

OVERSIGHT OF THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

HEARING BEFORE THE SUBCOMMITTEE ON IMMIGRATION AND BORDER SECURITY OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED FIFTEENTH CONGRESS FIRST SESSION

NOVEMBER 1, 2017

Serial No. 115-31

Printed for the use of the Committee on the Judiciary



Available via the World Wide Web: <http://judiciary.house.gov>

U.S. GOVERNMENT PUBLISHING OFFICE

WASHINGTON : 2018

30-995

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<http://docs.house.gov/meetings/JU/JU01/20171101/106561/HHRG-115-JU01-20171101-SD003.pdf>

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New York City ICARE Juvenile Docket letter, National Association of Immigration Judges, National Immigrant Justice Center, American-Arab Anti-Discrimination Committee, American Immigration Council, American Immigration Lawyers Association, Hebrew Immigrant Aid Society, Human Rights First, Kids in Need of Defense (KIND), Lutheran Immigration and Refugee Service (LIRS), National Immigration Law Center, Northern Illinois Justice for Our Neighbors, Tahirih Justice Center, USC International Human Rights Clinic, U.S. Committee for Refugees and Immigrants (USCRI) and Women’s Refugee Commission, and The Association of Pro Bono Counsel. Submitted by the Honorable Zoe Lofgren, California, Ranking Member, Subcommittee on Immigration and Border Security, Committee on the Judiciary. This material is available at the Committee and can be accessed on the Committee Repository at:

<https://docs.house.gov/meetings/JU/JU01/20171101/106561/HHRG-115-JU01-20171101-SD004.pdf>

Statement from the Honorable Sheila Jackson Lee of Texas for the hearing on Oversight of the Executive Office for Immigration Review. Submitted by the Honorable Sheila Jackson Lee, Texas, Member, Subcommittee on Immigration and Border Security, Committee on the Judiciary. This material is available at the Committee and can be accessed on the Committee Repository at:

<http://docs.house.gov/meetings/JU/JU01/20171101/106561/HHRG-115-JU01-State-J000032-20171101.pdf>

OVERSIGHT OF THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

WEDNESDAY, NOVEMBER 1, 2017

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON IMMIGRATION AND BORDER SECURITY

COMMITTEE ON THE JUDICIARY

Washington, DC

The subcommittee met, pursuant to call, at 2:05 p.m., in Room 2141, Rayburn House Office Building, Hon. Raúl R. Labrador [chairman of the subcommittee] presiding.

Present: Representatives Labrador, Goodlatte, Sensenbrenner, King, Jordan, Buck, Johnson, Biggs, Lofgren, Conyers, Jackson Lee, and Cicilline.

Staff Present: Joseph Edlow, Counsel; Maunica Sthanki, Minority Counsel; and Sabrina Hancock, Clerk

Mr. LABRADOR. The Subcommittee on Immigration and Border Security will come to order. Without objection, the chair is authorized to declare recesses of the committee at any time.

We welcome everyone to today's hearing on Oversight of the Executive Office for Immigration Review, and now I recognize myself for an opening statement.

Today's oversight hearing focuses on a critical facet of U.S. Immigration policy. The Executive Office for Immigration Review, or EOIR, is the linchpin of Immigration law as it administers, among other components, the U.S. Immigration Courts and the Board of Immigration Appeals.

The adjudication and appeals of immigration matters is of critical importance to the proper administration of justice in this country, and we must ensure that our immigration laws are interpreted as Congress intended.

As a former immigration practitioner who regularly appeared in immigration court, I certainly understand and appreciate just how important it is that the courts are administered effectively, and in a way that maximizes docket management and minimizes fraud and delay.

Unfortunately, EOIR has been plagued by management problems that have consistently hampered its ability to operate the courts.

During the past administration, the Department of Justice's Inspector General's office found that the office engaged in nepotism and other inappropriate practices.

These disturbing findings served as a distraction for EOIR making it impossible to focus on much-needed improvement.

Additionally, a 2014 server crash paralyzed the courts nationwide for several weeks, again, necessitating the allocation of resources away from management and oversight of the agencies.

The policies and practices instituted during the Obama administration served a decidedly political agenda throughout the Federal Government, and EOIR was not spared.

Companion memos to those issued by the Department of Homeland Security and prosecutorial discretion and administrative closure policies raised, at a minimum, the specter of collusion between Department of Justice and the Department of Homeland Security.

The prioritization of recent entrants, including the surges of unaccompanied minors and family units, likewise, were ill-advised and poorly executed.

Ignoring the irrefutable evidence of spikes and asylum fraud before the court, EOIR chose its focus based on political expediency rather than judicial prudence.

It is against this backdrop that the incoming leadership must begin to restore this agency and where necessary, needs to overhaul it.

Of utmost concern to this subcommittee is the current backlog of pending cases. I am appalled, but really not surprised, that the previous administration created conditions that ultimately resulted in a backlog of almost 630,000 pending cases nationwide. This number represents a 22 percent increase in fiscal year 2017, and is simply unacceptable. The Government Accountability Office's recent report on management practices at EOIR and the backlog identified several possible solutions, including reforming the hiring process for Immigration judges, and updating internal oversight practices to ensure better docket management.

The GAO report noted that continuances were a contributing factor to the backlog. The report found that from 2006 through 2015, the court saw 23 percent increase in the grants of continuances.

I would never suggest that continuances be disallowed. They can be valuable for attorney preparation. I've experienced that myself for purposes, and are essential and critical evidence must still be collected. However, the rash of continuances used for the purposes of delay, constitute and abuse of process that must be stopped.

The July 2017 memo from Chief Judge MaryBeth Keller, outlining EOIR continuance, is a tremendous step in curbing this abuse, but represents only one of the solutions to reduce the number of pending cases.

The GAO report further noted the inefficiencies associated with the hiring of additional Immigration judges, as your written testimony acknowledged, the Trump administration, through its immigration principles, has called for the hiring of an additional 370 immigration judges.

I remain concerned that EOIR must reevaluate hiring practices and processes to meet even a fraction of this goal.

The time between an initial job posting to the actual onboarding of a judge must be reduced.

Finally, I have long spoken about the need to modernize our immigration system. One of the key components must be the modernization of our immigration courts.

EOIR currently lags behind other Federal courts in terms of basic items, such as filings and other similar items. This was never a priority for the previous administration as the U.S. immigration courts are one of the last remaining Federal adjudicative bodies relying on paper filings.

Employing an e-filing system would drastically reduce the need for more filing space, and overall reduce the number of lost filings that could also lead to unnecessary delays.

In addition, EOIR relies on other technology, such as video teleconference system, or VTC, but there are concerns that this equipment is either outdated in some locations, or not operational at all in others.

With the challenges facing EOIR today, and the solutions of the new administration, I am hopeful that we can work together to bring real change to the agency and continue the goals of modernizing and reforming our immigration system.

Before I recognize the gentlewoman from California, I would ask unanimous consent to place into the record, a statement from Judge Ashley Tabaddor, President of the National Association of immigration Judges.

Without objection, the statement will be placed in the record.

This material is available at the Committee or on the Committee repository at: <http://docs.house.gov/meetings/JU/JU01/20171101/106561/HHRG-115-JU01-20171101-SD003.pdf>.

Mr. LABRADOR. I now recognize our ranking member, Ms. Lofgren of California, for her opening statement.

Ms. LOFGREN. The last time the Immigration Subcommittee gathered for an EOIR oversight hearing, we heard testimony from the former EOIR Director Juan Osuna.

In August of this year, Juan passed away suddenly, and I would like to take a moment to acknowledge his life and service to this country. Juan worked for 17 years as a Senior immigration legal adviser in the Justice Department for both Democratic and Republican administrations. He was a former Board of Immigration Appeals Judge and Former Associate Deputy Attorney General in charge of immigration policy at the Department of Justice. Juan had a remarkable career in public service, and he will be greatly missed, and I would like to extend my heartfelt condolences to his family over this loss.

We are assembled here now to take a close look at the administration of our immigration court system. The Executive Office of Immigration Review currently employs 339 immigration judges in 58 courtrooms around the country.

Immigration judges have a complex, often thankless task of making sophisticated legal decisions with decisive speed. Because there is no right to government-appointed counsel, immigration judges often have to act as a fact-finder and legal researcher to ensure that the result in each case is just, fair, and in accordance with legal precedent. The difficulty of this task is magnified by the severity of the consequences.

Immigration Judge Dana Leigh Marks has once said that immigration proceedings are, quote, “like death penalty cases heard in traffic court.” This is particularly true for asylum seekers, children, and other vulnerable populations.

Yet despite these difficulties, the Trump administration has taken steps towards imposing numeric and performance quotas on immigration judges. This could add an additional obstacle to the immigration judge juggling act by requiring faster case completions with fewer continuances and shorter evidentiary hearings.

In his written testimony, our witness states that “EOIR is transforming its institutional culture to emphasize the importance of completing cases.” He claims that this will improve the efficiency of our court system, but I don’t think it will do more, except increase the number of immigration removals, speedy deportations, and, also, increase appeals in our Federal court system.

Much of the discussion today will focus on the immigration court backlog and ways that this can be reduced. I want to start by saying that Congress must fully fund hiring of immigration judges, law clerks, technology, and infrastructure.

The immigration court backlog will not be fully remedied by policy shifts alone, it must include sufficient appropriations. But the immigration backlog is not one that happened overnight. There are reasons for the backlog.

First, immigration enforcement, specifically funding for ICE and CBP, far outpace the funding for immigration courts.

From 2002 to the present day, funding for immigration enforcement increased by over 400 percent. ICE and CBP went from a budget of \$4.5 billion in 2002 to over \$20 billion in 2017. In contrast, EOIR’s budget increased only 70 percent.

This means that at the same time ICE and CBP are funneling cases into the immigration court system, the courts are not given requisite amounts of resources to adjudicate with speed and efficiency, and it’s created a massive bottleneck and backlog, which we’re seeing today.

EOIR currently has approximately 640,000 cases pending, and in some courts, immigrants can wait 3 to 5 years to receive a final decision on their case.

Immigration judges currently have an average caseload of close to 1900 cases. For perspective, the average caseload of U.S. District court judge is 440.

Second, under both the Obama and Trump administration, EOIR implemented policy that prioritize cases at the southern border to the detriment of cases in the interior of the country.

Under President Obama, EOIR implemented a rocket docket that expedited the cases of recent border crosses. These cases primarily consisted of children and families from Central America who were fleeing violence and seeking asylum. This EOIR implemented a last-in-first-out strategy, which meant that removal cases of immigrants who had been waiting for months or years were further delayed.

Now, under the Trump administration, EOIR moved immigration judges from already backlogged courts to detention centers along the southern border. NewsPedia reports that many of these judges sat in empty courtrooms with little to do.

In his written testimony, our witness states that the mobilized judges completed approximately 2,700 more cases than expected if they had not been detailed, but what he fails to mention is that these so-called surge of immigration judges, over 20,000 non-detained immigration court hearings were rescheduled.

We all agree that our border must remain secure and immigration courts must ensure that those who enter our country seeking protection be afforded due process and a full and impartial hearing in a prompt manner, but this cannot come at the expense of immigration court backlogs in the interior of the country.

And lastly, one of the primary reasons for the immigration court backlog is a continued lack of representation, particularly for children and other vulnerable populations.

When a respondent, particularly a child, appears in immigration court without legal representation, an immigration judge will spend a considerable amount of time assessing the child and determining her legal options. This is precisely what a judge should do when a vulnerable child is presented in a courtroom without legal representation, but it, nevertheless, creates delays for other respondents.

The National Association of Immigration Judges has explained that, quote, "When noncitizens are represented by attorneys, immigration judges are able to conduct proceedings more expeditiously and resolve cases more quickly." This conclusion is supported by outside economic consulting firms, which found that government-funded counsel would actually save the country \$38 million through expedited hearing process and reduced detention. That's why I'm proud to be the lead sponsor for the Fair Day in Court for Kids Act. My bill would provide government counsel to children, and, particularly, vulnerable individuals. This would help reduce the immigration court backlog, save the government money, and ensure that the due process rights of children are protected.

I hope my Republican colleagues will join me in sponsoring this bill, and I look forward to a substantive discussion on our immigration court system today. And I yield back the balance of my name.

Mr. LABRADOR. Thank you, Ms. Lofgren. I would now like to recognize the full committee ranking member, Mr. Conyers of Michigan, for his opening statement.

Mr. CONYERS. Thank you, Chairman Labrador. And I want to let my colleague from California know that I am a cosponsor of her legislation with great pride.

Members of the committee and to our distinguished witness, I, too, want to note the passing of Juan Osuna who served as the director of the Executive Office of Immigration Review, and who testified before this subcommittee in that capacity.

Mr. Osuna was a model public servant who devoted the last 17 years of his life to the Department of Justice. He was of a consummate professional, known for his leadership and the ability to balance access to justice with court efficiency. And I'm sure he's deeply missed by the Department and those that work with him there.

Now, turning to the focus of today's hearing, we have an important opportunity to consider the current challenges facing the Executive Office for Immigration Review, particularly under the current administration.

To begin with, rather than the rule of law, is guiding immigration court policy under the Trump administration: the anti-immigrant ideology.

Now, after all, since the earliest days of his campaign, now-President Trump has shown troubling disregard for that rule. He's attacked the judiciary, issued an unprecedented pardon of a sheriff convicted of criminal contempt of court, and fired the FBI Director during an ongoing investigation by that agency into his own campaign.

Unfortunately, the Executive Office for Immigration Review appears to have not escaped this broad erosion of rule of law principles based on the administration's policies that threaten judicial independence, due process, and fundamental fairness within our immigration courts.

First, media accounts report that the Trump administration could impose numerical and time-based case quotas on immigration judges.

All of us, regardless of party, support commonsense measures for reducing immigration court backlogs, but quotas are not the solution. Their implementation would force already overstretched judges to hurry through lengthy dockets regardless of the circumstances of individual cases. Hearings would become lightning fast, fundamentally unfair, and devoid of due process. In short, a quota system would turn immigration courts into a forced march toward deportation.

Secondly, the administration issued a memorandum effectively pressuring judges to deny motions for continuances, which often represent a vulnerable immigrant's only chance for obtaining counsel essential to protecting his or her rights.

Together, with case quotas, this will force many respondents, even young children, to face Immigration and Custom Enforcement prosecutors without counsel, which all but ensures their unjust removal.

Thirdly, the Executive Office for Immigration Review has moved to strip children in immigration proceedings of other vital protections. In a callous break with prior policy, the agent's office of general counsel issued an opinion concluding that immigration judges may revoke minors, unaccompanied alien child status, and associated legal safeguards. As with the first two measures, this will substantially increase removal of minors.

The common denominators among these three measures are clear: far less due process and fairness; far more deportations, which is anything but the rule of law.

Instead, these policies undermine that rule in the service of the President's anti-immigrant ideology, intended to drive immigrants out of the United States.

Our task today must be to gain a greater understanding of how this administration's Executive Office for Immigration Review policies concretely advance that agenda and how they serve to further his mass deportation plan.

I thank Acting Director McHenry for his appearance before the subcommittee and look forward to a substantive dialogue with him on these critical matters.

I thank the chair, and yield back any time that may be remaining.

Mr. LABRADOR. Thank you, Mr. Conyers.

Without objection, other members' opening statements will be made a part of the record.

We have a distinguished panel here today, a panel of one. And the witness' written statement will be entered into the record in its entirety.

I ask that you summarize your testimony in 5 minutes or less. To help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony.

When the light turns red, it signals that your 5 minutes have expired. I will give you a little bit of leeway because you're the only witness, but don't go much beyond the 5 minutes.

And before I introduce our witness, I would like you to stand and be sworn in.

Do you swear that the testimony you're about to give is the truth, the whole truth and nothing but the truth?

Mr. MCHENRY. I do.

Mr. LABRADOR. Let the record reflect that the witness answered in the affirmative.

Thank you. Please be seated.

Mr. McHenry was appointed Acting Director of the Executive Office for Immigration Review on May 30th, 2017.

Prior to his appointment, he served as the Deputy Associate Attorney General in the Office of the Associate Attorney General. He was previously an administrative law judge for the Office of Disability Adjudication and Review in the Social Security Administration. Mr. McHenry has also worked as an attorney for the U.S. Immigration and Customs Enforcement.

Mr. McHenry earned a bachelor of science from the Georgetown University School of Foreign Service, a master of art in political science from the Vanderbilt University Graduate School, and a juris doctor from the Vanderbilt University Law School.

I now recognize Mr. McHenry for his statement.

STATEMENT OF JAMES MCHENRY, ACTING DIRECTOR, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, UNITED STATES DEPARTMENT OF JUSTICE

Mr. MCHENRY. Thank you, Mr. Chairman, Representative Lofgren, and other distinguished members of the subcommittee.

Thank you for the opportunity to speak with you today about the Department of Justice's Executive Office for Immigration Review, or as we affectionately call it, EOIR.

This is my third stint with the agency during my government career, and I have a deep respect for EOIR's mission.

I began my legal career as a judicial law clerk at EOIR for immigration judges, and then I returned to the agency several years later as an administrative law judge.

I am honored to now serve as its Acting Director and to be able to appear before you to discuss some of the challenges and opportunities it currently faces.

At EOIR, our primary mission is to adjudicate immigration cases by fairly, expeditiously, and uniformly interpreting and administering the Nation's immigration laws.

We do that under delegated authority from the Attorney General by conducting immigration court hearings, administrative hearings, and appellate reviews.

The last several years have raised significant challenges for EOIR as policy changes and docket management practices have contributed to a pronounced increase in pending immigration cases. EOIR's pending caseload currently is approximately 640,000, which is an all-time high. The caseload has almost tripled since fiscal year 2009, and doubled since fiscal year 2012.

Addressing this caseload is a top priority for the agency. And EOIR has formulated a multi-front plan to achieve our goal of expeditiously reducing the number of pending cases while maintaining due process.

We are actively implementing a number of initiatives towards that goal that I'm happy to talk about today.

First, we're increasing our adjudicatory capacity by hiring more immigration judges. We've hired 61 new judges since January 1, and we're in the process of filling up to 42 additional positions utilizing a new streamlined hiring process announced by the Attorney General earlier this year.

Second, we are maximizing our existing adjudicatory capacity by addressing both docket inefficiencies and unused courtroom capacity. For example, earlier this year, we issued guidance to assist immigration judges with fair and efficient docket management practices related to continuances.

We have also implemented a policy of "no dark courtrooms" by expanding our use of video teleconferencing, and by rehiring retired immigration judges on a part-time basis to hear cases as needed, when permanent immigration judges are unavailable.

Third, we are transforming EOIR's institutional culture and improving its infrastructure by focusing on reorienting the agency towards its core mission of adjudicating cases, and by upgrading our infrastructure to switch from a paper-based to an electronic-based system. We are committed to piloting an electronic filing system in 2018.

Fourth, we are working with our Federal partners, particularly at the Department of Homeland Security, to ensure that any influx, sudden influx of new cases, does not undermine our efforts.

Fifth, we are reviewing all of our internal regulations and policies to evaluate ways in which our own guidance may be utilized more effectively in the disposition of pending cases.

All these initiatives are beginning to yield some signs of progress. For instance, in fiscal year 2017, our judges completed approximately 20,000 more cases than they did the prior fiscal year and the most cases overall since fiscal year 2012. But we know that more challenges lie ahead of us.

There are two other EOIR programs that I would like to mention for the subcommittee, for they are also integral to the overall success of the agency.

First, we have expanded our Fraud and Abuse Prevention program, and in June, I issued a directive reminding all EOIR employ-

ees of their responsibility to report suspected fraud and abuse, particularly in regard to applications for relief or protection in immigration proceedings. EOIR has no tolerance for misrepresentations or fraud in our system.

Second, we have reinvigorated our strategic planning and analytics division, which has been underutilized in the past few years. None of our efforts can be successful without solid data analysis, and we are pleased to have a robust analytics division to aid us in our policy development and implementation.

Mr. Chairman, Representative Lofgren, I am proud of EOIR and proud of its employees, and I am also proud to highlight some of the progress that we have made.

However, we are also cognizant that more work needs to be done. Nevertheless, we are confident that with the continued support of the Department of Justice and Congress, we will continue to make significant strides in 2018 in reversing some of the negative trends of the recent past.

Thank you again, and I am pleased to answer any questions you may have.

Mr. McHenry's written statement is available at the Committee or on the Committee Repository at: <http://docs.house.gov/meetings/ju/ju01/20171101/106561/hhrg-115-ju01-wstate-mchenryj-20171101.pdf>.

Mr. LABRADOR. Thank you, Mr. McHenry. We will now proceed under the 5-minute rule with questions.

I will begin by recognizing myself for 5 minutes.

Mr. MCHENRY, how many immigration judges do you anticipate hiring and onboarding in the upcoming fiscal year?

Mr. MCHENRY. It's hard to say for the entire fiscal year. We have 19 that are currently in the pipeline, and we're in the process of hiring up to 42 additional ones. So that would be a total of 61. Beyond that, it will be depend on factors, such as availability, retirements, and things like that. But at least 61 by the spring of next year.

Mr. LABRADOR. What step is EOIR taking to begin the process of converting to an e-filing system?

Mr. MCHENRY. We have had several meetings with our Office of Information Technology, and I have made it clear, in no uncertain terms, that e-filing and electronic case system is an absolute priority for the agency.

We have begun piloting—well, we have begun developing a process to pilot an electronic filing system next year, but it's more than just an electronic filing system; it's an overall electronic case management system.

We're in the process of developing the prototype for it now and soliciting additional feedback, but I am confident that we will have a pilot of some type in one or more immigration courts by 2018.

Mr. LABRADOR. Okay. Judge Keller's memorandum of July 2017 provided the framework for continuances in immigration court. How is EOIR able to enforce that memorandum and ensure that immigration judges are not overtly ignoring it when ruling on continuances?

Mr. MCHENRY. The memorandum, by its own terms, it's an operating policies and procedures memorandum, doesn't direct a deter-

mination in specific cases. It does remind judges, however, of considerations they should keep in mind regarding docket efficiencies when entertaining certain types of continuance requests.

That memorandum was issued at the end of July, so we've just come upon about a 3-month window since it went into effect, and we're just now getting the data to analyze it.

Once we review the data and see what it shows, then we'll take appropriate steps, if necessary, to go back and revisit it.

Mr. LABRADOR. Do you have any preliminary findings from the data you've looked at so far?

Mr. MCHENRY. We had a couple of initial findings, but there seem to be some data quality issues, and that's why we're going back and double-checking them.

Mr. LABRADOR. Okay. Much of today's hearing focuses on the backlog, which as previously stated, stands at about 630,000 pending cases. To what extent do you believe that the reallocation of resources and judges to so-called priority dockets of unaccompanied minors and family units beginning in 2014 contributed to the backlog?

Mr. MCHENRY. I don't believe there's any question that it contributed to the backlog in a significant way. A measurement of the precise magnitude is perhaps a little difficult to come by, but it's clear, especially unaccompanied alien children cases, they typically take longer to resolve than other cases, other immigration cases for various reasons. So by putting them to the front of the line, you put cases that take longer to resolve first and then you continue cases that otherwise might have been resolved in their place. So it's had a significant impact, as I said, though, I'm not sure that we can—

Mr. LABRADOR. So it's almost the opposite of triage. That we actually put the ones that takes the longest in the beginning instead of taking care of the ones that we could handle right away.

Mr. MCHENRY. It was a system that was counterproductive, I think, to its stated goal of trying to resolve the cases more quickly.

Mr. LABRADOR. Does EOIR still prioritize these cases?

Mr. MCHENRY. We changed our priorities for the third time in 3 years in January of this year. That was before I became Acting Director, so I can't speak entirely to the process that drove that.

Currently, our priorities regarding unaccompanied children are only those who are in the custody of the Department of Health and Human Services. Other unaccompanied alien children are no longer considered a priority. But I can say that within the agency, within EOIR as a whole, myself, my senior management team, are reviewing our overall priorities in general and looking at whether that priorities memo, the last one that we issued, is still the best statement of how we look at cases.

Mr. LABRADOR. As EOIR is considering instituting certain performance metrics for immigration judges, including possible case completion goals, how would you expect such metrics to impact the current backlog?

Mr. MCHENRY. Well, EOIR already operates under a number of performance metrics, some of those are established by the Immigration and Nationality Act. Some of those have been developed by the Government Performance and Results Act, or GPRA. Those re-

sults have been positive so far, the goals that we do have. We would anticipate if we develop new goals, and we've been recommended to do those by the GAO, the Office of the Inspector General, by Congress. If we develop those new goals, we would expect the judges to be able to comply with those as well. We feel our judges are professional enough that they can understand the importance of adjudicating cases, while at the same time, maintaining due process in each individual case.

Mr. LABRADOR. So according to tract data, the average number of days that a case is pending before the immigration court is 691. It seems that it is meaningless for ICE to apprehend individuals and place them into removal proceedings if they will then be in limbo for over 2 years before there is final disposition of their case.

What is EOIR doing to reduce this average number of days pending?

Mr. MCHENRY. On data, I think, I don't have it in terms of days, I have it in terms of months, of the average pending non-detained case is approximately 21 months. But we are trying to reduce that. As I mentioned, we're looking at docketing efficiencies, we're looking at instituting specialized dockets to try to consolidate cases, achieve efficiencies of scale. We're also committed to no more dark courtrooms. Whenever we have a judge who is absent, we're going to have, either by VTC or rehired—retired immigration judge, be able to hear those cases in their absence. Together, that should start to bring the average down.

Mr. LABRADOR. Thank you very much.

I now recognize the gentlelady from California, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman. It's good news that we're making progress on the electronic case filing system. So that would be, I think there's unanimous support here for that success.

I do have some concerns, however, about some of the other proposals. I wanted to raise an issue, first, about the—what I understand is disbanding the juvenile court docket in New York City.

It's my understanding that almost the highest amount of pro bono service was provided to children in New York. And I'd like to ask unanimous consent, Mr. Chairman, to enter into the record a letter from Kids in Need of Defense, Safe Passage Project, and The Legal Aid Society of New York, and The Door about the closure of this docket. Can you explain the decision in this case? Or am I incorrect?

This material is available at the Committee or on the Committee repository at: <https://docs.house.gov/meetings/JU/JU01/20171101/106561/HHRG-115-JU01-20171101-SD004.pdf>.

Mr. MCHENRY. My understanding is that occurred in January of this year. I was not at EOIR at the time, so I can't speak to what was the driving force behind it. I do know, as I alluded to a moment ago, we issued a new priorities memo about the same time that limited the types of unaccompanied alien child cases that were considered priorities. So I assume that had something to do with it, but I can't speak to it directly.

Ms. LOFGREN. You know, in immigration removal proceedings, we all know that the government doesn't provide lawyers. And I think it was one Supreme Court decision that described immigration law as close to the complexity of tax law. I think they de-

scribed it as “bugs on the page.” That’s problematic for an adult, but for a child, it’s very challenging. There are children, some as young as 3 or 4, representing themselves in immigration court.

In 2016, Assistant Chief Immigration Judge Jack Weil made the claim that he was able to teach 3- and 4-year-olds to represent themselves in immigration court. Do you believe it’s possible for a 3- or 4-year-old to represent themselves in immigration court?

Mr. MCHENRY. I can’t speak for Judge Weil directly.

Ms. LOFGREN. No, but I asked what you think.

Mr. MCHENRY. But our judges don’t teach the law. That’s not their role. Their role is to adjudicate the case.

Ms. LOFGREN. No, I understand that. But do you think a 3- or 4-year-old has the legal capacity to understand the consequences of their statements, the validity of immigration claims?

Mr. MCHENRY. As the parent of a 4-year old, I can say no.

Ms. LOFGREN. Thank you. I have 2-year-old twin grandsons, so heading towards 4.

Thinking about the need to get representation for these kids—I won’t ask you to comment on my bill—but you’re going to have continuances because judges have an obligation to uphold due process and fairness. And I’m just wondering whether you might be willing to revisit the decision in New York and to take a look about how we could enhance representation of children, not only for fairness to them, but for efficiency in the system?

Mr. MCHENRY. I will look into that.

Ms. LOFGREN. I would like to talk also about the hiring issues. In your testimony, you talk about streamlining the hiring process. And it reminded me of the concern that we had here in 2008 when the Bush administration went on a hiring spree, and the Department of Justice found that Monica Goodling and others violated the Federal law and committed misconduct when they considered political and ideological affiliations when selecting immigration judges, and the EOIR’s hiring process was reformed to prevent that from ever happening again.

Have you changed those standards that were implemented following that hiring scandal to expedite, or are they basically the same and you’re moving through them quicker?

Mr. MCHENRY. The process is very similar. It’s still conducted according to merit systems principles.

The new process, however, has specific deadlines that each component has to meet. That’s one of the things that makes it faster and more streamlined.

Ms. LOFGREN. I’d like to just close with this: We remember when John Ashcroft was Attorney General. And streamlined measures at the Board of Immigration Appeals, which resulted in lack of opinions, which caused a flood of appeals to the Court of Appeals. And I’m concerned—and as a matter of fact, the immigration judges have written to us indicating their concern that these metrics are going to result in the same kind of flood of appeals to the court of Appeals. And that rather than making the process more efficient, the change—and this is a quote from their letter—“will encourage individual and class action litigation creating even more backlogs.”

We certainly do need to have efficiency in the system, but I am concerned, as are the judges, that having these metrics is going to backfire on us.

And I would ask unanimous consent, Mr. Chairman, to place in the record a letter from the—a statement from the National Immigrant Justice Center, letter from 13 immigration groups—and did you put the letter from the judges in the record already?

Mr. LABRADOR. Yes.

Ms. LOFGREN. Okay. Then I will not ask for that.

Mr. LABRADOR. All right.

Ms. LOFGREN. Unanimous consent?

Mr. LABRADOR. Without objection.

This material is available at the Committee or on the Committee repository at: <https://docs.house.gov/meetings/JU/JU01/20171101/106561/HHRG-115-JU01-20171101-SD004.pdf>.

Ms. LOFGREN. Thank you. And I yield back.

Mr. LABRADOR. The chair now recognizes the chairman of the full committee for his statement.

Chairman GOODLATTE. Thank you, Mr. Chairman. I apologize for being late, but I do appreciate your holding this hearing on a very important subject.

The Executive Office for Immigration Review is charged with the administration of the U.S. immigration courts and the Board of Immigration Appeals. As a component of the Department of Justice, EOIR has the task of adjudicating immigration cases, and ultimately interpreting the immigration laws enacted by Congress.

I am pleased that today, we can conduct our critical oversight role and hear more about the future of our immigration court system.

Just as in any other court matter or appeal, the onus is on the trier of fact to ensure that the law is applied correctly, and that justice ultimately prevails.

Over the past several years, this committee has engaged in review, both in an oversight capacity, and in the form of legislative action of the Obama administration's failed immigration policies. The politicization of the immigration courts and the clear bias by former individuals in top administration jobs, have led to a degradation of the courts.

The U.S. immigration courts, and, to a lesser extent, the BIA, are often thought of as a policy mechanism of whatever administration is in office. This was unfortunately illustrated by guidance aimed at ensuring that immigration judges were playing their role in carrying out the Obama DACA initiative.

While politics certainly played a role, mismanagement of the agency and the apparent lack of any meaningful guidance on docket control has resulted in an explosion of pending cases, some with hearing dates more than 5 years from now.

The allocation of resources to so-called priority dockets have left the typical non-detained alien without resolution, but with almost certain ability to receive work authorization in the United States.

Rampant continuances or postponements of both initial and merit hearings have further escalated this backlog, which has reached epic proportions.

As we know, the GAO identified several sources for the backlog. I am eager to hear about EOIR plans to hire additional immigration judges to implement best management practices and to potentially set some metrics for case completion.

Make no mistake, immigration judges must be autonomous and without bias while hearing cases and rendering decisions. But they must also be mindful of all components of the administration of justice.

Needless changes of venue or continuances made in bad faith for the purpose of delay are detrimental to our system and should not be tolerated.

It may turn out that legislative action is the best recourse to ensure that no matter what administration is in charge and what their principles may be, EOIR will have clear statutory parameters under which to function. I look forward to hearing from our witness on that issue.

There is no question that Congress must take action to reform many facets of immigration law in an attempt to ensure national security and streamline the process. But those actions will mean little if EOIR continues to lag behind the rest of the system.

Resource allocation must be prioritized to ensure that detailed judges have full dockets and incoming judges have courtrooms waiting. EOIR plays a vital role within the U.S. immigration system and the time has long past to make necessary reforms.

I'm encouraged by the steps taken in the past 10 months to address some of the issues already raised, and I look forward to hearing more about that.

Mr. McHenry, welcome. Thank you for your work. And I'll start with a question on the extent to which additional immigration judges in courts along the border accelerate removal proceedings, especially for those aliens referred following a positive credible fear determination. What's your opinion on that?

Mr. McHENRY. I haven't seen a specific proposal, and we would have to take into consideration a number of logistical factors, staffing, personnel, things like that. If the idea would be to send them to detention facilities, we would also have to coordinate that with the Department of Homeland Security. So in the absence of a specific proposal, I'm not sure I can give a broad opinion.

Chairman GOODLATTE. The GAO noted that a strategic workforce plan was needed at EOIR in order to better anticipate workforce concerns, including the eventual replacement of immigration judges eligible for retirement.

As 39 percent of immigration judges are currently eligible for retirement, has a workforce plan been created and implemented at the agency?

Mr. McHENRY. We completed the plan, actually, just before I became the Acting Director. And we've set up a staffing committee subsequently that's doing a top-to-bottom review of all positions within immigration courts. So that plan is in motion.

As to the immigration judge retirements, that's been a common issue that we've heard in the past. With the number of actual retirements averages fewer than 10 per year over the past decade. So the number hasn't quite gotten to a critical point.

Even if it were greater, we believe, under the new streamlined hiring plan, we're able to replace those judges within 6 months that wouldn't have a strong negative effect as it has in the past.

Chairman GOODLATTE. Thank you.

Going back to my first question. What would you—I think we all agree that you need more judges. Do you agree with that?

Mr. MCHENRY. Yes.

Chairman GOODLATTE. Okay. So how would you deploy those judges?

Mr. MCHENRY. We would look at a variety of factors. We would look at where the dockets are the most critical, where we have the largest dockets, but we also have to be mindful of space, personnel, logistical issues, things like that. We maintain sort of a running review of different locations around the country. We have cases broken down by Zip Code, by location. But we have to consider all of those factors in making determinations as to where we're going to deploy the next judges.

Chairman GOODLATTE. Thank you.

Thank you, Mr. Chairman.

Mr. LABRADOR. Thank you, Mr. Chair. And the chair will now recognize the gentleman from Michigan, the ranking member of the full committee, Mr. Conyers.

Mr. CONYERS. Thank you very much, Mr. Labrador.

Mr. McHenry, I understand that you're the chief administrator for immigration court system, and that you were recently appointed to this position under the Trump administration.

Now, as you and all of us are aware, President Trump has repeatedly promised to deport all 11 million undocumented immigrants. You're aware of that, I presume?

Mr. MCHENRY. I've heard that reported.

Mr. CONYERS. You've heard it, yeah.

This committee has marked up legislation that would unfortunately implement President Trump's vision for mass deportation. And these plans often involve expediting removal hearing, streamlining immigration court procedures and denying legal representation.

Now, under your watch, do you believe that the immigration court system will implement a mass deportation agenda?

Mr. MCHENRY. Our judges adjudicate immigration cases that are brought to us by the Department of Homeland Security. So I would defer any questions about their enforcement actions to them. I can't speak for that agency.

Our judges adjudicate the cases that are brought in front of them. They adjudicate them in a professional and dedicated manner, based on the facts and the evidence that are before them. And they ensure that due process is met.

Mr. CONYERS. Well, I'm not asking them. I'm asking you what you think about it?

Mr. MCHENRY. About? I'm sorry.

Mr. CONYERS. Well, the plans of the President are such that I want to know if you believe the immigration court system will implement a mass deportation agenda?

Mr. MCHENRY. I can't speak fully, and I'm not entirely sure what mass deportation agenda means in this context.

Mr. CONYERS. Deporting all 11 million undocumented immigrants.

Mr. MCHENRY. Our immigration judges aren't involved in the actual deportation or removal of aliens. They make determinations as to whether an alien or someone is removable in the first instance, and then they make a second determination whether that person is entitled to relief or protection from removal.

Mr. CONYERS. Well, that gets us right back to where we began. That's what they do, is determine removal. That's two steps you mentioned.

Mr. MCHENRY. But they do also determine relief and protection from removal as well.

Mr. CONYERS. Yes. But I'm asking you about President Trump's promise, or threat, to deport all 11 million undocumented immigrants. And all I want to know is that, do you believe that the immigration court system might implement a mass deportation agenda?

Mr. MCHENRY. Again, it's not the role of the immigration courts to implement any particular agenda. They adjudicate the cases that are brought to them by the Department of Homeland Security and issue decisions, either based on removability, or based on protection and relief from removal.

Mr. CONYERS. You don't think they're influenced by President Trump's public position on this question?

Mr. MCHENRY. I have confidence that our judges apply the law in each particular case to the facts and evidence of that case, and they make their best decisions based on the evidence before them.

Mr. CONYERS. Well, do you believe that President Trump's promise or threat has any bearing or influence upon them at all?

Mr. MCHENRY. I can't speak to the mindset of all of our judges. As I said, I do have confidence that they carry out their duties to the best of their abilities, the best of their understanding of the law, based on the facts and the evidence of each case that comes before them.

Mr. CONYERS. Well, do you believe that the policies implemented by the Executive Office for Immigration Review may lead to mass deportation?

Mr. MCHENRY. Our policies are not outcome-determinative, and they are not implemented with any specific outcome in a particular case in mind.

Our policies are essentially outcome-neutral. We're trying to resolve more cases, but we're not trying to reach any particular outcome one way or the other.

Mr. CONYERS. Well, I know, but you mean they may be neutral, but the policies may lead to mass deportation anyway, or they could. Or you may think that they wouldn't. I mean, in other words, I'm not asking you how they operate, but if there was implemented such a—such a policy, would this lead to mass deportation?

Mr. MCHENRY. I'm not sure I understand which policy in particular.

Mr. CONYERS. The policies that I've just mentioned, that President Trump has repeatedly promised to deport 11 million, all 11 million undocumented immigrants.

Mr. MCHENRY. I haven't seen a specific proposal as to how that would impact EOIR.

Mr. CONYERS. Well, I didn't say you did see it——

Mr. LABRADOR. The gentleman's time has expired.

Mr. CONYERS. I ask for consent for one additional minute, sir.

Mr. LABRADOR. Without objection, but I think you've asked him the same question, like, seven different ways and he's answered your question, so I'm not sure what else you want the gentleman to do but——

Mr. CONYERS. So could I get a minute?

Mr. LABRADOR. You can get an additional 30 seconds, yes.

Mr. CONYERS. 30 seconds. Well, thank you very much.

Mr. LABRADOR. It's already 2 minutes over the time.

Mr. CONYERS. Do you, Mr. McHenry, believe that the policies implemented by the Executive Office for Immigration Review will protect the due process rights of immigrants?

Mr. MCHENRY. All the processes, or all of the policies that EOIR has implemented, at least since I've been Acting Director, due process is certainly a significant consideration.

Mr. CONYERS. Is it fair for me to assume that you've said yes?

Mr. MCHENRY. Yes.

Mr. CONYERS. Okay. Last question. In recent Executive Office for Immigration Review announcements, the minimum qualifying experience required to apply has been changed from 7 years of relevant legal experience to 7 years of litigation in government-instituted proceedings.

Can you think of any kinds of legal examples, of any kinds of legal experiences that would qualify as litigation in government-instituted proceedings?

Mr. MCHENRY. With respect, Congressman Conyers, I believe that's a misreading of the advertisement that we sent out. The advertisements, I actually had occasion to look at this, because we got an inquiry to our Public Affairs Office on that very point not too long ago. The advertisement actually says a full 7 years of experience in either litigation or administrative proceedings at the Federal, State, or local level. It doesn't require, and it's not limited to proceedings that were just initiated by the government. That's one example that's given in the advertisement, but it's not the only example.

Mr. LABRADOR. All right. The gentleman's time has expired. Thank you.

Mr. CONYERS. I thank you very much, Mr. Chairman.

Mr. LABRADOR. And I recognize Mr. King, the gentleman from Iowa.

Mr. KING. Thank you, Mr. Chairman. Mr. McHenry, thank you for your testimony.

I'm just listening to the gentleman from Michigan in his discussion about the alleged effort to round up and deport 11 million people. I still haven't heard anyone advocate for that that seems to be for it. I make that point, but I'm also, I'm looking at the overruns here, I'll call it, the 691 days, the average wait for resolution, and 630,000 pending cases, and your intent to hire at least 61 new judges by spring.

And I'm wondering what your opinion would be if we were able to, and in short order, by spring—we won't get it done that soon—but build a 2,000 mile wall, 30 feet high. And if we were able to do that successfully, what would that, how would that impact your caseload over the longer term?

Mr. MCHENRY. Ultimately, I can't answer that. It's—

Mr. KING. I know.

Mr. MCHENRY [continuing]. Speculative and a bit of a hypothetical at this point. Moreover, DHS, the Department of Homeland Security would have primary responsibility for the wall and for border crossers. So a lot of it would depend on their actions and I would have to defer to them.

Mr. KING. But I don't think it takes Department of Homeland Security to answer the question, if we build an impermeable wall all the way down to hell and all the way up to heaven, what would happen to your caseload?

Mr. MCHENRY. Again, I can't speak to that.

Mr. KING. Sure, you can.

Mr. MCHENRY. It's a little too speculative for me to speak to.

Mr. KING. But if you had no one crossing the border—I guess I have to put this in some different terms. If no one crossed the border, yet, all done, then what happens to your caseload?

Mr. MCHENRY. Well, the other factors would have—

Mr. KING. Well, excuse me. I want to rephrase that. If no one can cross the border, now what happens to your caseload?

Mr. MCHENRY. There are other factors we would still have to consider. Some of our caseload is driven by interior cases. Individuals come in—

Mr. KING. Does it go up or does it go down?

Mr. MCHENRY. Again, I can't speak to it—

Mr. KING. Can you, can you—all right. How many judges does it take, then, to deplete this caseload down to a reasonable time?

Mr. MCHENRY. We've run several estimations, and we've asked for additional judges. I think up to a total of 700 is where it really starts to turn around.

Mr. KING. Judges?

Mr. MCHENRY. Yes.

Mr. KING. It's not a surprise to me to hear a number like that. It's actually not very often we get someone that lays out a proposal to get there. And then, how many judges does it take to maintain the current flow?

Ms. LOFGREN. Could the gentleman restate—I didn't hear what you said in terms of the number. I'm sorry, Mr. King.

Mr. KING. I've forgotten.

Ms. LOFGREN. You said the number of judges, and I didn't hear what you said.

Mr. MCHENRY. Yeah, we currently have authorization for 384. The next budget request brings it up to 449. The President has outlined a policy that would add 370. That gets to approximately 700.

Ms. LOFGREN. Thank you.

Mr. KING. Now if I could go back to where I was. And that would be the question of, if you get up to that number that's the number that you said it takes to deplete your caseload down to a reasonable turnover time.

How many judges does it take to maintain it at the current level that cases are coming in the door?

Mr. MCHENRY. I don't know that I have the analytics or the data on that in front of me.

Mr. KING. That's curious. How many judges does it take to get this under control, about how many does it take to maintain it are two separate questions that I would think would answer before you would have the answer to the first question.

Mr. MCHENRY. Well, we're actually, because we're focused on reducing it and bringing it down to a manageable level, we haven't studied sort of maintaining the status quo. That may be part of it.

Mr. KING. I see. And when you're evaluating the applicants, I listened to the gentlelady from California talk about the Monica Goodling case, and I recall her testifying here before this committee in this room. And I would ask the question: Do you, when you evaluate the applicants, do you examine their bios carefully?

Mr. MCHENRY. We look at their resumes. They typically have—

Mr. KING. And that's it?

Mr. MCHENRY. Yeah, they typically have to submit a resume.

Mr. KING. If they don't put it on the resume, then do you go beyond that?

Mr. MCHENRY. I think the last ad required a resume. I know in prior ads, we required law school transcripts. Going back a few years, I think we've also required letters of recommendations but our most—

Mr. KING. What about professional affiliations or NGO affiliations?

Mr. MCHENRY. Those have never been required, to my knowledge.

Mr. KING. Never required. So you could have someone there whose job is to bring about a legitimate adjudication that maybe had a long history with LULAC or MALDEF or La Raza or ACLU or SPLC, and you wouldn't know that?

Mr. MCHENRY. Our immigration judges, I think, represent a wide variety of careers. I mean, we run some numbers on that because it's an issue that comes up. And I think the vast majority of them have worked for many different organizations, entities, and government agencies throughout their careers.

Mr. KING. You know, if I were to request that information in a more precise fashion, would you be able to deliver that?

Mr. MCHENRY. I think all of the biographies of most of them are online currently.

Mr. KING. Then I just, in my concluding question here is, as the attorney advisers, can you tell me how they are chosen?

Mr. MCHENRY. Which—

Mr. KING. Attorney advisers, those that might be chosen to write or give an opinion?

Mr. MCHENRY. Are you talking at the Board of Immigration Appeals level, or at the immigration court level, or at some other agency or some other component of EOIR?

Mr. KING. Why don't you tell me both of them?

Mr. MCHENRY. Our judicial law clerks are typically hired through the honors program every fall. Those go to the immigra-

tion courts. They typically serve for 2 years and then go onto some other career.

Mr. KING. Okay. That's how you choose. But how do the case—how are the cases chosen? Is it a random selection process? How are they assigned?

Mr. MCHENRY. The cases at which level?

Mr. KING. At the board level.

Mr. MCHENRY. There are panels and teams that are assigned. I don't have the specific mechanics in front of me though.

Mr. KING. But you don't either testifying that it's a random selection process?

Mr. MCHENRY. Well, they do—they're required by regulation to have screening panels, so there are panels that look at the cases on the front end to determine if they're subject to summary dismissal or something like that.

Mr. KING. I'll follow up with that in written request. And I thank you, Mr. McHenry. And I yield back the balance of my time.

Mr. LABRADOR. Thank you.

The chair will now recognize Mr. Cicilline for 5 minutes.

Ms. LOFGREN. May I ask unanimous consent to put in the record the letter from the Association of Pro Bono Counsel?

Mr. LABRADOR. Without objection.

This material is available at the Committee or on the Committee repository at: <https://docs.house.gov/meetings/JU/JU01/20171101/106561/HHRG-115-JU01-20171101-SD004.pdf>.

Mr. LABRADOR. The gentleman is now recognized. The chair recognizes Mr. Cicilline.

Mr. CICILLINE. Thank you, Mr. Chairman.

I'm sure, sir, that you are aware that there is tremendous disparity in the asylum grant rates by our immigration judges. As recently as 2006, the Government Accountability Office confirmed this disparity noting that, for example, the grant rate in the New York Immigration Court was 52 percent, while the grant rates at the Omaha, Atlanta, and Bloomington, Minnesota, courts were less than 5 percent.

The GAO additionally found that this disparity persisted, even holding constant various case and judge characteristics. These jurisdictions with grant rates of 2 and 15 percent have earned the name "asylum-free zones," and include Houston, Dallas, Charlotte, Atlanta, and Las Vegas. The asylum denial rate in Atlanta, for example, is 98 percent. Almost no one is granted asylum.

I understand that you were an ICE trial attorney in Atlanta, and some of your colleagues at both DOJ and DHS are also former ICE trial attorneys from Atlanta. There have been reports that the goal of EOIR, and possibly even the goal of DHS, is to replicate the Atlanta model for the rest of the country with the goal of driving down asylum grant rates to minuscule percentages.

Do you think that the Atlanta courts with a 98 percent rate of asylum denial is the model that other immigration courts should be following? And is there any discussion, overtly or implicitly, in suggesting that model be followed?

Mr. MCHENRY. I'm not sure that we have a model, sort of a one-size-fits-all for any of our immigration courts—

Mr. CICILLINE. It's not a one-size-fits-all. My question is, is that model of that rate of denial is something that you, as the leader of the office, are promoting, or there's an active effort to use that as a standard?

Mr. MCHENRY. As I mentioned a moment ago, the policies that we've implemented are not driven by any particular outcomes. They're designed to be outcome-neutral. We're not looking to make one court like any other court. In fact, it would be inappropriate for us to start going into specific cases to tell judges which cases they should deny or which ones they should grant.

Mr. CICILLINE. Well, I mean, you don't think that that rate of 98 percent denial that the Atlanta courts follow ought to be a model followed by other immigration courts?

Mr. MCHENRY. No. As I indicated, we don't believe there's one standard model, whether it's a court that grants a lot of cases or a court that denies a lot of cases. We're not—our role is not to go in and pick and choose which cases should be granted, or which ones should not.

Mr. CICILLINE. No, I recognize you don't pick and choose. I guess my question is, does it concern you—this is a second question—that that kind of disparity exists?

Mr. MCHENRY. We've looked at this, because this concern has been raised before, but it's difficult to compare sort of apples and oranges once you start looking at specific or individual cases. Cases that may look the same on the surface turn out not to be the same down below.

Mr. CICILLINE. Yeah. Well, thank you very much. I mean, it is not so difficult to do—courts do this all the time. They do an analysis of sentencing, and they do an analysis of charging and they are able to control for the different jurisdictions and different judges. There's lots of good ways to do that. So I would urge you to look at this disparity and pay close attention to it, because I think it undermines confidence in the system.

The second thing I want to discuss with you, and I apologize if someone mentioned this while I was out of the room, but this report that we have been hearing, that the Department of Justice plans to use a numeric and time-based completion quotas to evaluate the performance of immigration judges with the idea, I presume, that someone would either be rewarded or disciplined for failing to complete a certain number of cases in a particular period of time.

I take it that you will publicly reject that idea, and that is not the plan to actually use the number of cases and the time it takes as a method of deciding whether or not a judge is doing his or her job?

Mr. MCHENRY. As I mentioned earlier, EOIR already operates under a number of performance metrics. Some of them are set by the Immigration Nationality Act. Others we've developed—

Mr. CICILLINE. Do any of those metrics involve the number of cases you complete and how long it takes you to complete them?

Mr. MCHENRY. Yes. The Immigration Nationality Act, Section 235, requires credible fear reviews to be conducted within 7 days. There's also a time limit for asylum applications in Section 208.

Mr. CICILLINE. Other than requirements by statute of meeting a certain deadline, are there other evaluations of immigration court judges that relate to how quickly or how many cases they resolve?

Mr. MCHENRY. We've developed standards under the Government Performance and Results Act that also looks at similar measures. And, in fact, for detained cases——

Mr. CICILLINE. Similar to what? What do you mean, similar measures?

Mr. MCHENRY. In terms of completing cases, moving cases more efficiently, that sort of thing.

Mr. CICILLINE. So are you telling me, sir, that you currently evaluate, in part, the performance of immigration judges based on the number of cases and the period of time of which it takes them to resolve those cases?

Mr. MCHENRY. It's not part of the individual judge's performance work plan currently, but it is numbers that we do track because we keep that data to make the process better.

Mr. CICILLINE. You intend to make it part of the performance plan of individual judges?

Mr. MCHENRY. That's something I can't get into, but that still requires some additional discussions with the union, so it's not appropriate for me——

Mr. CICILLINE. It's something you're pursuing?

Mr. MCHENRY. It's something that we're looking at again in consultation with the union.

Mr. CICILLINE. So, Mr. Chairman, I would just ask an indulgence for one moment. The National Association of Immigration Judges explains that this sort of effort would be, and I quote, a huge, huge, huge encroachment on judicial independence. It's trying to turn immigration judges into assembly line workers.

And I would ask, again, that you reject publicly the idea that you would use simply the numbers of cases or the amount of time it takes to complete immigration work as a measure of the quality of a judge's work. I think it turns our judicial system and proceedings such as this on their head.

And with that, I yield back.

Mr. LABRADOR. Thank you.

Just a follow-up question, Mr. McHenry. There is a split in the circuits, right, as to asylum law and all these different areas, so wouldn't that yield different results in different areas?

Mr. MCHENRY. Well, there are a number of reasons for the discrepancy in the rates. Not only are there differences in circuits, but many asylum applications are denied for reasons that are unrelated to the merits. An individual may be denied asylum, but granted withholding of removal or some other form because they didn't file for asylum on time, or because there's some criminal ground.

There are a number of explanations for the disparities, but it becomes difficult to sort of get down to that level of granularity without essentially re-deciding each case.

Mr. LABRADOR. All right. Thank you.

I now recognize the gentleman from Arizona.

Mr. BIGGS. Thanks, Mr. Chairman.

Thank you, Mr. McHenry, for being here.

The Trump administration is considering expedited removal procedures to increase those who can be immediately removed from the United States without first appearing before an immigration judge. In the past, this group has included illegal aliens caught within 100 miles of the border, and within 2 weeks of entry.

Reports say that could be expanded nationwide and to aliens who cannot prove they have been in the United States for at least 2 years. Do you think such a policy would be beneficial in eliminating the number of new cases that come before a court?

Mr. MCHENRY. Expedited removal is a policy that's undertaken by the Department of Homeland Security. I'd have to defer to them on any questions about it.

Mr. BIGGS. You don't—you can't make any assessment on whether that might decrease, because the number of people that would be in that pool that would normally come before a court—you don't know—you can't assess whether that would actually decrease your—

Mr. MCHENRY. It would be speculative for me to say, because there are a number of exceptions to expedited removal that are already enshrined in the statute. And we'd have to take into account all of those before giving any sort of impact on our caseload.

Mr. BIGGS. You said in your opening statement that—and I'm going to give a rough quote, because I was trying to get it while you were saying it—that you were concerned that the new influx doesn't overwhelm our capabilities. And I wondered what you meant by that, and if you would expand on that, please?

Mr. MCHENRY. I don't want to speak for the Department of Homeland Security, but my understanding is they have their own adjudicatory backlog concerns, so we have to make sure that we don't get swamped by any sudden influx of new cases that they bring to us.

Mr. BIGGS. Okay. And you talked about fraud in your opening statement and in your—and in your summary—or excuse me, in your document that you provided to us. Please tell me a little more about fraud, and more specifically, how you are dealing with fraud?

And with the amount of backlog that you have, I am interested in the number of fraud complaints being below—looks like it's below 200. Explain to me what that—how that impinges on the backlog?

Mr. MCHENRY. Well, we've—the Fraud and Abuse Prevention program was set up in the mid-2000s. And we've sort of tried to revitalize it or reinvigorate it in the past few months. The number of referrals that are coming in from the field has gone up, I think, over 100 percent.

I also issued a memo earlier this year to remind all the employees, all of our employees, including immigration judges, that they do have a duty and a responsibility to report fraud misrepresentations where they see them. So we are starting to see an increase. Some of those are still in investigations, so I can't really speak to them directly. But it looks like we're trying to ensure that our employees are focused on that.

In terms of the backlog, obviously, any misrepresentations undermine the integrity of the system. They cause cases to have to be

delayed to investigate allegations, things like that. The more that we can root out fraud, the more efficient our system is going to be.

Mr. BIGGS. And I get the impression that you're not satisfied with a very—basically a fraction of a point of fraud detection and apprehension?

Mr. MCHENRY. I wouldn't say that we have a specific target in mind, but we do know anecdotally there are a number of instances that are out there, a number of instances have been reported in the past few years. So we are marshaling all of our efforts to make sure we can root it out as much as possible throughout our proceedings.

Mr. BIGGS. So after an order of final removal is issued, what's the process for removal?

Mr. MCHENRY. I would defer that to the Department of Homeland Security. They're responsible for actually executing the order of removal.

Mr. BIGGS. And so you would not know how many individuals are currently present in the U.S. without a final order—or excuse me, with a final order for removal?

Mr. MCHENRY. I would not.

Mr. BIGGS. Okay. What penalty occurs for those who commit fraud in the system?

Mr. MCHENRY. It would depend on the nature of the fraud. I mean, it could be anything from a criminal penalty to a sanction to the denial of an application, to a permanent ineligibility for most benefits.

Mr. BIGGS. And in the criminal—in the field of criminal law, everybody has a certain period of time before they—their case has to actually be adjudicated and completed.

So, for instance, if you're in custody, it may be 90 days; if you've been in custody but you've been released, it's 120; and if you've never been in custody, maybe 150 days, depending on the State and the rules that govern.

What's the rule for immigration cases? Do you have any deadline for somebody who has to make an appearance and actually adjudicate the case?

Mr. MCHENRY. For a typical removal case, there's nothing like the Speedy Trial Act or something like that.

Mr. BIGGS. Thanks, Mr. Chairman.

Mr. JOHNSON [presiding]. The gentleman yields back.

The chair recognizes Ms. Jackson Lee from Texas for 5 minutes.

Ms. JACKSON LEE. Let me thank the witness and thank the chairman and the ranking member. This is an important hearing.

But I think, as some of my colleagues know, periodically, I've taken just a moment—and I guess it will be just a brief moment—to reassert, even as we discuss these vital issues, that in light of the indictments on Monday, October 30, we are not really focusing on the institutions that are important to stabilizing our government.

So I hope that I will place on the record the concern that many of us have that we've not begun to look at the questions of obstruction of justice, collusion in the 2016 election with Russia, and, frankly, the beginning of the Mueller special counsel work is not ending, but it is beginning, and to ensure that we discuss any pro-

hibition or any stopping of the administration attempting to fire Director Mueller.

So I wanted to place that on the record even as we questioned the witness. And, Mr. McHenry, thank you so very much for your presence here today.

I introduced legislation dealing with the need for immigration judges, and continuing to do so. At that time, I asked for 75 new judges. Did I hear you correctly that you are seeking to—or I think they're not immigration judges, you're looking to do sort of attorney advisers for 61? What was the 61 number that you were trying to do?

Mr. MCHENRY. We have 19 immigration judges currently in the hiring pipeline, and we've had three advertisements since July for up to 42 additional positions that we're in the process of also filling. So we expect or anticipate getting 61 additional immigration judges on board by the spring of next year.

Ms. JACKSON LEE. So we are speaking of judges?

Mr. MCHENRY. Yes.

Ms. JACKSON LEE. Permanent immigration judges?

Mr. MCHENRY. Yes.

Ms. JACKSON LEE. And so my number 75 was not unrealistic. I would encourage you to raise that number and the administration to raise that number.

Now, we have a different perspective on how—what we perceive this court to do. Do you seek judges who adhere to due process and the recognition that immigrants have a right to present their case fully?

Mr. MCHENRY. We expect all judges that we hire, after we train them, that they will respect the due process rights and apply the law as they see fit to the case and facts before them. We advertise and we hire from a wide range or wide variety of backgrounds when we select immigration judges.

Ms. JACKSON LEE. Well, you were asked by a colleague of mine whether or not you distinguish, or you weed out, individuals who may have differing legal backgrounds, whether they were on the defense side of the immigrant bar, whether they were individuals from the ACLU or various other advocacy groups. Do you do that? Do you weed them out?

Mr. MCHENRY. No, ma'am, we do not. We—all of our hiring is conducted according to merit systems principles. We don't require any information regarding any organizations or anything like that that individuals belong to. We evaluate them based on the resume, interviews, writing samples, things like that.

Ms. JACKSON LEE. And, Mr. McHenry, this is not a personal offense. Can I take you at your word? Because obviously, we come from different sides of the aisle and may have a different perspective. But I think your answer is more than a credible answer.

I know that you're a member of the bar, so am I, and not the drinking bar. And I hope that you would really be saying to me what is fact and truth and how you will implement that process. Is that—am I to understand that?

Mr. MCHENRY. Again, all—

Ms. JACKSON LEE. Is that your accurate and true representation of what occurs and will occur?

Mr. MCHENRY. All of our hiring is conducted according to merit systems principles, so we don't consider things like race, religion, political opinion, things like that.

Ms. JACKSON LEE. And, therefore, you do not attempt to exclude because of race, religion, or other aspects?

Mr. MCHENRY. No, we don't screen out any particular candidates one way or the other.

Ms. JACKSON LEE. Let me raise this question with you, if I might. And I want to read this story. I know that we went down this line of questioning before, but I think this is important.

The former majority leader, Senator Reid, often talked about an experience that he had in immigration court. Some of us had this experience where we saw the unaccompanied children. I was actually at the border with my colleague, Congresswoman Lofgren, and we saw children who were fleeing persecution.

But in this instance, the child was 5 years old, clutching a doll as she appeared before the judge. She was barely tall enough to see over the microphone. The judge asked her a series of questions to which she had no response.

Finally, after several non-responses, the judge asked her the name of her doll. She responded, Baby Baby Doll. That concluded the hearing. Baby Baby Doll. So do you think in the hiring of judges that that would be an effective way to run a courtroom of the judges that you might be hiring?

Mr. MCHENRY. I can't speak to that specific example. I'm not familiar with that case or that incident. But I do know that our judges, once they are hired, they receive—they undergo a rigorous training program that includes training on handling different types of cases, including juveniles, unaccompanied alien children, things like that.

Ms. JACKSON LEE. Well, that's a 5-year-old. And do you believe that in that instance, putting aside the very fine way in which you're going to be hiring judges, if you were in the back of the room, would that be an appropriate way—we haven't called the judge's name so we're not going to be citing who the judge was. But the point is, would that be an appropriate way for a 5-year-old to be handled in a proceeding?

Mr. MCHENRY. As I said, I can't comment on the specifics of that because I don't know the context or the background or any other factors. As I said, I do know our judges are trained to handle these types of cases.

Ms. JACKSON LEE. But common sense would say, if you just—not on the facts, and that's an answer that we as lawyers give—common sense, if you just were in the back of the room and that was the end of the case, would you argue that that child needed at least representation or better understanding of what was going on?

Mr. MCHENRY. Well, the issue of children and representation is in litigation, I can't comment on that specifically. As I said, in that particular case, I'm not familiar enough with the example. I would need to know more about the context and the facts.

Ms. JACKSON LEE. Just one more point on that. Would you think that this approach that may be being proposed by the administration of quotas, meaning that judges have a cycle of which they have

to meet, and meet certain numbers of processing cases, would that be effective if a child was in the courtroom?

Mr. MCHENRY. I'm not sure I understand the question.

Ms. JACKSON LEE. If the judge has to run through his or her cases, and a child happens to come before it as a petitioner in the courtroom unrepresented, so I'm not obviously—or represented, is that quota still going where you have to run through these cases or allowing a child to understand what was happening in the courtroom?

It takes a little bit more time, doesn't it? Under this quota system, is the judge going to be allowed to take the time necessary to give a fair hearing to an immigrant or defense, or petitioner's position?

Mr. MCHENRY. I have confidence that our judges can efficiently and effectively move cases and dispose of those cases while maintaining due process in individual cases, yes.

Mr. JOHNSON. The gentlelady's time has expired.

Ms. JACKSON LEE. That is an adherence that you—that's a commitment that you're making based on your testimony?

Mr. MCHENRY. I believe our judges are professional enough to be able to expeditiously adjudicate cases in conjunction with the mission of EOIR while maintaining due process.

Ms. JACKSON LEE. We will be watching. Thank you very much.

Mr. CONYERS. Mr. Chairman, may I have unanimous consent to enter into the record two documents that, one, "Donald Trump Promises Deportation Force to Remove 11 Million People"; and the second, "President Trump's Immigration Policy Takes Shape" prioritizing almost all undocumented immigrants for deportation?

Mr. JOHNSON. Without objection.

This material is available at the Committee or on the Committee repository at: <http://docs.house.gov/meetings/JU/JU01/20171101/106561/HHRG-115-JU01-20171101-SD002.pdf>.

Mr. CONYERS. Thank you, sir.

Ms. JACKSON LEE. Mr. Chairman—

Mr. JOHNSON. Yes.

Ms. JACKSON LEE [continuing]. I want to put a question on the record for answer in writing, please.

Mr. JOHNSON. Without objection.

Ms. JACKSON LEE. The question is, and I'll just—it's just very brief, the media is reporting that the Department of Justice—and I used this previously, but this is the specific question—the Department of Justice plans to use numeric and time-based case completion quotas to evaluate immigration judge performance, and that's obviously for compensation or to maintain that judge.

And so I'd like our Director to answer the question, whether that is accurate and whether that will mean that judges will be dismissed or disciplined because they take extra time to hear the cases of those who need extra time, whether it's a child, whether it's an elderly, whether it's a disabled, or any kind of petitioner before the court.

I'd like to know how that matches with your recommendation—not your recommendation, but your agency's work juxtaposed with the Department of Justice's representation about quotas and numeric time-based completion of their work?

Mr. JOHNSON. Thank you. Mr. McHenry, you can answer that in writing at a later time.

The gentlelady yields back. And the chair will yield myself the remaining time of the hearing here.

Mr. MCHENRY, there's been some discussion back and forth about handling of minors' cases, juvenile cases. There is, in fact, a set of rules and procedures that would apply to those types of cases, correct?

Mr. MCHENRY. Well, we have—I mean, they are both—depending on the exact facts of the particular case, there's both law and regulations that would govern it. We also have an operating policies and procedures memorandum that details—gives additional guidance to the judges on how to handle juvenile cases.

Mr. JOHNSON. Thank you.

As a result of the fraud and abuse prevention program that you've discussed today, do you anticipate, with regard to asylum cases, that we'll see a further decline in asylum grant rates as a result of these efforts?

Mr. MCHENRY. Again, I can't speculate because each asylum case is determined based on the evidence and the facts before it, so I can't speculate to what the future rates will hold.

Mr. JOHNSON. There was a recent report issued by the Government Accountability Office that found that EOIR failed on numerous procedures across the agency to adequately prevent asylum for all in the adjudication process. We've talked a lot about that today. And they recommended regular fraud risk assessments across the asylum claims in the courts.

You may have referenced this already this morning, but many of us had to come in and out. Have you consulted the GAO's specific representations that they issued in that report?

Mr. MCHENRY. I have. My understanding is my general counsel's office, they've completed one of the first risk assessments and we're still reviewing the results of that.

Mr. JOHNSON. So none of that has been implemented yet, is that—you're in the process of implementing risk assessments. Is that right?

Mr. MCHENRY. My understanding is it has been conducted, at least the initial one, but we're still reviewing the results of what came back.

Mr. JOHNSON. Could you get to us later a quick summary of what you find with that? I'm sure a lot of us would be interested in it.

This is—personally, you were a former judge. And do you agree that judges face greater difficulties in assessing an individual's statements being true or not when they're not recorded electronically? Isn't that—wouldn't that be of benefit to the judges to have electronically recorded statements?

Mr. MCHENRY. Speaking as a judge, every judge I know wants as much evidence as they can possibly get.

Mr. JOHNSON. And it is easier to determine, is it not, whether someone is being consistent in their statements if you have an electronic recording of what they've said prior?

Mr. MCHENRY. I think that's typically correct, yes.

Mr. JOHNSON. And you've testified earlier that those efforts are underway, that you're—I think the words you said—ramping up, or

someone said ramping up the technology in what you're able to do in these proceedings?

Mr. MCHENRY. In terms of our electronic filing and our electronic case adjudication, yes.

Mr. JOHNSON. Does that also extend to the recording of statements? Is that something you're working on?

Mr. MCHENRY. That's something that DHS would handle. We don't—we record our hearings, of course, but individual statements or anything that occurs outside of the hearing, I'd have to defer to DHS for that.

Mr. JOHNSON. Okay. Well, there's no further questions, and we want to thank you for attending today. This concludes the hearing.

Without objection, all members have 5 legislative days to submit additional written questions for the witness, or additional materials for the record.

With nothing further, the hearing is adjourned.

Mr. MCHENRY. Thank you.

Mr. JOHNSON. Thank you.

[Whereupon, at 3:33 p.m., the subcommittee was adjourned.]

