judges, DHS Trial Attorneys, and counsel for immigrants.

Our investigation revealed no effort to improve the certification process for interpreters by EOIR or the private companies contracted to provide interpretation services. The need for a tighter certification process remains. Several practitioners indicated that the quality of interpreters in the Immigration courts has either stayed the same or declined since the publication of *Assembly Line Injustice*. In the words of one Chicago attorney, the quality of interpreters is wildly inconsistent, and some are “just plain atrocious.” Another practitioner noted that interpreters assigned to her cases have been intrusive and inaccurate.

Another recurring problem is the lack of access to interpretation in particular dialects. Throughout our interviews we heard stories where the courts were unable to find interpreters who spoke an immigrant's specific language or dialect. One court could not find an interpreter for a Burmese dialect. Another could not find an interpreter for a Mongolian dialect and the respondent was forced to have his hearing without an interpreter. A third court could not find an interpreter who spoke Mandarin, so the respondent's Mandarin-speaking attorney acted as his client's interpreter. One practitioner responding to our survey stated that some judges have refused to believe that respondents from Latin America are not fluent in Spanish and thus have denied requests for interpreters in the immigrants' native dialects.

In one particularly disturbing story, a Somali immigrant who spoke only broken English and his native language was forced by the Immigration Judge to choose among several bad options: using a Kenyan interpreter, seeking a continuance to find his own interpreter, or proceeding in broken English. Under the final option, the court would have barred the Somali immigrant from raising issues concerning his inability to communicate properly. One practitioner reported that many Immigration Judges will agree to continue a case where the differences in dialect are detrimental to a respondent's case. However, many times these problems will go unnoticed by the judge or the respondent's attorney. Where the respondent is unrepresented, the likelihood of remedying an interpreter issue is highly unlikely.

Sometimes the system works. Three Chicago practitioners indicated that interpreters were generally good in the Chicago Immigration Courts, and two indicated that they had fewer complaints recently. Several survey participants stated that the quality of translation is much stronger for the more common foreign languages, such as Spanish, and is particularly good in jurisdictions with large Spanish speaking populations, such as Texas and California. Conversely, cases involving less common foreign languages must often be rescheduled in search of an interpreter, or more troubling, these cases proceed with incomplete or inadequate interpretations. An individual interpreter's quality may also vary depending on the situation in the courtroom. For example, one practitioner indicated that he believes interpreters are more careful with their interpretations when they know that the attorney also speaks the foreign language.

EOIR must ensure that interpreters are qualified and that certification is not simply a rubber-stamp. Interpreters should be subject to review by Immigration Courts, DHS Trial Attorneys and counsel for immigrants, through periodic surveys. Assistant Chief Immigration Judge Jack Weil, who has the responsibility for training interpreters, should institute a comprehensive review system that guarantees quality interpreters for Immigration Courts.

**2009 Recommendation: Improve complaint-tracking procedure for interpreters.**

*2012 Status: EOIR has improved the complaint procedures by adding a link to its website, but it appears that few practitioners are aware that this process exists and many expressed reluctance to use it for fear of retaliation by the court.*

**» Action Items:**

◆ **EOIR: Publicize the interpretation complaint process and guarantee anonymity.**

*Assembly Line Injustice* found that the complaint procedures for interpreters was underutilized and poorly advertised to practitioners and immigrants. The situation has not changed markedly in the years since, though a link to the complaint procedure was added to the EOIR website. A majority of the practitioners surveyed stated that they were unaware of EOIR's process for lodging a complaint against an interpreter (email: [complaints.interpreter@usdoj.gov](mailto:complaints.interpreter@usdoj.gov)).

More disturbingly, many of the attorneys surveyed stated that even if they were aware of the process, they would be reluctant to file a complaint. These attorneys expressed concern regarding retaliatory measures taken by the court, with one practitioner going

*One practitioner went so far as to call it “professional suicide” to make a formal complaint regarding any part of the proceedings.*

so far as to call it “professional suicide” to make a formal complaint regarding any part of the proceedings. We applaud EOIR's actions in creating an online form for filing complaints, and encourage EOIR to take greater steps to publicize the online complaint process, to guarantee that contributors' comments will be kept anonymous to the extent possible, and to ensure that any reports of retaliation are investigated diligently. This complaint system is less valuable if practitioners are unaware of the service or fear retaliation for using it.

**2009 Recommendation:** Enforce the prohibition on paraphrasing or opining and, if necessary, remove the interpreter when the interpretation appears to hinder an immigrant's ability to testify fully and openly.

*2012 Status:* Our field data and survey results indicate that practitioners still view paraphrasing and opining as an ongoing problem.

» **Action Items:**

- ◆ **Immigration Judges:** Stop the hearing when the translator is causing problems, and report the translator to ACIJ Weil.

A significant percentage of survey participants indicated that paraphrasing or opining by interpreters was still a problem. Because of language barriers between many practitioners and their non-English speaking clients, survey participants indicated that they are usually unable to monitor the performance of the interpreters. Moreover, survey participants stated that while faulty or incomplete interpretations concern them, they do not believe the court can do much to monitor the practices of the interpreters given that often the Immigration Judges also do not speak the translated language. In the words of one practitioner, “paraphrasing is a big problem. But I’m not sure how the judge is supposed to ensure quality of translation if the judge is not fluent in both languages.”

We recognize that monitoring the quality of interpreters imposes a great challenge for the court. However, it is for this reason in particular that we recommend that the EOIR maintain a robust certification and training process in order to ensure top quality interpreters for every immigration proceeding. In addition, Immigration Judges should be required to stop a hearing when an interpreter is causing any problems, and report the translator to Assistant Chief Immigration Judge Weil.

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## **STOP THE ASSEMBLY LINE: Investigate and Reform the Interpretation System**

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***Conduct a top-to-bottom review of the Immigration Court interpretation system, with public findings and recommendations.***

The Immigration Court interpretation system is so rife with problems that it needs to be examined from top to bottom. Our investigation uncovered some serious flaws, and following the recommendations above will improve interpretation, but these problems demand a more comprehensive examination. ACIJ Jack Weil, who is responsible for Immigration Court interpreters, or the DOJ Office of the Inspector General should initiate a broad investigation of the interpretation system. Such a study should include interviews with all stakeholders, including interpreters, interpretation certification companies, Immigration Judges, DHS Trial Attorneys, the private bar, legal services attorneys, and immigrant advocacy groups. This effort should result in the development of strong set of qualifications, and a system of evaluating, disciplining, and disqualifying interpreters. EOIR should also implement a system to provide interpretation for more unusual languages—even if the interpreter appears by phone or video (while the immigrant is in the courtroom)—so that an immigrant can tell his or her story most comfortably. EOIR should also explore whether phone or video can be used to ensure that the best interpreters are used.



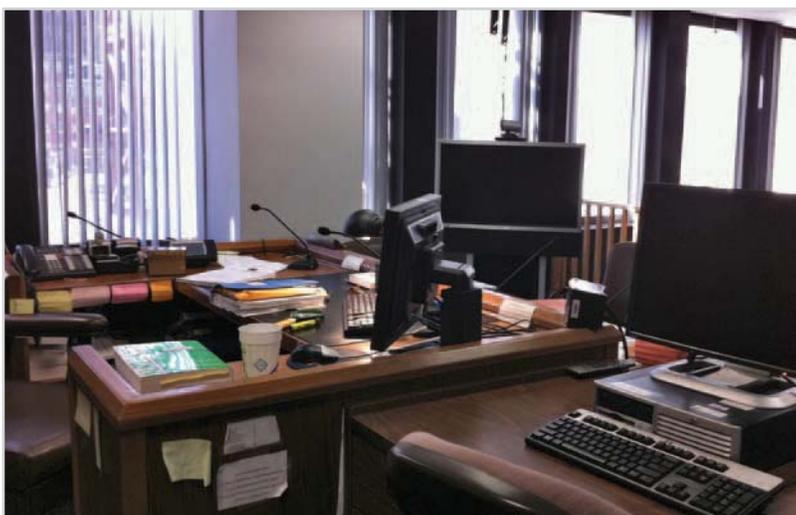
## 6 | Reducing the Unfairness of Videoconferencing

Trying immigrants by video remains the single largest procedural stain on the Immigration Court system, denying justice to immigrants and corrupting the Immigration Courts. As the Chief Judge of the U.S. Court of Appeals for the Fourth Circuit wrote, “virtual reality is rarely a substitute for actual presence ... even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it.”

Another panel in the Fourth Circuit criticized the use of video in Immigration Court proceedings because of the difficulty in evaluating the immigrant’s credibility, noting that an Immigration Judge’s “ability to judge a petitioner’s credibility and demeanor plays a pivotal role in an asylum determination; an unfavorable credibility determination is likely to be fatal to such a claim.”

### Report Card

2009	2012
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View of an Immigration Court video hearing monitor and camera from the bench.

Conducting a hearing remotely, where the lawyers and the judge are in the courtroom but the immigrant is miles away in detention, interferes with an immigrant's right to confer with counsel, to cross-examine witnesses, and to appear in one's own case. This is particularly true when the video and/or audio is of poor quality or is interrupted. One longtime practitioner was blunt about the impact of video. When asked whether videoconference hearings are of sufficient quality to ensure a fair proceeding, this attorney from Houston responded: "Is this question a joke? Of course not."

Unfortunately, there is nothing funny about videoconference hearings, during which the subtle but critical cues of eye contact, body language and demeanor are lost, perhaps along with the truth. Rather than looking the immigrant directly in the eye, an Immigration Judge using videoconferencing sees a tiny, blurred image on television. Perhaps, too, judges find it easier to order the deportation of someone who appears only on screen, rather than in the flesh before them. This low-tech virtual reality dehumanizes immigrants, who usually have no alternative but to submit to trial by videoconference. To make matters worse, repeated technological glitches with the video and audio feeds interrupt hearings, and sometimes make it impossible for immigrants to participate fully in their own hearings. Our interviewees unanimously agreed that the problems associated with trials by video are either not improved or even worse than in 2009.

Appleseed witnessed firsthand how trial by video denies even basic due process after visiting the Arlington, Virginia Immigration Court. In one hearing, an officer at the detention center hundreds of miles from the court positioned a Russian male in front of the video camera—but the immigrant scheduled to appear was Latino. So poor was the television image and sound that not even the immigrant's family could tell that the wrong person

appeared before the Immigration Judge until the very end of the ten-minute proceeding. When someone finally discovered the mistake, the detention officer ushered the correct immigrant before the camera, only for the Immigration Judge to summarize for the confused respondent what had been determined in the man's "absence," and the hearing ended.

*"The [immigrant] often looks awful via televideo. My detained clients wear bright orange jumpsuits [and] are unable to make eye contact with myself or the Immigration Judge ... Clients who have scars or other injuries can not accurately show them to the court. There is a few seconds delay in the audio ...if you ask a client ... about the death of a loved one, they many not show emotion until several seconds after ... and it comes across as insincere because it is not in real time."*

***—Practitioner in Florida***

Even when the right immigrant was in front of the camera, the camera was positioned so far away that it was difficult for courtroom observers to see and hear the immigrants clearly during multiple hearings conducted during one Appleseed visit. After the Immigration Judge finally asked a

detention officer to move the immigrants closer to the camera so that they would be easier to hear, the officer re-positioned the immigrants in such a way that their heads were cut

out of the screen and the hearings continued with the testimony of “headless” immigrants.

These problems are by no means new. A 2005 study by Chicago Appleseed and the Legal Assistance Foundation of Metropolitan Chicago of 110 master calendar hearings conducted by video “observed deficiencies related to access to counsel, presentation of evidence, and interpretation.” Nearly half the hearings observed had some problem with the video. The study concluded that “videoconferencing is a poor substitute for in-person hearings.”

***EOIR has never investigated whether video compromises the fairness of a hearing, though studies have found significant problems in video hearings.***

The increasing use of video hearings by EOIR and other federal agencies prompted the Administrative Conference of the United States (ACUS), an independent federal agency charged with improving federal agency procedures, to adopt recommendations and best practices regarding the use of videoconferencing for administrative hearings in 2011. In its Recommendation 2011-4, “Agency Use Of Video Hearings: Best Practices And Possibilities For Expansion,” ACUS urged federal agencies to use videoconferencing where efficient, but it cautioned that agencies should use video hearings only on a voluntary basis and should evaluate the use of video “to make sure that the use is outcome-neutral (*i.e.*, does not affect the decision rendered).” ACUS also recommended that agencies solicit feedback and comments from users of videoconference hearings, including witnesses and attorneys, perhaps through notice and comment rulemaking.

Despite its increasing reliance on video hearings, EOIR has never determined whether it is outcome-neutral for the immigrants who appear by video. Even the most basic data is lacking: EOIR does not track case results by mode of hearing, rendering the agency incapable of assessing how video compromises the fairness of its hearings.

Our contention is principally that videoconferencing impairs the accuracy and fairness of decisionmaking, but the expanded use of videoconferencing certainly also impairs the legitimacy of the Immigration Courts. We urge below that videoconference hearings should end unless and until EOIR determines how they can be used fairly. As long as EOIR continues to rely on video hearings, it should immediately follow the recommendations of ACUS. EOIR should conduct a comprehensive evaluation of its use of videoconferencing to determine whether such hearings are indeed outcome-neutral, using data and soliciting feedback from everyone involved in the system, including court personnel, attorneys, and, most critically, immigrants and their families.

Reimagining the  
Immigration Court  
Assembly Line

*Reducing  
Videoconferencing  
Unfairness*

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**2009 Recommendation: Return to in-person merits hearings.**

**2012 Status:** *With one exception in the Chicago Immigration Court, Appleseed found that EOIR is increasing its reliance on videoconferencing, rather than trying to return to in-person merits hearings.*

» **Action Items:**

- ◆ **EOIR:** Stop all video hearings until you know that video is not changing outcomes.
- ◆ **EOIR:** Adopt comprehensive regulations governing the use of video.
- ◆ **EOIR:** Require Immigration Judges to document and report all video and audio problems.

EOIR officials have repeatedly told us that the increasing use of videoconferencing in immigration proceedings is “inevitable.” One experienced interviewee in New Jersey noted that EOIR’s expansion of trial by video “is going to be one of the biggest problems [immigrants], particularly detained [immigrants], face in the future.”

EOIR’s scheduling makes the use of videoconferencing coercive for detained immigrants. Many immigrants in detention must choose between liberty and due process—they can receive a trial by video far quicker than a live hearing. Even if that video hearing is unfair, quicker resolution ensures that the immigrant will get out of detention one way or the other rather than remain in immigration jail for months or even years while waiting for an in-person merits hearing. Given the option of continued detention—often tantamount to prison despite the nominally “civil” nature of immigration detention—it is unsurprising that, according to one interviewee, trial by video now “is standard for detained cases.” Another practitioner agreed, observing that even in those Immigration Courts that tried to reduce the use of videoconferencing by sending Immigration Judges to more remote detention centers previously served only by video, “rapidly increasing case loads have forced the courts to go back to video hearings for many [immigrants].”

The Chicago Immigration Court serves as a notable exception to this trend. Interviewees who have practiced in that court told us that the use of videoconferencing decreased after the Chicago Immigration Court hired a new Immigration Judge to preside over the detained docket on a part-time basis. The Chicago Immigration Court also began rotating other Chicago Immigration Judges onto the detained docket for short-term shifts. According to one interviewee, these rotating Immigration Judges are favorably inclined to grant detained immigrants’ motions for in-person hearings at that court.

Unfortunately, the Chicago Immigration Court serves as a stark exception to EOIR’s nationwide-wide expansion of trials by video. Disturbingly, even the new “model” civil detention center in Karnes County, Texas, which DHS touts as an immigrant-friendly non-punitive setting, does not contain a courtroom. Thus, an immigrant in Karnes County may be treated to better conditions of confinement while in the United States, but whether he remains in this country will depend on his ability to testify credibly by video in a courtroom miles away to an Immigration Judge the immigrant will never see in person. This system of justice is an embarrassment, not a model.

The Chicago Immigration Court’s experience shows that reducing reliance on trial by video is possible with modest administrative changes if leadership has the desire to force

a change. As an initial step, we urge EOIR to mandate an extension of the Chicago Immigration Court reforms to all of its Immigration Courts. EOIR should ensure that scheduling discrepancies between in-person hearings and trials by video do not coerce immigrants into submitting to videoconferencing.

EOIR has justified its increasing use of videoconference hearings by pointing to its resource constraints. This excuse is beside the point: no funding limitation can justify the denial of basic due process. In some limited circumstances, videoconferencing can save significant government resources and be used as a smart case management tool. For instance, EOIR could use video for Master Calendar hearings where no substantive testimony is likely to be taken.

EOIR has simply failed to reconcile its increased reliance on videoconferencing with basic norms of due process, a damning lapse for any system of justice. EOIR has provided Immigration Judges with only rudimentary guidance on videoconferencing, mostly limited to technical advice on the operation of the equipment and the process of the hearing. EOIR should adopt comprehensive regulations governing the use of videoconferencing that protect due process, including binding restrictions barring its use in circumstances such as asylum cases where credibility is the central determination. Appleseed also urges EOIR to reverse its embrace of videoconferencing and to publicly disclose statistics concerning the use of videoconferencing in its annual statistical yearbook. In addition to the basic hearing information already collected, including the outcome of the hearing, information should also be recorded on technical difficulties with equipment or other problems encountered during videoconferencing, both in each case record—available on appeal—as well as in the statistical yearbook. The burden is on EOIR to show that videoconferencing is being used fairly. EOIR has not even tried to meet that burden, and thus should end the use of video hearings until it does.

**2009 Recommendation: Restore confidential attorney-client communications.**

*2012 Status: EOIR has made little progress toward guaranteeing confidential attorney-client communications during video hearings.*

**» Action Items:**

- ◆ **EOIR:** Provide headsets for immigrants’ counsel to communicate with clients appearing by video.
- ◆ **Immigration Judges:** Provide time for confidential communications between counsel and clients appearing by video.

Immigrants have a right to be represented by counsel in their proceedings (as long as they can afford to pay or can find a pro bono lawyer). Videoconferencing interferes with this basic (if limited) right by obstructing an immigrant’s ability to confer privately with his or her lawyer, who is typically miles away in the courtroom during the video hearing. Even more basically, the attorney can be hampered in her ability to help the client. As one Chicago attorney put it mildly, “too many things get lost when you don’t have contact with your client.” Given the limitations of video, an experienced immigration lawyer on the East Coast said that she cautions her clients not to confer with her at all during video hearings: “I advise clients not to talk to me at any time during the hearing [by videoconference] and to assume everything that is said will be heard even if the camera

breaks.” There are ways to allow confidential communication by video, but even these methods have their limitations. One interviewee noted that currently “[c]onfidential communication is only achieved by clearing the courtroom.” A New Jersey immigration lawyer told us that clearing the courtroom is “impossible during master hearings.” In the Chicago Immigration Court, where judges are often amenable to leaving the courtroom to allow attorneys to confer in private with their clients, one practitioner told us that even this is not an ideal solution: “as a practical matter, the videoconferencing machines are really loud, so these ‘private conferences’ are clearly not confidential” because they can be overheard.

Direct, confidential attorney-client communication is an essential element of due process, no less so when the client and lawyer are separated by miles during videoconference proceedings. EOIR must ensure that clients appearing by video are able to confer with counsel, just as they could in a live proceeding. One way to achieve this is to introduce headsets in all of its Immigration Courts for hearings conducted via videoconferencing, which would allow lawyers to talk in the same low tones they would use when conferring confidentially to a client in the courtroom. Absent such technology, EOIR should amend the Immigration Court Practice Manual to require Immigration Judges and DHS attorneys to provide appropriate time for confidential communications by video, and to clear the courtroom during hearings at the reasonable request of an immigrant or counsel so that they can confer in private.

**2009 Recommendation: Provide technical training to Immigration Court staff.**

*2012 Status: Videoconferencing still suffers from a lack of training and the absence of full-time technical support staff at the Immigration Courts.*

**» Action Items:**

- ◆ EOIR: Immediately hire and train staff on the use of video technology.
- ◆ EOIR: Replace outdated video equipment.

Forcing an immigrant to testify remotely via quality videoconferencing equipment is unfair, but this inequity is too often exacerbated by untrained users of the technology in Immigration Courts and detention centers alike. Our interviewees broadly agree that equipment problems plague videoconferencing, that technical training is deficient at best, and that the absence of full-time technical support at the Immigration Courts compounds these problems. “You’re lucky if the staff even knows how to operate the equipment,” commented one Kansas City lawyer.

Appleseed’s observations of hearings in the Arlington, Virginia Immigration Court brought home these shocking technological and training shortcomings, including the cavalcade of “headless” immigrant hearings discussed above. During a separate visit to the same Immigration Court, audio from three different detention facilities was simultaneously broadcast into one courtroom throughout the morning’s proceedings, filling the room with seemingly random, cacophonous voices. Another hearing was delayed for ten minutes while a courtroom official worked with detention officers at three detention facilities to address a problem with the sound equipment. Despite this effort, the audio problems persisted throughout the remainder of the morning’s hearings. Similarly, during a proceeding in the same courtroom a few weeks later, audio feedback

from the videoconferencing equipment made it difficult for everyone in the courtroom to understand what the immigrants were saying. The problem became so pronounced that a DHS Trial Attorney stopped in the middle of a hearing to attempt (unsuccessfully) to address the problem. The presiding Immigration Judge later remarked that conducting a hearing via videoconference “shouldn’t be this challenging.”

The Immigration Court staff also appeared wholly unequipped to address these technical issues. Sometimes the problems were so bad that immigrants were unable to participate fully and fairly in their own hearings. In one proceeding, for example, the video feed from one of the detention facilities stopped working completely, and the immigrant’s counsel was forced to waive the immigrant’s appearance during the remainder of the proceeding. These technical difficulties were often exacerbated by human error. For example, detention officers frequently brought the wrong immigrants into the videoconferencing cell, and in at least one case the error went unnoticed until the end of the proceeding.

This sorry state of affairs diminishes the fairness of the proceedings, in some cases rising to a Constitutional violation. EOIR should immediately train all relevant Immigration Court and detention center staff in the use of the videoconference equipment. EOIR should also increase the number of technical support staff available to address problems with the equipment. Over time, EOIR should replace its existing outdated videoconference equipment with high-quality, modern equipment.

**2009 Recommendation: Provide the capability for real-time document transmissions.**

*2012 Status: Even when Immigration Courts are equipped with technology that allows for real-time document transmission, Immigration Judges rarely use the technology available to them.*

**» Action Items:**

- ◆ **Immigration Judges: Prohibit video hearings from commencing without appropriate document transmission equipment and capabilities.**

Immigrants appearing by videoconference often have no way during the hearing to review courtroom documents or to provide documents to their attorneys. Our interviews indicate that this capability still is not available in every courtroom, and, even when it is, often sits unused because the court staff do not know how to operate it properly. The lack of a capability for real-time document transmission—or the ability to use it—is inexcusable when EOIR is racing to expand its reliance on videoconferencing.

We urge EOIR to equip all of its courtrooms with scanners or fax machines that allow immigrants to review documents with their attorneys during hearings, and to train Immigration Court and detention center staff in the proper use of these machines. No video hearing should go forward without such capabilities.



## 7 | Improving the Reliability and Availability of Court Records

Immigration Court document and records processes and procedures have improved since 2009, but are still unacceptably archaic. In *Assembly Line Injustice*, we characterized these processes as “more fitting for 1909 than 2009.” Although there have been some improvements since we published *Assembly Line Injustice*—most notably in digital audio recording of hearings—Immigration Court technology is only inching toward the latter part of the 20th century. Moreover, the agencies have not addressed some problems that have low-tech solutions—such as producing critical immigration files without requiring immigrants to file a burdensome Freedom of Information Act (FOIA) request—creating unacceptable, inexplicable, and inefficient hurdles for immigrants and their attorneys.

Report Card	
2009	2012
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### **2009 Recommendation:** Provide immediate access to records, filings and dockets

*2012 Status:* Our field data and research show halting progress has been made.

#### » **Action Items:**

- ◆ **DHS:** Give every immigrant his entire A-file (except classified information) at or before the master calendar.
- ◆ **Immigration Judges:** Make sure that immigrants have immediate access to all relevant documents, with no limitations on copying.
- ◆ **DOJ and DHS:** Eliminate all FOIA requirements for immigrants with cases in Immigration Court.

Although an immigrant facing removal proceedings is unquestionably entitled to unclassified records and documents pertaining to her admission or presence in the United States, she may not access those records unless she submits a written FOIA request. In *Assembly Line Injustice*, we noted that the government rejected less than one percent of FOIA requests by immigrants to get their own case files, indicating that this laborious formality is simply a waste of time. Despite the inefficiency and unfairness caused by the

FOIA requirement, DOJ and DHS continue to force immigrants seeking their case files to jump through this unnecessary hoop.

In 2009, Attorney General Holder issued new FOIA guidelines strongly encouraging all federal agencies to make discretionary disclosures of information. As a result of this new policy and other efforts, FOIA requests through the DOJ are fulfilled in relatively short periods. Access to these files allows respondents to review records of past proceedings. Still, our research shows that unnecessary obstacles continue to hinder access to court records. One attorney from Chicago told us that it is easy to set up appointments with the Immigration Court clerk to view court records, but another attorney who practices in Chicago pointed out that the Court allows immigrants to copy only 5 pages per appointment, a limitation found in other courts as well. Another attorney reported that lack of access to files precluded his firm from screening potential clients' cases to decide whether to take a matter on a pro bono basis. These unnecessary restrictions are a waste of time for immigrants and their attorneys and unacceptably increase the likelihood that an immigrant will not receive a fair hearing.

DHS apparently has not gotten Attorney General Holder's message: filing a FOIA request through DHS continues to be an unacceptably arduous and long process. DHS delays are particularly troublesome because DHS files are typically more critical to an immigrant's defense of removal: these files usually reflect every interaction the immigrant has had with the immigration enforcement system, as well as any indication of the immigrant's legal status. Amazingly, unlike long-established practices in civil and criminal courts across the United States, the rules in Immigration Court do not require that DHS produce the documents in its files to an immigrant against whom it is prosecuting removal. The failure to implement even the most basic document production requirements that underlie our adversarial justice system indicates just how stacked the process is against immigrants, and contributes to the perception of the Immigration Courts as illegitimate.

A recent U.S. Court of Appeals decision "opens a lot of doors," according to one Chicago practitioner, and raises the possibility that a subsequent suit could bring about an injunction enjoining DHS from denying immigrants access to their own records. In *Dent v. Holder*, the Ninth Circuit held that an immigrant who asks the government for help in getting his A-file for use in a removal hearing should be given access to the file without having to submit a FOIA request. The court noted, "It would indeed be unconstitutional if the law entitled an alien in removal proceedings to his A-file, but denied him access to it until it was too late to use it. That would unreasonably impute to Congress and [DOJ] a Kafkaesque sense of humor about aliens' rights." The writing is on the wall: the FOIA requirement needs to end.

Appleseed encourages DHS and DOJ to take initiative and eliminate the FOIA requirement for all immigration documents requested by an immigrant in removal proceedings before it is forced to do so by court order. Appleseed has provided draft language to DOJ and DHS to help it revise its policies and procedures. We repeat our recommendation in *Assembly Line Injustice* that the government give immigrants summoned to appear in Immigration Court immediate access to their full case files, excluding only sensitive government documents that would otherwise be properly withheld under FOIA rules. Basic fairness requires no less.

**2009 Recommendation: Create an electronic document filing system**

*2012 Status: Our field data and research show no progress has yet been made, but DOJ officials have indicated that the implementation of eWorld is a major priority for 2012.*

**» Action Items:**

- ◆ **EOIR:** Prioritize the implementation of eWorld.

Since the publication of *Assembly Line Injustice*, EOIR has made no progress implementing eWorld, its planned electronic document filing system, which would bring the courts in line with other courts around the country. EOIR has indicated that the implementation of eWorld is a top priority for 2012. This is a promising development, as a filing system is desperately needed. Immigrants who are represented tend to change lawyers frequently, and an electronic system would assist lawyers in obtaining information about their clients. As one practitioner told us, “EOIR is in the Dark Ages when it comes to resources online.”

The difficulty of obtaining important court documents causes individuals to miss court dates, forces lawyers to represent clients without adequate preparation, and can even result in deportation orders being issued simply because immigrants are not properly informed about their court proceedings. Immigration Court databases are often not updated with new information provided by immigrants’ counsel, resulting in notices being sent to wrong addresses. We also heard reports that the court’s phone notification system sometimes provides parties with the incorrect dates and times for hearings.

This planned transition from paper to electronic records should improve the efficiency of Immigration Court proceedings by, among other things, allowing data from electronically filed documents to be automatically uploaded to EOIR’s database and making Records of Proceedings immediately accessible to its staff. Appleseed encourages EOIR to continue to push for funding and rapid implementation of electronic filing. The efficiency and credibility of the Immigration Courts will only be enhanced by this development.

**2009 Recommendation: Continue the installation of digital recording systems and provide copies of recordings of Immigration Court hearings.**

*2012 Status: Our field data and research show significant achievements with some room for improvement.*

**» Action Items:**

- ◆ **Immigration Judges:** Provide a copy of the digital recording to the immigrant at the end of each hearing.

Appleseed congratulates EOIR for completing the installation of its Digital Audio Recording (DAR) system in August 2010. DAR is now available in every Immigration Courtroom nationwide. In addition, in 2009 EOIR announced it had eliminated the backlog of hearing tapes and maintained a five-day turn-around for transcriptions.

***EOIR has substantially upgraded the Immigration Court recording System.***

Despite these wonderful achievements, many interviewees have never listened to a digital recording of a proceeding. Amazingly, some of our interviewees were not aware that transcripts are available or that DAR has been implemented. In *Assembly Line Injustice*, we suggested that EOIR should automatically provide a digital copy of the recording to each immigrant at the conclusion of his or her hearing. Implementing this recommendation would not only increase immigrants' access to hearing recordings and eliminate the use of court resources to search for and produce these records at a later time, but it would also serve to publicize DAR and its benefits. Alternatively, EOIR should publicize the DAR system and its availability in the Immigration Courts, at detention centers, on its website, and in its literature and notices.

## 8 | Helping the Unrepresented

Unrepresented immigrants continue to fill the Immigration Court system, delaying proceedings and resulting in unfair outcomes and foregone claims for relief. In fiscal year 2011, 49 percent of respondents—more than 148,000 people—were unrepresented and forced to litigate life-altering issues without counsel. EOIR acknowledges that unrepresented respondents are “of great concern” and our interviewees consistently told us that unrepresented respondents face an all-but-impossible task. Attorneys in the field told us that immigration law is so complicated that non-immigration lawyers would find it difficult to defend themselves, leaving little hope for an unsophisticated immigrant with a limited grasp of English. At the same time, we heard that attorneys are less able to represent immigrants housed in remote detention centers due to the constraints of time and distance, a problem exacerbated by the difficulties in gaining access to the clients and obtaining documents.

One interviewee characterized the problem of unrepresented respondents—and the dearth of attorneys willing or able to represent them pro bono—as the largest problem facing the Immigration Courts today. Other interviewees offered hair-raising stories of injustice, including at least one case in which an unrepresented individual was deported under the wrong name simply because the judge did not have the time or patience to listen and understand what the respondent was trying to explain. While sympathetic Immigration Judges often allow respondents extra time to find a lawyer, these continuances only slow down the system, increase time in detention, and by themselves do little to end the crisis of unrepresented litigants in Immigration Court.

Our court observers witnessed unrepresented respondents suffering quick hearings consisting of terse colloquies and minimal translations. The majority of respondents were unrepresented and the disparity between their cases and those with counsel was clear. Unlike those who had lawyers, unrepresented immigrants had no arguments made on their behalf, requested bond but never had it granted, and did not request (and thus

Report Card	
2009	2012
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## ***Fighting Immigration Fraud***

*For many immigrants, even legal representation isn't what it seems to be. Unfortunately, the immigration bar is not only plagued by too many incompetent lawyers, but also by "notarios," who pose as immigration lawyers or accredited representatives. In 2011, DOJ announced a new multi-agency effort to combat immigration scams involving notarios and other unauthorized immigration practitioners. With DHS and the Federal Trade Commission, this important DOJ initiative focuses on enforcement, education and collaboration to protect vulnerable immigrants from these scammers. EOIR now requires Immigration Courts to distribute to all respondents a helpful flyer that explains who is qualified to represent individuals in Immigration Court.*

did not obtain) asylum. Apart from those atypical but exemplary Immigration Judges in some cities who made a strong effort to assist unrepresented immigrants, our interviewees have seen little or no progress with respect to how unrepresented respondents are treated by the Immigration Court system.

EOIR needs to treat the fact that so many immigrants are unrepresented in Immigration Court like the crisis that it is. In *Assembly Line Injustice*, we published a number of recommendations designed to help the unrepresented: those that maximize pro bono representation and those that make it easier for the unrepresented to represent themselves. EOIR has indeed made some progress on these recommendations, and reports that additional efforts to improve access to counsel are ongoing, but needs to undertake these efforts with more urgency. The legitimacy of the Immigration Court system hangs in the balance when so many litigants face important consequences without a lawyer or even a basic understanding of the process they face.

### **2009 Recommendation: Ensure that the 2008 Pro Bono Guidelines are faithfully implemented.**

*2012 Status: Legal Orientation Programs have expanded, but there are still not enough pro bono attorneys available.*

#### **» Action Items:**

- ◆ **EOIR:** Expand pro bono referral programs in Immigration Courts.
- ◆ **BIA:** Reward pro bono counsel with oral argument, if requested.
- ◆ **Private Bar:** provide more pro bono representation, particularly to detained immigrants, children, and those with special vulnerabilities.

In *Assembly Line Injustice*, we identified the 2008 Chief Immigration Judge guidelines for facilitating pro bono legal services as a useful list of steps that would improve the Immigration Courts. Specifically, the guidelines sought to reduce the administrative burden on pro bono counsel with a series of recommendations, including designating at least one judge in each Immigration Court to work with local practitioners to facilitate pro bono representation;

increasing the flexibility of courtroom practices and scheduling for pro bono practitioners; making greater use of pre-hearing statements and conferences to increase the efficiency of pro bono representation; and providing training to pro bono lawyers. We noted, however, that the status of the recommendations' adoption was unclear, and suggested that EOIR provide a timeline to Immigration Courts for full implementation.

Under the leadership of Steven Lang, the Program Director for Office of Legal Access Programs (a position created in July 2011), EOIR has made some significant strides in improving representation in Immigration Court, though much work remains to be done. EOIR reports that representation in asylum cases has increased substantially, with some courts reporting up to 90 percent of asylum applicants represented in contested proceedings. This improvement, according to EOIR, is not due just to its own efforts, but an increased focus on immigration representation by federal bench and the bar, including, for example, Second Circuit Judge Robert A. Katzmann, who has for several years made a strong push for pro bono immigration representation. EOIR has also reported increasing rates of representation in the later stages of proceedings, though it acknowledges that the proportion of detained immigrants with counsel remains unacceptably low.

EOIR's "Legal Orientation and Pro Bono Program," or "L-O-P-," has had growing success in reaching the unrepresented, and EOIR continues to expand the program, now located in 27 sites across seven states. The LOP initiative uses representatives from nonprofit organizations to provide detailed explanations to immigrants about court procedures and other basic legal information. The program is typically comprised of three components: (1) large, interactive, group orientations, which are open to questions, (2) individual orientations, and (3) referral/self-help, where those with potential relief or who wish to voluntarily depart or request removal are either referred to pro bono counsel or given self-help materials and training. LOPs tend to focus on detained immigrants—25 of the 27 programs are based in detention centers—and EOIR reports that around 50 percent of detained respondents in removal proceedings were served in some way by the program in 2011. EOIR's goal is to reach respondents prior to their first hearing and make them aware of every legal option available.

In the past three years EOIR has also launched pilot programs in San Diego and Miami to help refer non-detained immigrants to pro bono attorneys and provide information on the legal process. In San Diego, if an immigrant appears in court without representation, he or she is referred to LOP for a weekly orientation program that includes helpful materials. In Miami, if an Immigration Judge sees an unrepresented individual who does not appear to understand the proceedings due to mental competency, the judge directly refers the individual to LOP and provides information on the local Catholic Charities branch, which provides attorney referrals and follows-up with these individuals. AILA has worked with at least one Immigration Court to establish a pro bono case placement program, though one practitioner reports that this court has not publicized its efforts because it is afraid that EOIR would think the Court is "biased" in favor of immigrants. We encourage EOIR to encourage other courts to establish similar programs, and to reassure judges that helping immigrants find counsel is not favoritism, but rather the fair administration of justice.

Additionally, in the past two years EOIR has expanded the LOP initiative to serve children in removal proceedings. The program is now in 13 locations to assist the custodians of

children so they may better advise the children in their care. In 2012, EOIR also started the process of reviewing its accreditation of non-lawyer Immigration Court representatives in order to expand participation in the program and ensure that accredited representatives are providing competent service to immigrants.

At the BIA level, pro bono representation continues to be strong, as EOIR continues to expand its effective program to obtain counsel in meritorious appellate cases. Those cases would be even more attractive if the BIA expanded the opportunity for oral argument, when requested by pro bono counsel. As discussed below, we encourage the BIA to consider additional ways to expand pro bono representation.

Many of our interviewees agree that some of the 2008 Pro Bono Guidelines are being partially implemented. Some courts seem more engaged in pro bono programs and supportive of pro bono work, including allowing pro bono attorneys to appear first, before paid counsel, at master calendar hearings calls. The perception among practitioners is that most Immigration Judges respect pro bono attorneys and may give them the benefit of the doubt, perhaps more so than paid counsel. In Chicago, for example, the Immigration Court appointed an Immigration Judge to serve as that court's pro bono liaison, responsible for facilitating cooperation among DHS, public interest organizations, and pro bono attorneys. Specifically, the pro bono liaison has worked with AILA and ICE to (1) establish a "Know Your Rights" education initiative that is transmitted live to detained immigrants using the Immigration Court's videoconferencing technology equipment, and (2) lay the groundwork for a pro bono program in which pro bono attorneys can file limited appearances to represent detainees at bond hearings without obligating them to represent the immigrant for the entirety of the Immigration Court proceeding. EOIR reported that every court has a designated pro bono liaison, and EOIR conducts periodic updates with the liaisons to discuss their role and best practices.

Unfortunately, in many areas implementation of pro bono reform is either underdeveloped or unknown. We heard reports that many Immigration Courts lack a pro bono liaison judge, despite the fact that a liaison has been assigned for each court, and that some courts lack pro bono training. The vast majority of responders to our survey could not identify their local pro bono liaison judges—they either believe there is no pro bono liaison (32.5 percent) or they do not know whether there is a liaison (55 percent). One interviewee from the Midwest went so far as to say that he had seen no effort by EOIR or by the private bar to make pro bono resources available. Another respondent thought that while the 2008 Pro Bono Guidelines are aspirational and represent the true attitude of EOIR leadership, he noted that the guidelines lack specifics on procedural accommodations and enforcement mechanisms.

**2009 Recommendation:** Use videoconferencing, even though flawed, to expand representation to immigrants in remote areas.

*2012 Status:* The overwhelming majority of our field data show no progress. The court in Arlington, Virginia, is an exception that could serve as model for other Immigration Courts.

» **Action Items:**

- ◆ **EOIR:** Partner with the private bar to investigate ways to use videoconferencing to expand pro bono representation.

In *Assembly Line Injustice*, we acknowledged that videoconferencing was here for the near term anyway, no matter how flawed it may be. We recommended that videoconferencing be harnessed to expand representation to unrepresented immigrants in remote areas. We suggested that EOIR and DHS leverage their already-existing technology—and plan future expansions of it—to connect unrepresented respondents in remote areas or in far-flung detention facilities with willing and available pro bono attorneys, who are often located in major cities. This recommendation is not being implemented to any significant degree. We spoke to practitioners in large cities in the Midwest and on the East Coast, and attorneys who work in smaller cities and remote areas across the U.S. All of them told us the same thing: videoconferencing is not being used to help unrepresented respondents, with one exception.

Two models in the Washington, D.C., area prove that video can be used to expand pro bono representation. ICE recently provided video equipment to a local legal services organization so that its staff and pro bono attorneys can talk directly with their clients in a distant detention center. The Arlington, Virginia Immigration Court provides a “pro bono room” where attorneys can talk with clients via videoconference, a facility that allows attorneys to talk with their clients confidentially before, during and after hearings. This facility is somewhat limited, however, as it does not allow for transmission of documents and is not available outside of hearings. Our interviewees praised these efforts and the impact they have had on pro bono representation in the area. EOIR reports that a number of other courts are trying to initiate a similar program. We urge EOIR and DHS to replicate and expand these successful programs across the country.

### **2009 Recommendation: Simplify the filing and pleading standards for unrepresented immigrants.**

*2012 Status: Our field data primarily show no systemic progress, though the Kansas City Immigration Court has simplified some filing and pleading standards for unrepresented respondents.*

#### **» Action Items:**

- ◆ **EOIR: Distribute the Kansas City Immigration Court’s materials nationally.**

Our interviewees overwhelmingly told us that that burdensome, highly technical, and arcane pleading and filing standards imposed by Immigration Courts around the country have not been simplified or relaxed for unrepresented immigrants, and that those unrepresented parties are being held to the same standards as members of the bar. Our interviewees also overwhelmingly supported simplified standards, and one noted that simplified pleading requirements would be especially helpful for unaccompanied minors and respondents in detention centers, who are often forced to rely on each other for information about immigration procedure. The practice seems to vary among the Immigration Courts, but in many cases the courts are rejecting filings for minor nonconformance. One Immigration Court in Texas is notorious for rejecting paperwork from unrepresented respondents, and has sent filings back for offenses such as the respondent’s putting the certificate of service on the second-to-last page instead of the last page, as required under the rules. The problems are particularly acute if the litigant is not filing in person.

The Kansas City Immigration Court, though, has commendably embraced relaxed standards for those respondents without attorneys. We urge EOIR to follow the successful model and track record of the Kansas City Immigration Court and relax standards for pleadings and filings by unrepresented immigrants nationwide. EOIR is not currently working on standard forms, but notes that LOP providers do make such materials available, including sample motions that are generic, brief, and easily understandable.

**2009 Recommendation: Upgrade the Immigration Court hotline.**

**2012 Status:** *Our field data show no progress.*

» **Action Items:**

◆ **EOIR:** Ensure that the hotline is working at all times, and is a credible source of useful information.

In *Assembly Line Injustice*, we recommended that EOIR upgrade the Immigration Court hotline to provide basic “Know Your Rights” information and refer callers to immigration legal services across the country. We also recommended that EOIR staff the hotline with agents who provide friendly and competent customer service in multiple languages, make the hotline accessible through detention center telephones, and publicize the hotline in Immigration Courts and detention centers.

Some of our interviewees reported success with the existing hotline, but others reported it has gotten worse or, in some cities, simply does not work. In at least one Midwestern city and two California cities, attorneys and respondents cannot get through by phone unless they are lucky enough to catch the receptionist when he/she is at his/her desk and not on the phone. EOIR should make sure that the Immigration Court hotline is working at all times, and is providing immigrants with sufficient information. Every immigrant should easily be able to determine his status, the time and location of the next hearing date, and sources for pro bono representation through the hotline. The hotline should be a credible source of useful information to help unrepresented immigrants as much as possible.

**2009 Recommendation: Produce a pamphlet explaining essential immigration law and Immigration Court procedure**

**2012 Status:** *Our field data show some progress, with some self-help materials distributed to Immigration Courts around April 2012.*

» **Action Items:**

◆ **Immigration Courts:** Provide space for self-help and other materials useful to immigrants, including information on protecting assets and custodial rights relating to their children.

In *Assembly Line Injustice*, we urged EOIR to create a simple pamphlet that would be given to all unrepresented respondents and introduce them to the Immigration Court and its hearing, legal structure, deadlines, and acronyms. The pamphlet would also describe the roles of the Immigration Judges, Trial Attorneys, and private counsel. The pamphlet should be available in every Immigration Court in multiple languages and should describe available unrepresented resources. Our field data demonstrates that no such pamphlet has been created, but that EOIR is close to finalizing helpful materials.

LOP providers are required to distribute self-help materials, and several providers make materials available on their websites, including The Florence Project and The Lutheran Immigration and Refugee Service. The Vera Institute maintains all self-help materials and makes them available online to LOP providers. Additionally, the group orientation sites also typically distribute educational materials. However, it seems that these materials are either not available or not sufficiently publicized because many respondents reported either not knowing whether materials are available (22 percent) or believing they were not (24.4 percent). One respondent practicing in Pennsylvania reported the LOP program provides education and materials to all detainees on the court docket, but that such programs are not at each Immigration Court site.

Over the course of the past year, EOIR has been working with LOP providers to identify the most requested self-help materials. EOIR reviewed and updated these materials in conjunction with Immigration and Customs Enforcement (“ICE”), and sent them to Immigration Courts in April 2012. Using the example of the Denver courts, EOIR is encouraging all Immigration Courts to display a notice with the materials available upon request. These materials should be available on line.

EOIR should not stop with the distribution of these materials. Space should be provided in every Immigration Court for materials distributed by non-governmental organizations who assist immigrants. Appleseed, for example, has produced materials advising immigrants on how to protect their assets and custodial rights if detained or deported. In short, the Immigration Court should be a place where an immigrant feels he can get the best and most useful information about the court process and other immigration issues.

In addition, many immigrants need information about how to protect their relationships with their children. They need to know how to avoid being charged with neglect when they are picked up and detained, and what their options are for keeping children—some of whom may be US citizens—in the States if they leave, or bringing children to parents’ countries of origin if the parent is removed.

Moreover, many immigrants are not only concerned about the legal proceedings they face, but they need legal advice as to how to protect assets they have acquired in the U.S. Even if they have no right to stay in the U.S., they are entitled to keep their cars, money, and other assets. The LOP program should provide information about protecting these assets and the extent of the proceedings against them.

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## STOP THE ASSEMBLY LINE: *Find Counsel for Unrepresented Immigrants*

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*Immigration Judges, Chief Counsels, and the private bar need to develop additional innovative pro bono models, like “attorney for the day” programs.*

*Hold Immigration Judges accountable for reducing the number of unrepresented immigrants on their dockets.*

Ultimately, the problem of unrepresented immigrants in complex Immigration Court hearings will not be eliminated until Congress sets up a program akin to the federal public defenders in the criminal justice system. All observers agree that, perhaps with the exception of certain vulnerable populations such as children, the chances for government-funded immigration counsel are slim, if not non-existent.

The lack of counsel in Immigration Court for so many immigrants is a crisis, and a substantial threat to the legitimacy of the system. In the absence of a government-funded defender program, Immigration Judges need to look for ways to reduce the number of unrepresented immigrants on their dockets. Judges have a variety of tools at their disposal, and every judge should be challenged to develop solutions to the crisis of unrepresented immigrants. Only when each judge understands that it is his or her responsibility to implement the various pro bono reforms will those reforms come to fruition. Too few judges seem to think that they are allowed to persuade law firms to undertake cases pro bono, much less establish immigration law clinics. Even fewer think it is within their role to call a local counsel and ask the attorney to take on an immigrant’s case.

Some Immigration Courts have allowed creative programs to provide counsel in limited yet important ways. For example, under the leadership of the law firm O’Melveny & Myers and with the strong support of EOIR, at least six Immigration Courts across the country have allowed pro bono attorneys to appear for immigrants only for purposes of their bond hearings, which determine whether the immigrant must remain detained while their case proceeds. This program not only gives the immigrant counsel at this one critical juncture, but statistics show that immigrants who are not detained have a much easier time finding counsel to represent them. While the general rule in Immigration Court is that an appearance by an attorney is considered to be an appearance for all matters, the Immigration Court Practice Manual gives Immigration Judges the authority to allow this kind of limited scope representation.

Immigration Judges can build on this bond hearing model, looking to “attorney for a day” models used in courts across the United States. Pro bono attorneys and accredited representatives could be given space at the Immigration Court to meet with immigrants immediately before their Master Calendar hearings and appear with them for this hearing only. Immigrants would then get advice on how to plead to the charges in the Notice to Appear and what remedies might be available to them, making these hearings more efficient, and avoiding continuation of these hearings while the immigrant seeks permanent counsel.

The ultimate goal should be universal access to counsel or accredited representatives for immigrants, but the fact that this cannot be achieved in the foreseeable future should not

deter EOIR from forcing Immigration Judges to show movement toward that goal. Each Immigration Judge should be held accountable for the unrepresented immigrants on that judge's docket. Working with private law firms, many of which take significant numbers of asylum cases pro bono, Immigration Judges and Chief Counsel's Offices need to find creative ways to solve this crisis in representation.

Reimagining the  
Immigration Court  
Assembly Line

*Helping the  
Unrepresented*

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## 9 | Getting It Right On Appeal

When an Immigration Judge gets it wrong, immigrants and the government alike rely on the BIA to get it right. In *Assembly Line Injustice* we reported that the BIA had received withering criticism from federal circuit courts and our interviewees for failing in this essential function. Most of our interviewees pointed to the havoc wreaked by the 2002 “streamlining reforms”—which slashed the size of the BIA, mandated review by only a single member with minimal exceptions, and emphasized affirming the decisions of Immigration Judges without explaining why (so called “affirmances without opinion” or “AWOs”)—as the main reason for the BIA’s fall into disrepute. By replacing careful review with expediency, the “streamlining reforms” severely affected the quality of BIA decisions, which in turn led to an avalanche of appeals to the federal courts, from just 6 percent of BIA decisions in fiscal year 2001, to 19 percent of BIA decisions just two years later in fiscal year 2003, and to a high water mark of 33 percent in fiscal year 2006.

Report Card	
2009	2012
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The BIA has made some progress in improving the quality of its decisions. Since 2006, it has significantly reduced the percentage of its opinions that are appealed to the federal circuit courts, as well as the percentage of its opinions that those courts reverse or remand:

Year	BIA Decisions Appealed (percent)	BIA Decisions Reversed (percent)
2006	33%	17.5%
2007	30%	15.3%
2008	30%	12.6%
2009	26%	11.2%
2010	25%	11.5%
2011	23%	12.8%

Some interviewees confirmed the improvement in the BIA's decisions. Practitioners commented that in its more recent decisions the BIA provides some basis for formulating appeals, more frequently overturns decisions by Immigration Judges, and gives more direction to Immigration Judges. Accordingly, our interviewees believe that the BIA has received less criticism from the appellate courts. On the other hand, other interviewees cited continuing problems with the lack of precedential decisions, the brevity of written opinions, and the BIA's avoidance of difficult issues when deciding cases. Some interviewees still believe that the BIA continues to simply "rubber stamp" Immigration Judges decisions, rather than function as an effective appellate body.

We applaud the BIA's progress, though the BIA still can make significant improvements. EOIR should revoke the "streamlining" rules, which remain in force even if not strictly followed. Revocation will prevent any backsliding by the BIA in future administrations, and will enhance the legitimacy of the BIA.

**2009 Recommendation: Mandate the use of three-member panels except for purely procedural issues or motions that do not decide the outcome of a case.**

*2012 Status: While the BIA's use of three-member panels has inched higher, DOJ has made no progress in mandating their use.*

**» Action Items:**

- ◆ **DOJ:** Require three-member review of all decisions, except those that are purely procedural or not outcome-determinative.

The BIA has made marginal improvements in using three-member panels to decide cases. According to EOIR, in FY 2008 only 6 percent of the BIA's decisions were issued by three-member panels. The use of three-member panels has improved to 8 percent in FY 2009, 10 percent in FY 2010 and 11 percent during the first nine months of FY 2011. One interviewee observed that three-member panels are used only when the BIA views the case as involving major decisions, explaining that his most recent three-member panel decision occurred about a year ago in a case with a long decision and "a very complicated legal issue." Our interviewees universally believe that in order to improve the quality and accuracy of decisions, three-member panels must be the rule rather than the exception.

In June 2008, DOJ proposed a rule to expand "the [BIA's] authority to refer cases for three-member panel review for a small class of particularly complex cases involving complex or unusual issues of law or fact." This proposal, by its terms limited to a "small class" of vaguely-defined cases, is insufficient to solve the problem of single member decisions. Appleaseed urges DOJ to propose and finalize a clear rule mandating three-member panel review of all appeals, except those appeals regarding purely procedural issues or motions that do not decide the outcome of a case.

**2009 Recommendation:** Eliminate the use of affirmances without opinion and require reasoned opinions.

*2012 Status: The BIA's reliance on affirmances without opinion continues to wane, but the rules mandating affirmances without opinion remain on the books.*

» **Action Items:**

- ◆ **DOJ:** Require the BIA to issue full written opinions in all cases, providing the reasoning and addressing all relevant issues.
- ◆ **DOJ:** Increase the BIA to 25 members.
- ◆ **Congress:** Approve funding for more staff attorneys to assist BIA members.

The BIA has nearly weaned itself off of AWOs, which may explain the decrease in appeals and reversals of its decisions. In FY 2003, AWOs comprised 36 percent of the BIA's decisions, dropping to 5 percent in FY 2009, 3 percent in FY 2010 and 2 percent during the first nine months of FY 2011. Appleseed applauds this reduction, and urges the BIA to eliminate its use of AWOs entirely in the future. Nonetheless, this progress has been made by disregarding the rules still in place that require the BIA to issue AWOs in most instances. Accordingly, there is nothing to prevent a future administration from turning the BIA back into an AWO factory. Appleseed urges DOJ to repeal this rule and amend its regulations to prohibit the use of AWOs.

Simply eliminating AWOs is not enough. The BIA in some cases uses boilerplate or perfunctory opinions written by single BIA members, which are little better than AWOs. DOJ should also enact new regulations requiring that the BIA issue full written opinions in all matters. While these opinions need not be lengthy in many cases, they should fully discuss the relevant issues.

EOIR Director Juan Osuna has testified that the BIA should ideally contain 25 members in order to handle its case load most efficiently. Accordingly, DOJ should promulgate a new regulation to increase the size of the Board to 25, and the Attorney General should appoint new members to fill all vacancies as soon as possible.

We urge EOIR to continue to seek funding for additional staff attorneys to help BIA members write full written opinions in all cases, and urge Congress to approve these positions.

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**STOP THE ASSEMBLY LINE:**  
*Make the BIA More Transparent*

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- Publish more precedential decisions.*
- Make public all non-precedential "unpublished" decisions.*
- Hold more oral arguments.*
- Get out of Falls Church.*

If the BIA suffers from a lack of legitimacy and respect, it is largely because of the way this court has chosen to cloister itself in an office building in Falls Church, Virginia, where it rarely sees practitioners, never encounters immigrants, and from which it only sporadically issues public decisions. The BIA holds a position of trust, forming law that has

profound implications for this country and its immigrants. The BIA can easily improve its transparency and legitimacy by issuing more precedential decisions, posting its non-precedential decisions, holding more oral arguments, and appearing in Immigration Courts around the country.

Precedential decisions are the way the BIA informs the law, yet it publishes them at a shockingly low rate. EOIR Director Juan Osuna testified to the U.S. Senate that precedential decisions are important to “provide guidance to immigration judges and the parties in removal proceedings on the many complex legal issues that arise in these proceedings.” Nonetheless, since 2007, the BIA has published fewer than 40 precedential decisions each year among the more than 30,000 cases it decides annually. In other words, fewer than one out of every 750 cases, or 0.13 percent, results in the publication of a precedential decision. Aside from these limited number of precedential decisions, the BIA does not publicly disclose any of its other 29,950-plus “unpublished” decisions it issues each year. Accordingly, practitioners who want to know what the BIA is deciding resort to emailing around redacted, unpublished opinions. The BIA Practice Manual specifically states that these unpublished decisions are not to be considered as precedent, though they may be referenced and attached to briefs.

Appleseed urges the BIA to increase its use of precedential decisions. Binding decisions would settle the law, provide additional guidance to practitioners, and could therefore reduce the number of appeals to the BIA. Of course, thousands of opinions will still be non-precedential, but that does not mean that they should be hidden from public view. The BIA should issue redacted versions of all its decisions, and publish them on its website. If these decisions are made available to the public, no doubt an enterprising company or practitioner will develop a database to make them searchable.

The other major problem with the BIA’s image is that it is entirely too hidden. It is true that most appellate courts interact relatively infrequently with the public, but the BIA brings judicial seclusion to an entirely new level. The Board has an extreme aversion to oral argument, going to far to write in its Practice Manual that oral argument is “rarely granted.” It has kept that promise: since the beginning of 2009, the BIA has scheduled oral argument only 17 times, and actually held argument on just 9 occasions. The BIA could improve its reputation and its legitimacy by offering more opportunities for oral argument, where members would interact with practitioners and give them the opportunity to determine first-hand what issues are meaningful to BIA members. The BIA members might learn something, too.

In order to increase its visibility and its experience with a variety of practitioners, the BIA should occasionally hold oral argument in Immigration Courts around the country. For oral arguments held in Falls Church, the BIA should make sure that private attorneys whose clients cannot afford the travel expense are given the option of declining oral argument (without penalty) or appearing by video. In this context, the use of video is appropriate, as appellate argument does not depend on credibility determinations or on an appearance by the immigrant.

The BIA needs to recognize that it has an important leadership role in the immigration justice system. A more visible and active BIA will bring more legitimacy and transparency to the entire immigration system.

# APPENDIX



## EXHIBIT 1:

### Practitioner Survey

#### Summary

After we conducted interviews and research, we put our preliminary conclusions through several tests. We met with government officials to discuss our findings and hear their responses. We also reached out to the community of practitioners who advocate on behalf of immigrants in Immigration Courts to ask their opinions on whether the problems Appleseed identified in *Assembly Line Injustice* had improved or worsened.

We designed a survey with 20 questions and sent it to members of Detention Watch Network; well-known legal services lawyers; immigration-law related non-governmental organizations; law firm pro bono partners, counsel and coordinators, and friends of Appleseed at more than 35 major law firms. Forty-nine practitioners from 15 states and the District of Columbia, representing every region of the country, gave us opinions on how EOIR and DHS had progressed in addressing the most significant problems Appleseed identified in the Immigration Courts and collectively provided a wealth of comments expounding on those opinions. This survey was not intended to be scientific—for instance, we had no access to DHS Trial Attorneys and to practitioners who are not part of the communities we identified above. Rather, we wanted to determine whether the facts and opinions presented during our interviews were shared by others. The statistical results therefore are not intended to be taken as precise measurements of opinion, but rather they are meant to indicate those practitioners' sense of how the Immigration Court system is handling some of the most significant problems we have identified.

The survey respondents represent a range of immigration law experience: approximately 20 percent of the respondents had been practicing immigration law for more than 10 years; about 25 percent had been practicing between five and ten years; another 25 percent between two and five years; and the remaining 30 percent had been practicing immigration law for less than two years. About half described their familiarity with the Immigration Courts as “good” or “deep,” 27 percent described their familiarity as “intermittent,” and the remaining 23 percent as “minimal.”

For each of the following questions, we first asked respondents to rate the accuracy of the statement to indicate whether they (1) agreed, (2) disagreed, (3) neither agreed nor disagreed, or (4) if their answer was more complicated. We also requested comments. We varied the phrasing of the questions, sometimes stating a problem we had identified (*i.e.*, asking whether the respondent agreed or disagreed with the statement of the problem), sometimes phrasing it in the normative (*e.g.*, asking people to agree or disagree that the particular matter is being handled competently, fairly, efficiently, accurately, justly). We then asked respondents to rate the relative improvement on the issue since 2009, when Appleaseed released *Assembly Line Injustice*: is the situation (1) worse, (2) same, (3) better, or (4) better but still a problem.

We found the results offered an interesting insight to what some practitioners are experiencing in the field, below are the results by question. The states in which a respondent has practiced and the years in practice are listed next to the comments.



## Survey Results

### 1 | Immigration Judges (IJs) seem well-trained and knowledgeable about the relevant law.

Accuracy of Statement	Agree	Disagree	Don't Know	More Complicated
	54.8%	11.9%	7.1%	26.2%
Improvement since 2009	Worse	Same	Better	Better, But Still A Problem
	9.1%	63.6%	12.1%	15.2%

#### Notable Comments

- It varies so much from IJ to IJ. Some are great and some are terrible.  
*(TX; practicing 2-5 years)*
- I agree that they seem knowledgeable overall. Some are appallingly bad. These, however, are the minority. Others, while knowledgeable still demonstrate a political bias rather than engaging in a dispassionate examination of a case.  
*(PA, MD, NJ, NY, MA; practicing 10+ years)*
- The quality of judges varies wildly. Some are excellent and some are ridiculous.  
*(Los Angeles; practicing 2-5 years)*
- Newer appointees seem more well informed about process/procedure issues, though shakier on how to incorporate experts and other supporting witnesses. A fair number of longer serving IJs still preface many rulings with statements like “*that may be what the manual says, but that’s not how we do it in my courtroom.*”  
*(NY, Los Angeles, San Francisco; practicing 5-10 years)*

2 | IJs fraternize with DHS trial attorneys in a way that leaves an impression of bias in the courtroom.

Accuracy of Statement	Agree	Disagree	Don't Know	More Complicated
	41.9%	23.3%	18.6%	16.3%
Improvement since 2009	Worse	Same	Better	Better, But Still A Problem
	7.1%	85.7	7.1%	0%

**Notable Comments**

- I have not seen such fraternization, but I have mainly appeared before an impartial, committed, and kind immigration judge. *(NJ; practicing less than 2 years)*
- It typically seems apparent to the client and to me that there are two teams in the courtroom (1) the applicant, and (2) the judge and the TA. *(Los Angeles; practicing 2-5 years)*
- This depends on the individual judge. It is not a problem with the majority of judges in South Texas. *(TX; practicing 10+ years)*
- This has been the situation in ~1/3 of our cases for as long as I can remember. It's not "every" (or even "most") judges, but it's still disturbingly prevalent. *(NY, Los Angeles, San Francisco; practicing 5-10 years)*

3 | In spite of the Morton Memo calling for prosecutorial discretion, DHS field offices are not yet exercising prosecutorial discretion in any coherent fashion.

Accuracy of Statement	Agree	Disagree	Don't Know	More Complicated
	60.5%	7%	23.3%	9.3%
Improvement since 2009	Worse	Same	Better	Better, But Still A Problem
	13.6%	36.4%	13.6	36.4%

**Notable Comments**

- It's a bit early to know. NY has just completed a review of some pending cases. One of the biggest problems seems to be the one-time-take-it-or-leave-it approach which puts many asylum seekers who may have difficult claims (for example because of a one year filing deadline issue) in a really tight spot where they have to choose to pursue permanent relief (but get deported if they lose) or choose the sure thing of admin closure, but likely with no work authorization or assurances about the future. *(NY, NJ; practicing 10+ years)*
- The implementation of this program is just beginning, but so far things do not look good based on comments from the Office of Chief Counsel in court and anecdotal stories I've heard from other lawyers. *(TX; practicing 2-5 years)*
- We have explicitly asked for prosecutorial discretion in a number of matters and have not received responses or acknowledgments from the court to that issue. From my end, hard to see that there is any movement in the direction to increase the administrative closure of matters. I feel like we have very little information about this, despite the Morton memos. *(NY; practicing 2-5 years)*

**4 | Individual DHS trial attorneys (TAs) are not being assigned to specific cases at the master calendar, but instead one case is still handled by several different TAs at different hearings.**

Accuracy of Statement	Agree	Disagree	Don't Know	More Complicated
	66.7%	4.8%	21.4%	7.1%
Improvement since 2009	Worse	Same	Better	Better, But Still A Problem
	7.7%	73.1%	0%	19.2%

**Notable Comments**

- “Vertical prosecution” only happens between the last master hearing and the individual hearing. Many different TAs appear at master calendar resets. *(TX; practicing 2-5 years)*
- This assignment “system” is one of the more frustrating aspects of Immigration Court cases. It effectively makes it impossible to work out a resolution on any issue before the case goes to an individual hearing, because the individual attorneys see the case as “not their problem.” The result is that in the vast majority of cases, respondent’s counsel has to prepare to put on every issue at hearing, where an ability to conference the case in a meaningful manner with a lawyer who has had the file for more than a day would simplify many of the hearings. *(NY, NJ, TX; practicing 10+ years)*
- The TA seems to constantly change, even at the very last minute in complicated cases. This prevents counsel from going over important issues before hearings that could significantly reduce the time in front of the judge. *(Los Angeles, San Francisco; practicing 2-5 years)*

**5 | I have difficulty getting in touch with a TA to discuss a client’s case before the merits hearing.**

Accuracy of Statement	Agree	Disagree	Don't Know	More Complicated
	71.4%	11.9%	9.5%	7.1%
Improvement since 2009	Worse	Same	Better	Better, But Still A Problem
	3.3%	80%	6.7%	10%

**Notable Comments**

- Some TAs are good, but most are not responsive. *(NJ; practicing 2-5 years)*
- Because a specific trial attorney is usually not assigned until the matter is scheduled for a merits hearing, it is difficult to discuss the case with anyone familiar with the file prior to the week leading up to the merits hearing. *(NY, PA, MD; practicing 2-5 years)*
- It is difficult to determine who is assigned, first. After the assignment, TA’s are often unwilling to discuss the case because they do not have the file in front of them until just before the hearing, they claim not to have received my documents served on the office because of mail room issues, or they are unsure that they will even be covering the case. *(LA; practicing 2-5 years)*

**6 | Pre-hearing conferences are not being used as a tool to expedite cases.**

<b>Accuracy of Statement</b>	<b>Agree</b>	<b>Disagree</b>	<b>Don't Know</b>	<b>More Complicated</b>
	59.5%	7.1%	31%	2.4%
<b>Improvement since 2009</b>	<b>Worse</b>	<b>Same</b>	<b>Better</b>	<b>Better, But Still A Problem</b>
	11.5%	84.6%	0%	3.8%

**Notable Comments**

- I have never heard of a pre-hearing conference in the immigration court context. *(TX; practicing 2-5 years)*
- Pre-hearing conferences are used, but only because we expend the extra effort to contact the TAs on their terms and at their convenience. *(NJ; practicing less than 2 years)*
- In two recent cases our attempt to have a pre-hearing conference was flatly refused. *(Los Angeles; practicing 2-5 years)*

**7 | The DOJ Executive Office for Immigration Review (EOIR) does not provide for full or simultaneous translation during proceedings so that non-English speaking respondents can understand the entire proceeding.**

<b>Accuracy of Statement</b>	<b>Agree</b>	<b>Disagree</b>	<b>Don't Know</b>	<b>More Complicated</b>
	51.2%	24.4%	14.6%	9.8%
<b>Improvement since 2009</b>	<b>Worse</b>	<b>Same</b>	<b>Better</b>	<b>Better, But Still A Problem</b>
	7.4%	81.5%	7.4%	3.7%

**Notable Comments**

- At a merits hearing I have always had translators provided. At masters where an interpreter was needed, they put one on the phone. *(PA, MD; practicing 10+ years)*
- There are translators in the courts, but they are often not very good. Their translation can be intrusive and inaccurate. *(NJ; practicing less than 2 years)*
- Cases involving Spanish speakers in LA, SF, and NY generally get well staffed by translators, though ~25% of the time their translations are not entirely full/accurate. Cases for more “exotic” languages, particularly African and Middle Eastern dialects are often re-calendared due to lack of translators although frequently a fair amount of “business” transpires even without aid of certified interpreters, leaving clients confused and distraught. *(Los Angeles, San Francisco, NY; practicing 5-10 years)*

**8 | Immigration courts do not provide quality interpreters for proceedings.**

<b>Accuracy of Statement</b>	Agree	Disagree	Don't Know	More Complicated
	22.5%	42.5%	12.5%	22.5%
<b>Improvement since 2009</b>	Worse	Same	Better	Better, But Still A Problem
	0%	96.3%	0%	3.7%

**Notable Comments**

- In my experience, sometimes the interpreters provided by the court are completely inadequate and I have seen the cases where the interpreter was from a different dialect and [as a result] the quality of the proceedings was compromised. *(NY, San Francisco; practicing 5-10 years)*
- Some interpreters do a poor job or speak the wrong dialect. *(PA, VA; practicing 5-10 years)*
- Some interpreters are better than others--I would say for the most part that the quality of Spanish interpretation is good but not excellent. *(TX; practicing 2-5 years)*
- Most of the EOIR staff interpreters are good but there is a variance with the contract interpreters that fly in from other parts of the country. *(TX; practicing more than 10 years)*

**9 | IJs are not ensuring that translators are being accurate or otherwise appropriate (i.e. enforcing the prohibition on interpreters paraphrasing or opining during translation or removing an interpreter who appears to be hindering the respondent's ability to testify fully and openly).**

<b>Accuracy of Statement</b>	Agree	Disagree	Don't Know	More Complicated
	37.5%	17.5%	40%	5%
<b>Improvement since 2009</b>	Worse	Same	Better	Better, But Still A Problem
	0%	95%	0%	5%

**Notable Comments**

- I don't know if the IJs are really paying attention to the translator in court. They are ignoring them and move forward despite how hard it is for the translator to keep up. *(DC, MD, VA; practicing 2-5 years)*
- When clients have pointed out concerns during proceedings, IJ have instructed/allowed correction. *(PA, VA; practicing 5-10 years)*
- This month I witnessed a judge chastise an interpreter for doing a poor job, but the judge did nothing to resolve the situation when the problem continued to occur. The applicant's testimony suffered significantly for it. *(Los Angeles; practicing 2-5 years)*
- Paraphrasing is a big problem. But I'm not sure how the judge is supposed to ensure quality of translation if the judge is not fluent in both languages. *(TX; practicing 2-5 years)*

10 | I am aware of EOIR’s process and where to find the form to make complaints about IJs, attorneys, or interpreters and feel comfortable making complaints without jeopardizing my client’s interests.

Accuracy of Statement	Agree	Disagree	Don't Know	More Complicated
	12.2%	63.4%	19.5%	4.9%
Improvement since 2009	Worse	Same	Better	Better, But Still A Problem
	4.3%	95.7%	0%	0%

**Notable Comments**

- I didn’t know this was even an option, and definitely would be hesitant to use it, in any case. *(Chicago; practicing 2-5 years)*
- I do not feel comfortable making a complaint about IJs. I fear it will come back and haunt my other clients. I have witnessed things that I do not feel were appropriate but did not know what to do about it. *(PA; practicing 10+ years)*
- I think it is always a concern that a complaint may jeopardize a case. *(NY; practicing less than 2 years)*
- A complaint against an IJ would likely be professional suicide in our immigration court, and would almost certainly disadvantage our clients. *(Mid-South Region (New Orleans Field Office), Memphis, San Francisco; practicing less than 2 years)*

11 | The FOIA process limits my ability to gain access to my client’s A-File and other documents in a timely manner.

Accuracy of Statement	Agree	Disagree	Don't Know	More Complicated
	76.2%	11.9%	9.5%	2.4%
Improvement since 2009	Worse	Same	Better	Better, But Still A Problem
	28.6%	57.1%	0%	14.3%

**Notable Comments**

- It would be much easier to request documents directly from trial counsel, but they refuse to give any documents other than the Notice to Appear. *(TX; practicing 2-5 years)*
- In my experience it has taken 2-3 months to get FOIA requests back. For some cases this is timely, but for some it is not. *(NY; practicing 2-5 years)*
- The FOIA expedited process is a joke. FOIA CD(s) still take several months, and that proves extremely difficult when you are representing a detained client. *(San Francisco; practicing 10+ years)*
- The delay in receiving responses to FOIA requests often defeats the purpose of the request. *(Los Angeles; practicing 2-5 years)*

**12** | Videoconference hearings are of sufficient quality to ensure a fair proceeding.

Accuracy of Statement	Agree	Disagree	Don't Know	More Complicated
	2.4%	48.8%	46.3%	2.4%
Improvement since 2009	Worse	Same	Better	Better, But Still A Problem
	26.1%	73.9%	0%	0%

**Notable Comments**

- Videoconferencing is used with increasing frequency in NJ, and it undermines confidential lawyer-client communication and otherwise fails to meet basic due process standards. *(NJ; practicing less than 2 years)*
- Is this question a joke? Of course not. *(TX; practicing 10+ years)*
- Video hinders the IJ's ability to assess meaningfully the client. It also gives the client the impression that he is not being heard. Where the client is far away from both counsel and the court, and counsel is not in the room with the client to confer, there is a deficiency in counsel's ability to effectively represent the client. *(NY, NJ, TX; practicing 10+ years)*

**13** | I cannot confidentially confer with my clients during videoconference hearings.

Accuracy of Statement	Agree	Disagree	Don't Know	More Complicated
	43.6%	2.6%	51.3%	2.6%
Improvement since 2009	Worse	Same	Better	Better, But Still A Problem
	22.2%	77.8%	0%	0%

**Notable Comments**

- I advise clients not to talk to me at any time during the hearing and to assume everything that is said will be heard even if the camera breaks. This is because it is so. *(PA, MD, NJ, NY, MA; practicing 10+ years)*
- I've always gone to the same location as the client--to avoid this problem. *(PA, VA; practicing 5-10 years)*
- Of course not. *(TX; practicing 10+ years)*

**14** | Real-time document transmission is rarely used during videoconference hearings.

Accuracy of Statement	Agree	Disagree	Don't Know	More Complicated
	2%	7.9%	65.8%	2.6%
Improvement since 2009	Worse	Same	Better	Better, But Still A Problem
	8.3%	91.7%	0%	0%

**Notable Comments**

- Never used in any proceeding I have been involved with. *(PA, MD, NJ, NY, MA; practicing 10+ years)*
- Never. *(TX; practicing 10+ years)*

**15** The Immigration Courts in which I practice lack an EOIR pro bono liaison.  
(If so, please name court(s) in comments section.)

Accuracy of Statement	Agree	Disagree	Don't Know	More Complicated
	7.5%	32.5%	55%	5%
Improvement since 2009	Worse	Same	Better	Better, But Still A Problem
	21.4%	64.3%	14.3%	0%

**Notable Comments**

- There is one but they have ceased the meetings or any initiative on the part of the court. *(TX; practicing 10+ years)*
- If there is one, I would like to meet them. I'm not aware of any such person. There are also attorneys on the EOIR pro bono list that shouldn't be there because they have horrible reputations and/or charge regular fees. *(FL; practicing less than 2 years)*
- If there is one, I do not know who it is. *(Los Angeles; practicing 2-5 years)*
- Arlington and Baltimore both have a liaison. *(San Francisco, VA, MD; practicing less than 2 years)*

**16** The immigration court hotline often doesn't work.

Accuracy of Statement	Agree	Disagree	Don't Know	More Complicated
	19.5%	34.1%	36.6%	9.8%
Improvement since 2009	Worse	Same	Better	Better, But Still A Problem
	15.8%	73.7%	10.5%	0%

**Notable Comments**

- I have had success with the hotline. *(Los Angeles; practicing 2-5 years)*
- I think it works pretty well most of the time. One strange thing is that there does not seem to be consistency about how withholding or deferral of removal is recorded. Sometimes for clients with withholding it says "was granted relief" and sometimes "was ordered removed" (both of which are true) but this inconsistency makes it hard to know what happened when meeting with a prospective client. *(NY, NJ; practicing 10+ years)*
- The court date is listed but the hotline has stopped listing the Judge, for the most part. Because our assessment of a case depends on who the IJ is (another whole problem!), this means we have to call the court and ask who the Judge is. This is a waste of both our time and the court clerk's time. They should start listing the judges again. *(NJ; practicing 2-5 years)*

**17** | There are no EOIR-approved materials (i.e. brochures or pamphlets) for respondents to learn about essential immigration law and courtroom procedure.

Accuracy of Statement	Agree	Disagree	Don't Know	More Complicated
		41.9%	23.3%	18.6%
Improvement since 2009	Worse	Same	Better	Better, But Still A Problem
	4.5%	86.4%	0%	9.1%

**Notable Comments**

- The Manual is useful, but doesn't have a lot of information about courtroom procedures. Plus all of the judges are so different so it's a little difficult. *(Los Angeles; practicing 2-5 years)*
- EOIR funds an LOP (Legal Orientation Program) program at the York Immigration Court. This provides education and materials to all immigration detainees who appear on the Immigration Court Docket. This program helps increase the detainees' understanding of the immigration court process. However, there are not LOP programs at each immigration court site, and without this program, the rights of people in removal proceedings are not being met. *(PA, MD; practicing 2-5 years)*

**18** | The BIA too frequently issues single-member opinions.

Accuracy of Statement	Agree	Disagree	Don't Know	More Complicated
		62.5%	5%	32.5%
Improvement since 2009	Worse	Same	Better	Better, But Still A Problem
	17.4%	73.9%	4.3%	4.3%

**19** | The infrequency of oral argument at the BIA is a problem.

Accuracy of Statement	Agree	Disagree	Don't Know	More Complicated
		56.1%	9.8%	31.7%
Improvement since 2009	Worse	Same	Better	Better, But Still A Problem
	9.5%	90.5%	0%	0%

**20** | The BIA does not issue enough precedential decisions (the recent average is about 35 per year).

Accuracy of Statement	Agree	Disagree	Don't Know	More Complicated
	75%	5%	15%	5%
Improvement since 2009	Worse	Same	Better	Better, But Still A Problem
	13%	78.3%	4.3%	4.3%

**Notable Comments**

- It seems like they should issue more precedential decisions as the primary interpretive body of a complex area of law, though I'm somewhat afraid to have them do so since so many of their decisions are so terrible. Also it seems odd to me that so many of their precedential decisions are on such esoteric state criminal law issues. By way of contrast, I'm aware of only one precedential case dealing with the one year filing deadline for asylum, and, to a large extent, federal courts are precluded from ruling on this issue, which leaves virtually no guidance on exceptions. *(NY, NJ; practicing 10+ years)*
- The way the BIA cherry-picks which opinions will become precedent fundamentally undermines any appearance of fairness or adherence to precedent within EOIR. It is also inefficient, as respondents frequently have to litigate issues fully at the [Immigration Court] level which, but for the BIA's refusal to publish, would resolve the issue definitively. However, given the frequency of arbitrary, incoherent, and legally erroneous BIA decisions, greater publication would likely be a bad thing for respondents. *(Mid-South Region (New Orleans Field Office), Memphis, San Francisco; practicing less than 2 years)*



**Additional Comments**

- “The immigration court backlog is a HUGE problem for us. In NYC we’re having individual hearings calendared for 2015. This backlog makes it virtually impossible for us to place cases with pro bono lawyers who can’t reasonably guess whether they’d be in a position to do a pro bono hearing in three or more years.” *(NY; practicing 10+ years)*
- “As I mentioned the list of free legal service providers needs to be regulated. While there are several quality attorneys and non-profits currently on our list, there are also several private attorneys that are incompetent and charge. Detained immigrants are particularly vulnerable to these types because that are so desperate for an attorney and often have no way to vet the attorneys on the list.” *(FL; practicing less than 2 years)*
- “The wait for appeals at the BIA is a bit ridiculous. Also, the procedure for getting a work permit is way too slow with inadequate customer service/support. Finally, the agency’s failure to submit guidelines for waivers of the material support bar is very frustrating.” *(Chicago; practicing 2-5 years)*
- “Judges and TAs need to be better informed about issues regarding unaccompanied minors. This is particularly true for judges in adult detention facilities dealing with minors who filed applications for asylum or SIJS while they were still

minors, and need to be treated as minors with regard to these applications.”

*(TX; practicing 2-5 years)*

- “Mentally incompetent respondents need appointed lawyers at York.” [The BIA’s recent opinion in] Matter of M-A-M- is useless. *(PA, VA; practicing 5-10 years)*
- “These issues are generally superficial and even if all corrected will do little to rectify the systemic injustice and due process violations that EOIR perpetuates.” *(PA, NY; practicing 5-10 years)*
- “Board members have written articles in EOIR publications that espouse and even advocate a particular result in the law of cases that they themselves decide. If any sitting federal judge did this (other, perhaps, than Posner), it would be grounds for recusal. IJs and Board members should get out of the business of ruling from the EOIR advisor if they wish to maintain any appearance of impartiality.” *(Mid-South Region (New Orleans Field Office), Memphis, San Francisco; practicing less than 2 years)*

## EXHIBIT 2:

### BIA Decisions vs. Federal Court Reversals (2006 – 2011)

Date	Number of Decisions	Number of Reversals	Reversal Rate (percent)	BIA Precedent Decisions
<b>2006</b>	<b>5398</b>	<b>944</b>	<b>17.5%</b>	
<b>2007</b>	<b>4932</b>	<b>753</b>	<b>15.3%</b>	
<b>2008</b>	<b>4510</b>	<b>568</b>	<b>12.6%</b>	
<b>2009</b>				
Jan	375	28	6.9%	4
Feb	280	30	10.7%	4
Mar	521	47	9.0%	4
Apr	433	51	11.8%	3
May	311	67	21.5%	2
June	395	44	11.1%	5
July	590	60	10.2%	5
Aug	420	34	8.1%	0
Sep	325	48	14.8%	2
Oct	320	36	11.3%	5
Nov	282	20	7.1%	5
Dec	538	60	11.2%	2
<b>TOTAL</b>	<b>4829</b>	<b>540</b>	<b>11.2%</b>	<b>33/36</b>

Reimagining the  
Immigration Court  
Assembly Line:

APPENDIX

*Exhibit 2*

A-I4

Date	Number of Decisions	Number of Reversals	Reversal Rate (percent)	BIA Precedent Decisions
<b>2010</b>				
Jan	403	28	6.9%	4
Feb	417	39	9.4%	4
Mar	273	33	10.8%	1
Apr	309	48	15.5%	3
May	231	38	16.5%	3
June	447	58	13.0%	4
July	466	56	12.0%	5 (July/Aug)
Aug	299	41	13.7%	-
Sep	382	33	8.6%	6
Oct	390	33	8.5%	1
Nov	234	34	14.5%	2 (Nov/Dec)
Dec	166	25	15.1%	-
<b>TOTAL</b>	<b>4050</b>	<b>466</b>	<b>11.5%</b>	<b>33/35</b>
<b>2011</b>				
Jan	310	40	12.9%	0/not reported
Feb	228	28	12.3%	3
Mar	460	48	10.4%	2
Apr	337	39	11.6%	2
May	257	43	16.7%	10 (May/June)
June	378	66	16.7%	-
July	260	28	10.8%	3
Aug	232	29	12.5%	2
Sep	149	21	14.1%	2
Oct	184	26	14.1%	3
Nov	206	18	8.7%	4
Dec	122	13	10.7%	4
<b>TOTAL</b>	<b>3123</b>	<b>399</b>	<b>12.8%</b>	<b>35</b>

*This report does not constitute legal advice and creates no attorney-client relationships. Persons appearing before the Immigration Court are urged to find counsel and not rely on this report as a substitute for representation. Moreover, while we have made every effort to be clear about the timing and limits of our research, persons trying to understand the immigration courts are reminded that the law, regulations and policies we discuss in this report are continuously being updated and may vary in different jurisdictions.*

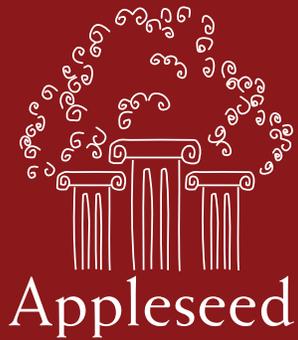
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727 15<sup>th</sup> Street, NW | 11<sup>th</sup> Floor  
Washington, D.C. 20005

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