



Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow

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Almost three years ago, in August of 2006, then Attorney General Alberto Gonzalez announced a series of changes he said were necessary "to improve the performance and quality" of the nation's Immigration Courts. He said an essential element of this overall effort was an increased number of judges. Six months later Kevin D. Rooney, then the director of the Executive Office for Immigration Review (EOIR), issued a follow up statement saying that the Bush Administration had asked Congress for funds to add 40 new judges.

Subsequent to these announcements, however, the number of Immigration Judges steadily fell rather than grew. And it was not until just a few weeks ago on April 24, 2009, with the swearing in of 10 new judges, that the number of Immigration Judges finally inched up to and slightly surpassed (238 versus 230) the number of judges who were working at the time Gonzalez and Rooney had announced a critical need for more resources.

A detailed study of the recent performance of the Immigration Courts — undertaken by the Transactional Records Access Clearinghouse (TRAC) — draws upon a variety of sources including hundreds of thousands of internal administrative records obtained from the EOIR under the Freedom of Information Act. The key conclusion: the failure of the Justice Department even to fill existing judge vacancies, combined with growth in the number of matters the judges are handling each year, has exacted some very real costs. Among them:

- The backlog of immigration cases awaiting disposal by the judges is steadily increasing. Just since the end of FY 2006 this backlog has grown by 19 percent. And over the past decade, the backlog of cases has increased by 64 percent. See Figure 1 and [accompanying table](#).
- Because of the growing number of backlogged cases, the length of time each one has to wait to be resolved — many of them involving aliens who are being held in detention facilities — is also increasing. As Figure 1 shows, the age of pending cases increased by 23 percent over the last two and a half years, and is up by nearly a third over the past decade. See [supporting table](#) for details.
- Another overall indicator of the mounting stresses afflicting the courts is seen in the slowly eroding amounts of time that the judges have to deal with each immigration matter received by the courts. See [Figure 2](#) and [supporting table](#). Since TRAC first reported this finding last year the erosion has continued: 74 minutes per matter

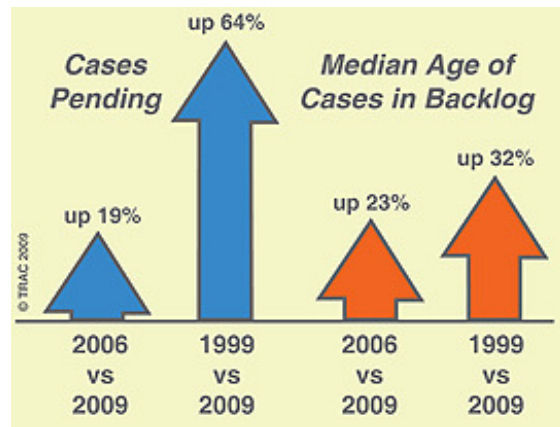
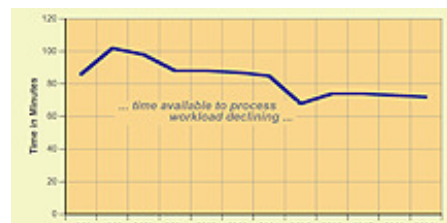


Figure 1. Growing Backlog ([click for details](#)).



received (FY 2007), 73 minutes per matter (FY 2008), and at the current pace during the first seven months of FY 2009 only 72 minutes.



Figure 2. [Click for larger image.](#)

Background

The report presented here on the EOIR is one in a [series](#) covering various aspects of the operations of the Immigration Courts and EOIR's progress in implementing the 22 reform measures announced by former Attorney General Gonzales in August of 2006. This particular report focuses on the adequacy of the number judges and judicial law clerks, and updates TRAC's [report posted on July 28, 2008](#).

EOIR Response to TRAC's Findings

Prior to publication, TRAC furnished its proposed findings to the Executive Office for Immigration Review (EOIR) to provide the agency with an opportunity to make suggestions and corrections. EOIR did not dispute TRAC's figures, nor challenge the fact that pending case backlogs were growing and wait times were increasing.

[See more...](#)

The EOIR, a very busy agency within the Justice Department, has a unique responsibility to interpret and administer the nation's immigration laws. The 200-plus judges in this court are regular department employees who are appointed by the Attorney General. Unlike the judges who serve in the federal district court, the judges do not have tenure and their appointments do not require confirmation by the Senate.

In fiscal year 2008 the courts received 351,477 matters requiring decisions on a range of different immigration matters. Will an individual request for asylum be granted or rejected? Will an individual alien be deported or not? Will the families of individuals coming before the court be irrevocably divided? The decisions on these and other similar matters can have serious and sometimes life threatening

consequences.

The growing concern that led to the Justice Department's announced plans to improve the working of the Immigration Courts was triggered by criticism from a range of different and independent institutions. The criticisms focused on several distinct problems, among them the following:

1. In a significant number of decisions about the handling of individual immigration matters, federal court of appeals judges around the country found numerous inadequacies involving due process and other matters.
2. In a series of statistical studies, TRAC and several others found inexplicable disparities in how the Immigration Judges were deciding individual requests for asylum. In its [July 2006](#) and [September 2007](#) TRAC studies, the judge-by-judge disparities persisted in city after city and for national group after national group.
3. More recently, in July of 2008, the Inspector General of the Justice Department and its Office of Professional Responsibility published a [joint report](#) fully documenting previous news reports that the department from 2004 to December of 2006 had used a heavily politicized and unlawful process to appoint Immigration Judges with conservative credentials.

By the Numbers Summary

The growing backlog of cases, as well as the increasing wait times resulting from clogged dockets, are at the most elemental level the product of two basic ingredients: the number of available judges (plus judicial law clerks to assist them) versus the number of cases brought by the Department of Homeland Security seeking removal of immigrants from this country. Following are the latest numbers TRAC has compiled for each of these.

Immigration Judges and Judicial Law Clerks

According to EOIR, it has the discretion to increase or decrease the number of Immigration Judges, subject to perceived needs and the overall constraints imposed by its total budget dollars and the total positions of all types — of which Immigration Judges are just one very small component — set by Congress in EOIR's annual appropriations. As shown in [Figure 3](#), the number of Immigration Judges on the payroll have varied modestly from year to year, but trending upward over the past decade. In FY 1998 there were 212 IJs, with relative high points of 228 in FY 2003, 230 in FY 2006, and finally — as mentioned above with the swearing in of 10 new judges at the end of April — 238 today (see [supporting table](#)).

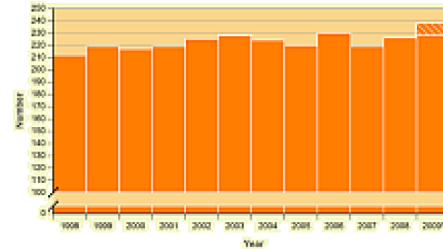


Figure 3. [Click for larger image.](#)

Included in the annual totals shown in Figure 3 are judges whose primary roles are administrative and supervisory. Beginning in FY 2008 some of the positions with managerial duties, whose responsibilities did not change in nature, were moved to the field as part of the implementation of the Attorney General's reform measures. Including these field Assistant Chief Immigration Judges (ACIJs), the number of judges with administrative roles has varied between 9 and 12 (see [supporting table](#)).

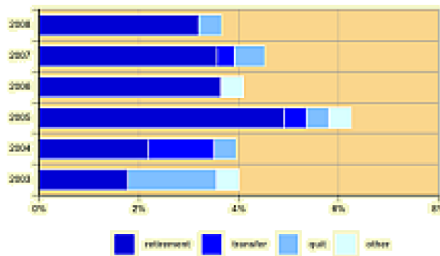
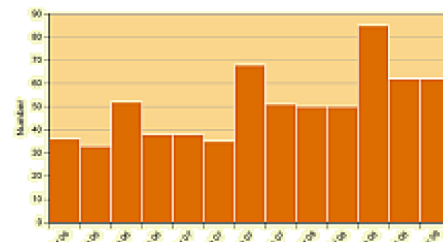


Figure 4. [Click for larger image.](#)

The pace of *hiring*, rather than *turnover*, has typically driven the total number of judges on the bench. Available information on the annual number of judges leaving their position show that turnover rates have been fairly steady averaging under 5 percent. This includes individuals who retire or leave federal employment, as well as those who transfer to another government position. See [Figure 4](#) and [supporting table](#).

Since last July, EOIR swore in 21 new Immigration Judges while 9 IJs left the bench, making a net increase of 12. EOIR reports that, based on its current hiring targets, it still has 19 IJ positions it has not filled. All but 3 of these 19 positions have been unfilled for an extended period of time. These same unfilled positions existed at the time of TRAC's report last year. Only three of the unfilled positions are newly created when EOIR raised its IJ hiring targets by 3 after the passage of the 2009 Omnibus Appropriations Act last April. In that Act Congress increased EOIR's appropriation by \$5 million over what the administration had requested.

Judicial law clerks perform many functions that can help Immigration Judges handle their caseload. Law clerks are hired each year for temporary one-to-two year positions from recent law school graduates through the Attorney General's Honors Program. Last September EOIR increased the number of hires to 62, up from 55 the previous year. Over time, as shown in [Figure 5](#), EOIR has slowly increased the number of judicial law clerks.



(September figures are unusually high each year because there is some overlap between prior clerks who are leaving and new hires who are assuming their posts after completing law school.) Most but not all Immigration Courts now have at least one law clerk shared among the judges in that city. But there are still on average slightly under four Immigration Judges sharing a single law clerk.

Figure 5. [Click for larger image.](#)

Immigration Court Workload: Recent Trends

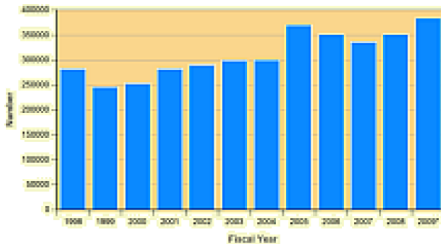


Figure 6. [Click for larger image.](#)

According to data from the EOIR, the total "matters" received each year by the Immigration Courts has fluctuated during the last decade — sometimes up and sometimes down — but the overall trend has been clearly upward. See [Figure 6](#) and [supporting table](#). Last year there were a total of 351,477 matters received, the highest volume recorded over the last decade. Currently the pace of new filings this year is running somewhat higher than last year. If this pace continues for the remainder of the current fiscal

year, TRAC projects that around 384,000 new matters will be presented to the Immigration Judges for their consideration.

The caseload of the Immigration Courts is of course affected by a number of different factors. One of them most commonly mentioned is the number of Border Patrol agents assigned to apprehending aliens, mostly along the border. Because of generous funding by Congress, the Border Patrol in the last decade has been among the fastest growing agencies in the federal government. In FY 2008, for example, the number of agents was more than twice what it was in 1998. The natural product of the very different staffing levels for the courts and the Border Patrol is obvious. In 1998, there were 39 border patrol agents for every judge. By 2008, there were over 72. See [Figure 7](#) and [accompanying table](#).



Figure 7. [Click for larger image.](#)

As can be seen from a comparison of Figures 6 and 7, even though the largest segment of proceedings filed in Immigration Courts over the past decade involves entry without inspection (EWI) — the charge typically brought against aliens for attempts to slip across the border rather than entering the U.S. at regular ports of entry — changes in the Immigration Courts workload don't closely track the changes in Border Patrol agents. This fact underlines in stark terms the fact that there is not a simple relationship between the number of Border Patrol agents and Immigration Court workload, as we discussed more fully in our [previous report](#).

Congress Weighs In

Two persistent problems of the Immigration Courts — documented in TRAC's investigative reports — recently have become the focus of Congressional concern.

In a provision of the appropriations bill (Public Law 111-8) just approved by the full Congress, for example, the House and Senate Appropriations Committees said the Justice Department's current budget request "fails to articulate or account for" the increased funding it was requesting because of the activities of other agencies. This problem was particularly true, Congress said, in the immigration area where the Immigration Courts have been forced to redirect internal resources in order to provide

"necessary judicial support and basic care for aliens" turned over to the Department of Justice by Department of Homeland Security.

But Congress did not stop at describing the problem. In addition it ordered the Justice Department to develop a method to create what it called "defensible fiscal linkages" between two agencies, the EOIR and the Border Patrol. To do this, the Department was instructed to spend up to \$1 million for "a contract with the National Academy of Science to develop, test and select a budget model that accurately captures the fiscal linkages and leverages them into an estimate of DOJ's immigration-related costs."

In addition to mandating this unusual outside study of an agency's budget process, Congress also demonstrated a level of skepticism about a broader matter: the efficacy of the 22-point program that former Attorney General Gonzales had announced in August of 2006. The Congressional doubt was expressed in several orders. One gave the EOIR 30 days to provide it a status report on the implementation of these measures. The EOIR furnished a thirteen page report to Congress. (A much shorter version of the report to Congress — posted on June 5, 2009 — contended that most of the points had been accomplished.) An updated and detailed TRAC analysis of the agency's claims is forthcoming. Also see [TRAC's September 8, 2008 report](#) on the same subject.

Clearly concerned about the obvious problems in the government's immigration regulation process, the committees took a third action, ordering the Department and EOIR — within 90 days of the passage of the Appropriations Act — to submit to them "a strategic plan to address the case backlogs."

A Week in the Work Life of a Typical Immigration Court Judge

Over the last decade, the 200-plus judges working in the specialized Justice Department court central to the regulation of immigration have handled a swirling mass of more than 2.6 million matters, according to data obtained from the Executive Office for Immigration Review (EOIR). Because of the unusual size and complexity of this caseload, it is very hard for the public, members of Congress, immigration rights groups and even the EOIR itself to fully grasp all of the many details involved in the working of this unique court.

To reduce this understandable confusion, TRAC decided to examine the operation of the Immigration Courts in a very focused way: presenting information about the typical work experience of one judge in one week and in one year, FY 2008. The basis for this study was the very detailed information recorded in the court's internal administrative record-keeping system for the nation as a whole.

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”

In a single week last year, for example, the typical judge was scheduled to preside over 69 hearings, according to EOIR records. The FY 2008 total was higher than it has been in any recent year. While the judge's hearings often involve court scheduling matters that are dealt with quickly, many others are extremely time consuming: analogous to actual trials in which complex substantive evidence is presented by both sides and arguments are heard. Long or short, EOIR's records further indicate that the typical judge usually is scheduled to conduct

hearings on 9 out of every 10 work days.

In running these hearings, the immigration judge — unlike those in most other courts

— is not assisted by a clerk or bailiff. This means the judge, along with the legal duties normally associated with a trial, also is responsible for handling various administrative chores such as ensuring that the proceedings are mechanically or digitally recorded and keeping track of any papers or exhibits submitted by either side. (The only time when a clerk is routinely in the court room is for the "master calendar," the period similar to an arraignment in a criminal court when the hearing schedule is established.)

A unique characteristic of these hearings is that in contrast to trials in criminal courts the individuals has no right to an appointed counsel and that many of them therefore are unrepresented. This absence imposes a special burden on the judge to guide the lawyer-less individuals through the proceedings. For example, judges under the law must determine whether the respondent knows how they can seek relief from removal and then advise them about these options. This means that judges in a typical week may spend considerable time advising individuals about their rights, spelling out the court's procedures, explaining pieces of evidence, describing possible appeal rights and answering other questions.

But the special challenges go beyond the sheer number of hearings that are scheduled each week, the general absence of clerical assistance and the significant proportion of those who do not have lawyers. In about three quarters of the cases the typical judge deals with each week (78%), the immigrants did not speak English and thus required a translator. (EOIR records indicate that during the week any one of 389 languages — other than English — may be spoken at the hearings.)

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The background of the immigrants appearing before the court have also been undergoing change. A large proportion of the aliens in the hearings were not newcomers to the United States but rather had come to this country years before ending up in court. Last year the typical alien appearing in the Immigration Courts had entered this country more than six years prior to his or her hearing. Presumably in part because of changing charging patterns by DHS, this length of time has been on the rise: 3.3 years in FY 2006, 5.0 years in FY 2007, 6.4 years in FY 2008 and 7.2 years so far in FY 2009.

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Decisions are the basic product of any court. The record shows that on average a single judge during a single week disposed of 27 cases — 22 of which were decisions on the merits. Sixteen out of these 22 decisions were oral rulings made by the judge at the end of a hearing, while 6 were issued as written rulings after the completion of the

hearings. The number of decisions issued each week by the typical judge was up about 30 percent from the levels recorded at the beginning of the decade.

In addition to presiding over actual court proceedings and making a determination on outcome, court records document that an average judge in a typical week ruled on six additional miscellaneous matters — bonds and other motions. Some of these are determined on the basis of papers filed rather than through an actual hearing.

In resolving these cases each week, a judge typically must sort out the government's claims on 32 separate charges (some aliens are subject to multiple charges), as well as 17 applications for relief filed by the aliens. EOIR's tracking systems recorded 38 different types of relief that an immigrant can pursue under the immigration statutes. One of these claims — the request for permanent asylum in the United States — was at the heart of 4 cases per week for the typical judge.

How Many Immigration Judges Are Needed?

Given the court's current workload, how many Immigration Judges and judicial law clerks does the EOIR need *right now*? Clearly, given the growing backlog and wait times, the courts needs more than they have today. However, on the question of how many more, the plain truth is that no one appears to have come up with solid answers — leastwise EOIR itself.

The primary reason there aren't more Immigration Judges on the bench today goes to the surprising fact that the Justice Department has for many years failed to fill the openings that EOIR has long had on its books. That said, it must be acknowledged that recently EOIR has been making some progress, however slow, in filling its backlog of vacant judge positions. One big question remains unanswered. Once the current vacancies are filled, how many additional judges — if any — will be needed to adequately handle the current flow of immigration cases, let alone deal with the possibility that the caseload will go on growing?

In a pending FY 2010 budget request to Congress, EOIR is now seeking funding to hire 28 additional Immigration Judges and 28 more judicial law clerks to assist in the administration of the courts. As noted above, however, because Congress already has expressed deep skepticism about the absence of a solid basis within the agency for determining EOIR's staffing needs, prospects for this new request may be uncertain.

The systemic problems of the EOIR have been well documented. But before the Justice Department and the agency can move forward to resolve them, the government itself must end its habit of turning a blind eye to the challenges it faces. TRAC's review of numerous budget requests, reports and other official statements of the agency offers strong proof that EOIR managers have generally failed to carefully analyze what is going wrong and what short term and long term remedial steps are required. There is no record, for example, that they regularly ask themselves even simple questions such as how much time is needed, on average, to handle the many different types of cases that make up their workload streams. Or that they have sought to assess just how many hours of Immigration Judges' time would be freed up if the judges had a larger number of law clerks to assist them.

TRAC's basic finding is both deceptively simple and profoundly troubling. The EOIR, long responsible for deciding the fate of hundreds of thousands of individuals each year, has not developed realistic projections about its future needs. More critically, it has even failed to develop a principled methodology for determining the level of resources it needs today to "adequately" handle its current workload. Until this work begins, achieving meaningful improvements in the Immigration Courts will not be possible.

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