



Measuring *In Absentia* Removal in Immigration Court

By Ingrid Eagly, Esq. and Steven Shafer, Esq.

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ABOUT THE AUTHORS

Ingrid Eagly is a Professor of Law at the UCLA School of Law. An expert on immigration law, Eagly is an affiliated faculty member of the UCLA Center for the Study of International Migration. She earned an A.B. from Princeton University and a J.D. from Harvard Law School.

Steven Shafer is a managing attorney at the Esperanza Immigrant Rights Project in Los Angeles. Before pursuing law, Shafer spent a decade as a social scientist at Princeton University and the Harvard Business School. Shafer earned a B.A. from Yale University, a M.A. in sociology from Princeton University, and a J.D. from UCLA School of Law.

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Executive Summary

Do immigrants attend their immigration court hearings? This question is central to current debates about the immigration court system. Contrary to claims by the government that most immigrants fail to appear in immigration court, our analysis of data provided by the federal government reveals that 83% of all nondetained immigrants with completed or pending removal cases from Fiscal Years (FY) 2008 through 2018 attended all of their court hearings. Among those who were represented by counsel during the same time period, 96% attended all of their court hearings. Moreover, we reveal that 15% of those who were ordered deported because they didn't appear in court successfully reopened their cases and had their removal orders rescinded. This crucial finding suggests that many individuals who fail to appear in court wanted to attend their hearings but never received notice or faced hardship in getting to court.

Key Findings

- 83% of nondetained immigrants with completed or pending removal cases attended all their hearings from 2008 to 2018.
- 96% of nondetained immigrants represented by a lawyer attended all of their hearings from 2008 to 2018.
- 15% of all removal orders for failure to appear issued from 2008 to 2018 were successfully overturned. In some years, as many as 20% of all orders of removal for missing court were later overturned.
- Individuals who applied for relief from removal have especially high rates of appearance.
- Appearance rates varied strongly based on the immigration court's location.
- The Executive Office for Immigration Review's method for measuring the rate at which immigrants fail to appear in court presents a limited picture of the frequency of missed court appearances.

This report presents these and other key findings from a recent study of the rate at which immigrants appear for hearings in U.S. immigration court.¹ The findings stand in marked contrast to the bold and inconsistent claims made by former President Donald Trump and members of his administration about purportedly dismal court appearance rates. Indeed, former President Trump repeatedly shared misinformation that noncitizens never or rarely appear in court.² Policymakers have relied on these assertions about purported failures to appear to drive key decisions, including to expand reliance on immigration detention³ and to reduce access to asylum.⁴ Appearance rates have also been pivotal to the debate about building a border wall, which the Trump administration sought to justify by claiming that those who cross the southern border simply “vanish” into the country and never come to court.⁵

This report provides accurate information, based on independent analysis of government data, of the rate at which immigrants attend court. It sheds light on the concerted effort made by immigrants to comply with the law so as to increase transparency to policymakers and the public. The report provides a detailed analysis of the frequency of *in absentia* orders and discusses the important relationship between appearance rates and representation by counsel, applications for relief, and court location. Taken together, this data-driven report lays bare the lie that noncitizens never appear in court. It also serves as a necessary guide for the newly elected administration of President Joe Biden, which has the opportunity to take a fresh look at immigration policy and implement the data-driven policy recommendations discussed in the report’s conclusion.

About the Data

This report analyzes the government’s own court records in immigration cases. Using the Freedom of Information Act (FOIA), these court records were obtained from the Executive Office for Immigration Review (EOIR), the division of the Department of Justice (DOJ) that conducts immigration court proceedings. EOIR periodically updates these data, and we analyzed data tables made available by EOIR as of November 2, 2018. These data included 8,253,223 immigration court proceedings, with completed and pending cases dating back to 1951.

To conduct the analysis, we limited our data to 2,797,437 nondetained removal proceedings from the period between fiscal years 2008 and 2018. These proceedings included both individuals who were never detained and those who were released from detention. Each of these immigration court proceedings contained one or more hearings.

For more information regarding the data and methodology used in this analysis, see Ingrid Eagly and Steven Shafer, “Measuring *In Absentia* Removal in Immigration Court,” *University of Pennsylvania Law Review* 168, no. 4 (2020): 817-876.

Introduction

Throughout much of the 20th century, immigrants that the United States sought to deport were required to present themselves to “Special Inquiry Officers” for the former Immigration and Naturalization Service (INS), who in 1973 were authorized to wear judicial robes and use the title of “immigration judge.”⁶ At those hearings, immigration judges would choose whether to issue a deportation order. In 1983, immigration judges became part of the Department of Justice (DOJ) and housed within a new agency, the Executive Office for Immigration Review (EOIR).⁷

Prior to 1990, immigration judges had discretion over how to handle missed court appearances. For example, they could hold a hearing and dismiss, continue, or administratively close the case.⁸ In 1990 the law was amended to require immigration judges to order a noncitizen who missed even one court hearing deported.⁹ This type of deportation without the individual being present in court is called *in absentia* removal,¹⁰ based on the Latin phrase meaning “in the absence of.”¹¹

Today, immigration judges must order removal *in absentia* if the noncitizen is not in court at the scheduled hearing, provided the government can first establish by “clear, unequivocal, and convincing evidence” that the noncitizen is subject to removal and that written notice of the hearing was provided.¹² Those subject to *in absentia* removal are generally barred from seeking admission to the United States or relief from removal for a period of years.¹³

Since the 1990 law took effect, U.S. government officials have routinely relied on a purported rise in the prevalence of *in absentia* removal orders to support major policy shifts to the immigration system and buttress legal arguments defending those changes. For example, in 1995 Congress relied on government-produced statistics showing a “high rate of no-shows for those criminal aliens released on bond” to change the immigration law to require noncitizens with certain convictions be mandatorily detained pending deportation without access to a bond hearing.¹⁴ In 2002, the solicitor general cited those same government *in absentia* statistics as persuasive authority in defending against a challenge to the constitutionality of mandatory detention.¹⁵ The U.S. Supreme Court later relied on the government’s statistical claims to uphold the constitutionality of mandatory detention for immigrants with criminal convictions as reasonable to prevent “an unacceptable rate of flight.”¹⁶

More recently, DOJ officials have repeatedly told the public that many asylum seekers “simply disappear and never show up at their immigration hearings,”¹⁷ thus justifying tighter restrictions on the asylum law and even criminal prosecution of asylum seekers to prevent the court system from being “gamed.”¹⁸ Claims about failures to appear have also been relied upon by the Department of Homeland Security (DHS) to justify the so-called Migrant Protection Protocols (MPP) program that requires migrants to remain in Mexico to await their immigration court hearings.¹⁹ The Department of Health and Human Services and DHS have also prominently relied on purportedly high *in absentia* rates to argue in favor of radically restructuring the established system that protects children against long-term detention.²⁰

Summary entry of a removal order when someone does not appear for a hearing—without the opportunity for the individual to respond and without regard to the merits of the individual’s eligibility for relief—has been controversial and raises serious due process concerns.²¹ The practice also differs markedly from the criminal system, where failure to appear at trial is generally treated with issuance of an arrest warrant,²² not adjudication of the criminal charges without the defendant present in court. For example, pursuant to Federal Rule of Criminal Procedure 43, a defendant’s presence in court is required to begin a trial and cannot be waived.²³ This is very different from the immigration court system, where there is no requirement that a noncitizen be present before concluding the hearing with the entry of a removal order.²⁴

Although much is at stake, government officials offer no verifiable empirical support for their claims that migrants “never” or rarely come to court. Therefore, scholars, members of the press, and other experts have turned to the annual report published by the statistical division of EOIR.²⁵ The EOIR’s annual statistics yearbook has typically included a measurement of the *in absentia* removal rate but has offered only a sparse description of the method used to reach their measurement.²⁶ This report offers an independent analysis of EOIR’s method for calculating *in absentia* removal and discusses the policy implications of these findings.²⁷

The Overwhelming Majority of Immigrants Appear for Their Immigration Court Hearings

This report relies on the government’s own court data to provide reliable measurements of *in absentia* removal orders. Specifically, to calculate the rate at which immigrants have been ordered removed for failing to appear in court, we analyzed data released by EOIR, the agency within DOJ that contains the immigration courts.²⁸ Because almost all *in absentia* orders take place in nondetained cases, we limited our analysis to those cases where the immigrant was never detained by ICE or had been detained and then released. In total, we analyzed 2,797,437 nondetained removal proceedings from the period between fiscal years 2008 and 2018.

We examined these data using three different analytical methods for calculating *in absentia* removal.

First, we replicated the method of calculating the *in absentia* rate generally used by EOIR in its annual statistics reports, which divides the number of *in absentia* removals issued at the initial case completion stage of a case²⁹ by the total number of initial immigration judge decisions issued during the fiscal year.³⁰ Initial immigration judge decisions are the first on-the-merits decisions by the immigration judge to order removal, grant relief, or terminate the case. This report refers to EOIR’s approach to measuring the *in absentia* rate as the “IJ decisions” method.

Second, we analyzed the rate at which immigrants were ordered removed for failure to appear among all cases which reached an initial case completion of any kind, including both initial immigration judge decisions and other immigration judge completions, such as administrative closures. Administrative closure is a discretionary docket-management

tool that immigration judges have used for decades.³¹ Through this practice, a judge removes a case from the active docket, thereby putting the case on indefinite hold and allowing the noncitizen to remain in the United States.³² We call this the “all completions” method.

Third, we analyzed the rate at which immigrants were ordered removed for failure to appear as a percentage of both all initial case completions (including initial immigration judge decisions and other immigration judge completions) and pending cases. Pending cases are not yet resolved and have ongoing hearings to rule on motions and applications for relief. Pending cases ballooned from 156,714 in 2008 to 707,147 in 2018. This report calls this approach that includes pending cases the “all matters” method.

Table 1: *In Absentia* Removal Rate (Initial Case Completions), by Method (Nondetained Only)

Fiscal Year	IJ Decisions		Other		<i>In Absentia</i> Removal Rate (Among . . .)		
	<i>In Absentia</i>	Not <i>In Absentia</i>	Other IJ Completions	Pending	IJ Decisions	All Completions	All Matters
2008	24,882	60,337	8,020	144,996	29%	27%	8%
2009	22,071	57,640	6,803	178,156	28%	26%	6%
2010	23,852	64,357	7,883	212,053	27%	25%	6%
2011	21,739	65,417	5,235	246,153	25%	24%	5%
2012	18,990	60,344	14,994	275,132	24%	20%	4%
2013	20,940	56,727	27,243	303,015	27%	20%	4%
2014	25,587	46,655	29,845	372,884	35%	25%	5%
2015	37,994	45,467	41,003	393,651	46%	31%	6%
2016	33,896	47,579	47,071	443,658	42%	26%	5%
2017	41,374	45,684	28,055	559,855	48%	36%	5%
2018	44,764	63,975	9,046	673,580	41%	38%	5%
Summary Statistics							
Total	316,089	614,182	225,198	673,580	34%	27%	17%
Average	28,735	55,835	20,473	345,739	34%	27%	5%
(SD)	(9,092)	(7,990)	(14,877)	(163,990)	(8%)	(6%)	(1%)

Source: Authors' analysis of Executive Office for Immigration Review data, FY 2008–2018

Table 1 provides the findings from this analysis. Each of these three methods yielded a different *in absentia* rate for nondetained immigrants during the period from 2008 to 2018.

- First, using the government’s IJ decisions method, the *in absentia* rate was 34%.
- Second, using the all completions method, the *in absentia* rate was 27%.
- Third, using the all matters method, the *in absentia* rate was 17%.

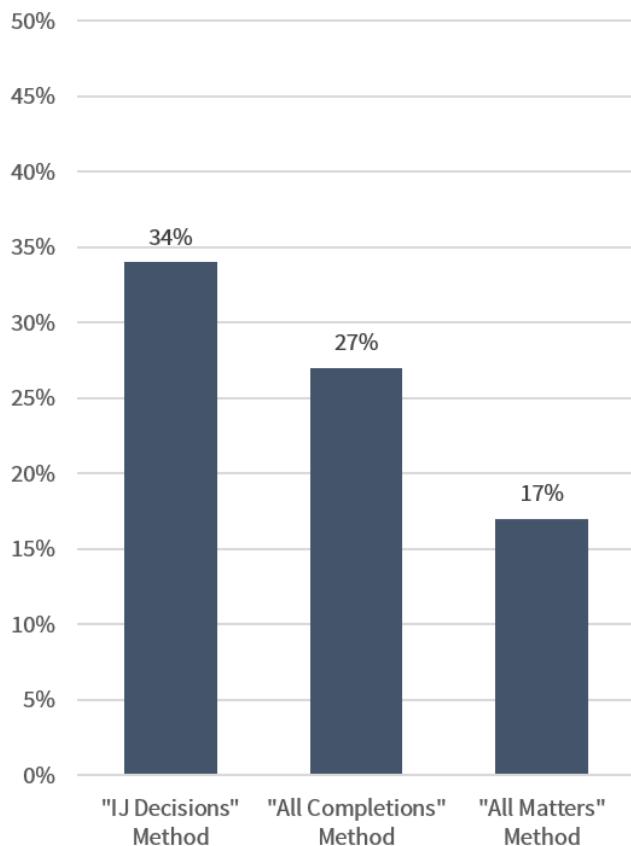
When the same data were analyzed using the government’s IJ decisions method, nondetained immigrants appear to miss court much more often. The government measurement is twice as high as the all matters approach—34% of the time compared to just 17% of the time. That means that under the all matters approach, immigrants have appeared for all scheduled hearings in 83% of all pending and completed cases over an 11-year period.

Of the three methods, the all matters method is the most reliable measurement of the rate at which immigrants appear in court. First, unlike the government’s IJ decisions method, the all matters method includes all judicial decisions, including decisions to administratively close a case, in its analysis. Because administrative closure reached a rate as high as one-fourth of all initial case completions from 2008–2018, the failure to include such closures makes the government method significantly less inclusive of what is happening in immigration court.

Second, unlike the government’s IJ decisions method, the all matters method includes pending cases. If immigration cases were quickly decided on their merits, excluding pending cases when measuring the *in absentia* removal rate—as EOIR does—might make sense. But given the immense and growing backlog in the immigration courts,³³ cases can drag on for many years before a decision is reached. During this time, immigrants who diligently are attending all of their court hearings should not be excluded from calculations of appearance rates.

Because the government’s IJ decisions method excludes pending cases, it does not account for the hundreds of thousands of cases each year in which immigrants appear for a hearing while their case wends its way through the lengthy court process. Given the flaws with the government’s IJ decisions method, and its tendency to overstate the rate at which immigrants fail to appear in court, we recommend against the method’s use whenever possible.

Figure 1: *In Absentia* Removal Rate, by Calculation Method (Nondetained Only)



Source: Authors' analysis of Executive Office for Immigration Review data, FY 2008–2018

The Majority of Immigrants Came to Court if Given a Second Chance

The immigration court compliance rates discussed above reveal that the vast majority of immigrants have attended their court hearings. For those who do miss their hearings, a crucial question is whether they were made aware of their court date and time in accordance with due process. Indeed, court appearance rates must be considered against the backdrop of a pervasive failure of DHS to include the time and date of hearings in the charging documents given to individuals in removal proceedings. In a 2018 oral argument before the U.S. Supreme Court, counsel for the government admitted that “almost 100%” of notices to appear issued over the previous three years had omitted the time and date of the court proceeding.³⁴ These pervasive defects in notice are part of the reason why noncitizens do not appear in court. This reality has made it hard for individuals—particularly if they do not speak English, are unfamiliar with the court system, or do not have lawyers—to figure out when and where to go to court.

To address these notice deficits, we evaluated how often immigration judges identified failures to appear that occurred because of notice issues.³⁵ Looking at the cases of individuals who were never detained, we found that immigration judges adjourned fewer than 1% of initial hearings due to potential notice issues.³⁶ However, when judges did adjourn these missed hearings due to notice issues, we found that 54% of these individuals appeared in court at the next hearing.³⁷

This is an essential data point. First, it reveals that, although notice issues were prevalent during the time period of this study and the government has the burden to prove proper service of notice, notice issues were rarely identified or challenged by immigration judges.³⁸ Second, it demonstrates that when immigration judges did pay attention to notice issues, the majority of noncitizens made it to court after the notice issue was addressed.

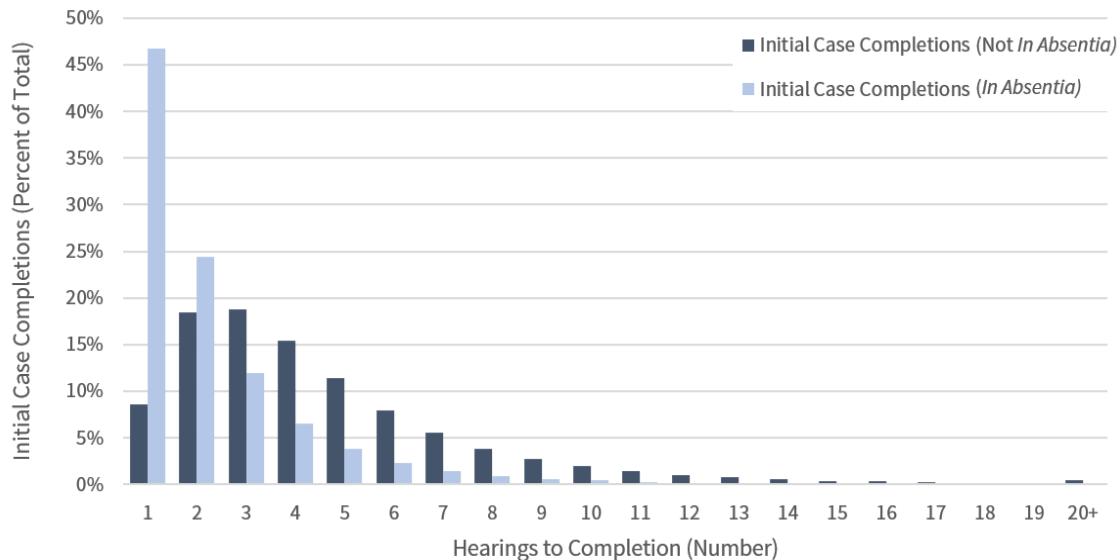
Immigrants Were More Likely to Miss Court in the Early Stages of the Removal Process

Each immigration proceeding contains one or more hearings. The first hearings in a case are generally referred to as “initial master” hearings (also commonly known as “master calendar” hearings), which are scheduled to allow for general administration of the case, including the taking of pleadings, requests for time to find an attorney or time to prepare a case, and the filing of applications for relief. Some cases proceed on to an “individual” hearing (also commonly known as “merits” hearing) in which the immigration judge adjudicates the substance of the claim for relief, such as asylum or cancellation of removal.

As seen in Figure 2, 47% of *in absentia* removal orders occurred at the very first hearing in the case. The pattern was very different among initial case completions that did not result in an *in absentia* order. Less than 9% of non-*in absentia* decisions were completed at the first hearing. These patterns, along with the other data reported above, suggest that some immigrants who fail to appear at their first hearing may not have received notice about the court proceeding.

Figure 2 also reveals that once individuals have begun the court process, they were more likely to appear in court. In other words, the more an immigrant becomes invested in the court process through awareness of how the system works and familiarity with the procedural requirements, the less likely the person is to fail to appear.

Figure 2: Number of Hearings Before Initial Case Completion, by Decision Type (Nondetained Only)³⁹



Source: Authors' analysis of Executive Office for Immigration Review data, FY 2008–2018

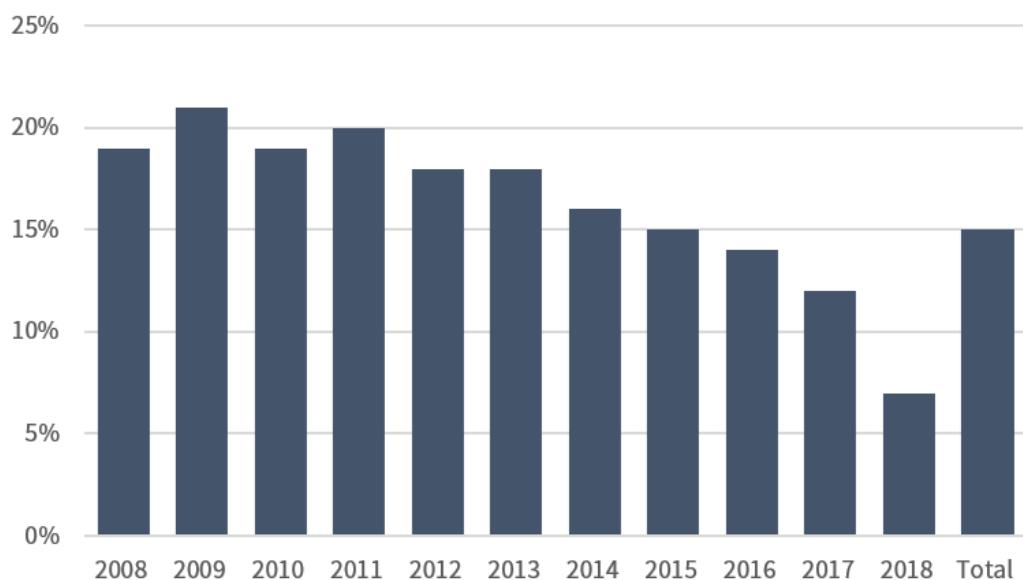
A Significant Portion of Immigrants Ordered Removed for Missing Court Later Overturned That Order

Immigrants may overturn a removal order for failure to appear in court in two specific circumstances, both of which require the immigrant to prove they did not intentionally or negligently fail to appear:

- When a motion to reopen is filed within 180 days of the order of removal, demonstrating that “exceptional circumstances” prevented the immigrant from appearing in court and led to the failure to appear.
- When the immigrant can prove that they never received notice of the scheduled hearing.⁴⁰

We relied on the EOIR data to examine what happened after the initial *in absentia* order was entered. From 2008 to 2018, nearly 20% of all *in absentia* removal orders were challenged through a motion to reopen.⁴¹ These motions were overwhelmingly successful, and fully 15% of those who were ordered removed *in absentia* during that period successfully reopened their cases and had their deportation orders rescinded (see Figure 3 & Table 2).⁴² This crucial finding suggests that many individuals who failed to appear in court wanted to attend their hearings but never received notice or faced hardship in getting to court.

Figure 3: Rate at Which *In Absentia* Orders Are Overturned, by Fiscal Year Order of Removal Order Entered (Nondetained Only)



Source: Authors' analysis of Executive Office for Immigration Review data, 2008–2018

Table 2: Reopening of *In Absentia* Removal Orders, by Fiscal Year (Nondetained Only)

Fiscal Year	<i>In Absentia</i> Removal at Initial Completion	Successful Motion to Reopen	Reopened (Percent)
2008	24,882	4,716	19%
2009	22,071	4,560	21%
2010	23,852	4,651	19%
2011	21,739	4,331	20%
2012	18,990	3,464	18%
2013	20,940	3,799	18%
2014	25,587	4,188	16%
2015	37,994	5,558	15%
2016	33,896	4,589	14%
2017	41,374	4,812	12%
2018	44,764	3,284	7%
<i>Total</i>	316,089	47,952	15%

Source: Authors' analysis of Executive Office for Immigration Review data, FY 2008–2018

In reviewing Figure 3, note how older cases had a higher rate of reopening than newer cases. For cases that received an *in absentia* order in 2008, 19% were reopened by the end of our study period. In contrast, only 7% of *in absentia* orders entered in 2018 had been reopened at the end of 2018. This outcome makes sense given that many individuals with *in absentia* orders may not yet be aware that they were ordered removed and need time to make a motion to reopen in immigration court. Given the legal complexity of such a motion, individuals may also need time to find and retain counsel. Over time, therefore, we can expect the percentage of *in absentia* cases that are reopened to rise.⁴³

Higher Rates of Appearance in Court Were Associated with Having a Lawyer, Applying for Relief from Removal, and Court Location

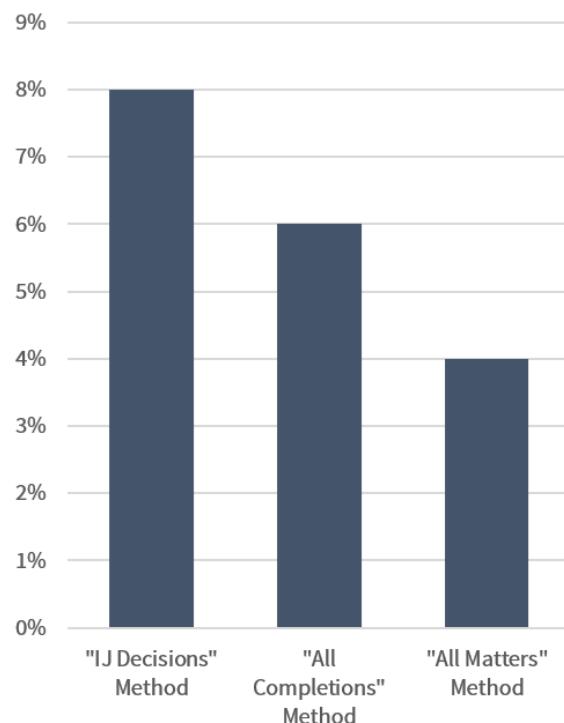
We also analyzed three factors associated with showing up in immigration court: having a lawyer, applying for relief from removal, and court location.

Attorney Involvement

Noncitizens have a right to be represented by counsel in immigration proceedings, but generally not at the expense of the government.⁴⁴ To evaluate the relationship between representation and *in absentia* removal rates, we examined the rate of *in absentia* removals among those who had counsel between 2008 and 2018.

The data reveal that individuals with counsel rarely failed to show up in court. Even using the government's IJ decision method, persons with counsel were ordered removed *in absentia* just 8% of the time. When using the all matters method, those with counsel were ordered removed *in absentia* in just 4% of cases (see Figure 4).

Figure 4: *In Absentia* Removal Rate for Individuals Represented by Counsel, by Calculation Method (Nondetained Only)



Source: Authors' analysis of Executive Office for Immigration Review data, FY 2008–2018

We also find that most cases with failures to appear involved unrepresented litigants. Overall, only 15% of those who were ordered removed *in absentia* during our study period had an attorney.⁴⁵ By contrast, 86% of those with an initial completion not ending *in absentia* had counsel (see Figure 4).⁴⁶

We also find that the ability to reopen an *in absentia* removal case is mainly reserved for those who find a lawyer. That is, among those who were able to successfully reopen their case after an *in absentia* removal order, 84% had a lawyer representing them.⁴⁷

As these striking statistics suggest, attorneys play a vital supporting role in ensuring that their clients make it to court.⁴⁸ Attorneys can make sure their client knows when and where to appear and how to keep the court updated on any change of address. Without a lawyer, some immigrants attend their check-in appointments with ICE believing erroneously that it is their court date and then miss their actual court date. Others have reported missing their hearings after being given Notices to Appear (NTAs) with no court date or with a fake court date at an erroneous location.⁵⁰ Unrepresented litigants may also encounter challenges in completing the necessary court documents to reschedule an immigration court hearing or to notify the court about a change of address.⁵¹ For example, despite policy to the contrary,⁵² immigration courts do not always accept notifications of changes of address before proceedings have formally begun, making it impossible to receive notice at a new address.⁵³

Applying for Relief

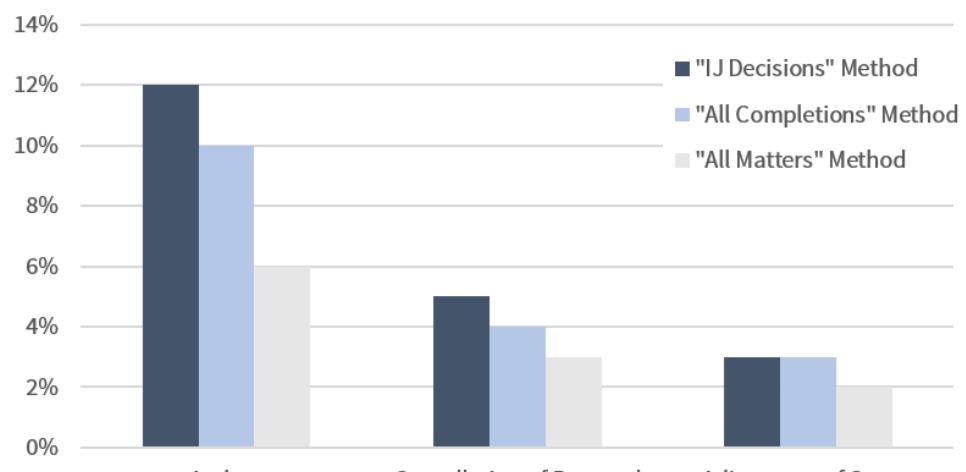
Immigration removal proceedings are best understood as occurring in two stages. In the first stage, the immigration judge decides whether to sustain the charge of removability alleged by DHS in the NTA against the individual, who is referred to in immigration court as the “respondent.” If the charge is sustained and the respondent is found to be subject to removal, the respondent can seek relief from removal in the second stage. There are numerous forms of relief in immigration court. The most commonly sought are asylum,⁵⁴ cancellation of removal,⁵⁵ and adjustment of status.⁵⁶ To qualify for relief, a respondent must satisfy the applicable statutory eligibility requirements and convince the judge that the case merits the favorable exercise of discretion.⁵⁷ A respondent who wins relief will be able to remain lawfully in the United States.

Across the 11 years of our study period, 48% of individuals in removal proceedings who were not detained sought some form of relief prior to the initial completion in their cases. Among these individuals who sought relief, 72% submitted an asylum application,⁵⁸ 28% applied for cancellation of removal for lawful permanent residents or non-lawful permanent residents; and 10% applied for adjustment of status.⁵⁹

Overall, 95% of all litigants with completed or pending applications for relief attended all of their court hearings between 2008 and 2018.⁶⁰ This result makes sense: individuals pursuing claims for relief in court have a strong incentive to fight for permission to remain in the United States.⁶¹

Figure 5 presents the *in absentia* rates for nondetained respondents who sought relief in immigration court, organized by the most common types of relief (asylum, cancellation of removal, and adjustment of status). We present these findings using all three possible measurements for *in absentia* removal: as percentages of all initial immigration judge decisions on the merits, all initial case completions, and all matters. Focusing on the all matters approach, only 6% of those seeking asylum failed to appear during the study period, while only 3% of those seeking cancellation of removal and 2% of those seeking adjustment of status did.

Figure 5: *In Absentia* Removal Rate, by Application Type and Calculation Method (Nondetained Only)



Source: Authors' analysis of Executive Office for Immigration Review data, FY 2008–2018

These findings are noteworthy because they reveal that immigrants seeking relief are highly likely to come to court. Such statistics have not traditionally been released by the federal government, which generally provides only overall rates—not rates among those seeking relief from removal.⁶²

Court Location

The *in absentia* rate also varied by court location. Currently, there are more than 60 different cities in the United States that host immigration courts,⁶³ and approximately 460 immigration judges appointed by the attorney general of the United States.⁶⁴ As seen in Table 3, the variation in *in absentia* removal rates by city was striking, ranging from a high of 54% in Harlingen, Texas, to a low of 15% in New York City. The three courts that handled the highest numbers of cases involving individuals who were not detained—San Francisco, Los Angeles, and New York—also had among the lowest *in absentia* removal rates.

Some of these differences across jurisdictions no doubt reflect different migrant populations at these court locations. In column 3 of Table 3 we calculate by jurisdiction the percentage of nondetained initial case completions that involved respondents who were never detained (as opposed to being released from detention). In Harlingen, Texas, for example, only 20% of initial case completions were for never-detained respondents; the remaining 80% were for individuals who were released from detention. Interestingly, however, there was still wide variation in the *in absentia* removal rates across cities with similar proportions of never-detained cases. For example, approximately two-thirds of the dockets in both San Francisco and Dallas were composed of cases of individuals who were never detained, but the government method for measuring *in absentia* removal rate in San Francisco was 19%, compared to 41% in Dallas.

This deviation in appearance rates may also reflect differences in local court practices. For example, some local courts may have better and more timely systems in place for scheduling court hearings and notifying respondents about their upcoming court hearings. A 2017 DOJ on-site review of the immigration court in Baltimore, Maryland, found that the court was so understaffed as caseloads grew that administrators were unable to enter change-of-address paperwork sent to the court into their computer system. This problem means that respondents would not receive their court notices, which the report warned “can result in respondents being ordered removed [for failure to appear in court] through no fault of their own.” As our data reveal, 33% of respondents in the Baltimore court were ordered removed for failure to appear.

Table 3: *In Absentia* Removal as a Percentage of Initial Case Completions, by Court Location (Nondetained Only)

City	Initial Case Completions	Never-Detained (% of total)	Active IJs (2008–2018)	<i>In Absentia</i> Rate
Harlingen, TX	16,535	20%	8	54%
Houston, TX	46,691	56%	17	46%
New Orleans, LA	17,633	53%	12	45%
Charlotte, NC	36,619	78%	4	44%
San Antonio, TX	26,444	19%	16	42%
Dallas, TX	34,193	69%	9	41%
Chicago, IL	41,253	60%	13	38%
Memphis, TN	26,225	75%	7	36%
Atlanta, GA	37,845	66%	10	35%
Arlington, VA	41,022	67%	15	33%
Baltimore, MD	33,407	76%	9	33%
Orlando, FL	39,334	79%	9	29%
Philadelphia, PA	20,015	73%	8	28%
Kansas City, MO	17,862	57%	13	28%
Cleveland, OH	14,423	60%	11	28%
Newark, NJ	30,641	65%	18	27%
Miami, FL	85,383	77%	37	26%
Boston, MA	33,517	73%	12	24%
Denver, CO	18,722	57%	10	23%
Los Angeles, CA	135,393	74%	54	23%
Seattle, WA	22,113	61%	5	19%
San Francisco, CA	59,257	68%	31	19%
San Diego, CA	18,583	50%	10	17%
Phoenix, AZ	25,140	42%	5	16%
New York, NY	149,444	76%	48	15%

Source: Authors' analysis of Executive Office for Immigration Review data, FY 2008–2018

Another court practice that is associated with whether respondents came to court is the length of delay between the issuance of the NTA and the initial court date. Looking only at all initial case completions among never detained,⁶⁷ we found that the average time between the filing of the NTA and the initial hearing was 239 days for cases that ended with *in absentia* orders. By comparison, on average there were only 167 days between the filing of the NTA and the first hearing in never-detained cases that did not end with *in absentia* removals. The median number of days showed similar patterns: 153 days median for cases ending *in absentia*, compared to 101 days median for cases not ending *in absentia*. This finding suggests that, on average, long delays can make it harder for people to receive proper notice, remember their court hearings, and remain in contact with the court.

The availability of counsel in different jurisdictions may be an additional contributing factor to variation in failures to appear. In previous work, we found that some cities have very few practicing immigration attorneys. These problems were most acute in smaller cities where detained courts tend to be located. For example, we found that Lumpkin, Georgia, where the Stewart Detention Center is located did not have a single practicing immigration lawyer in 2015, and Oakdale, Louisiana, had only four.⁶⁸ As a result, the rate of attorney representation also varies dramatically between immigration courts.⁶⁹

Notably, those cities with the highest *in absentia* removal rates using the all case completions method also had the lowest representation rates (Table 3). For example, in Harlingen, Texas, where 54% of nondetained respondents were ordered removed for failing to appear, only 41% of nondetained respondents had counsel.⁷⁰ In sharp contrast, 85% of nondetained respondents in New York City’s immigration court had counsel,⁷¹ and only 15% were removed for not appearing in court.⁷²

In summary, attorney representation, seeking relief, and court assignment were all associated with variation in *in absentia* removal rates. Individuals who filed claims for relief (such as asylum or cancellation of removal) were very unlikely to miss court: 95% attended all of their court hearings over the 11 years of our study in pending and completed nondetained cases.⁷³ Those who obtained lawyers also almost always came to court: 96% attended all court hearings in pending and completed nondetained cases.⁷⁴ In addition, the prevalence of *in absentia* removals varied widely based on court location, ranging from a low of 15% of all initial case completions in New York City, to a high of 54% in Harlingen, Texas.⁷⁵

Conclusion

A key insight of this report is that the method chosen for measuring failures to appear in court matters. As we have set forth, the method adopted by the government to measure annual rates of *in absentia* removals—as a percentage of initial immigration judge decisions on the merits—ignores a large number of court cases in which respondents have not missed any court hearings. In particular, the government’s measurement ignores cases that are administratively closed, an essential tool that has been used by immigration judges over the past decade to remove cases indefinitely from the immigration court’s docket. The government’s measurement also ignores the historically high number of backlogged cases pending in immigration courts today. These backlogs matter because nondetained deportation cases now take many court hearings and several years to resolve, and during this time immigrants continue to appear for their court hearings. This report has argued that counting administrative completions and pending cases in the *in absentia* removal measurement is a necessary complement to the government’s measurement that enhances public understanding of the rate at which noncitizens are complying with their court dates. We recommend that future statistical reporting by EOIR include these measurements.

The analysis of over a decade of government data presented here also has immediate relevance to the consideration of policy questions in which statistics on failures to appear in court play a central role. The findings presented in this report are particularly important as the new administration of President Joe Biden considers how to reform the immigration system, including the immigration courts. The “timely and fair” adjudication of asylum and other cases by immigration judges is a vital component of the Biden plan “for securing our values as a nation of immigrants.”⁷⁶

In particular, this report supports four meaningful policy reforms:

1. reducing reliance on detention and programs such as the Migrant Protection Protocols (MPP) that keep asylum seekers in Mexico while awaiting court hearings;
2. ensuring access to counsel for individuals in removal proceedings;
3. reforming the *in absentia* law and enhancing judicial training; and
4. establishing an independent Article I immigration court.

First, our findings that the vast majority of nondetained respondents attended their court hearings supports releasing far more people from custody rather than creating stricter detention rules and expanded detention capacity. Further improvement in court appearance rates could also be attained by learning from the proven success of other court systems in providing reminder calls, postcards, and text messages with the accurate time and date of the hearing.⁷⁷ In addition, ICE could ensure that individuals who are scheduled for agency check-ins are educated on the court process and provided transportation assistance to court if necessary. Our analysis showing that asylum seekers are very likely to attend their court hearings similarly undermines arguments that asylum seekers should be prevented from entering the country out of a fear they will not come to court.

Second, further enhancements in appearance rates could be fostered by expanding funding for pro bono lawyers and know-your-rights programs. Our data show that individuals with attorneys have near-perfect attendance rates. Over the 11 years of our study, 96% of represented individuals in completed or pending courts attended all of their court hearings (Figure 4).

Third, this report's findings support giving immigration judges greater independence and training to give individuals a second chance to come to court. Our independent analysis of federal data reveals that in those cases where individuals were given another opportunity to come to court, more than half did show up at the next hearing.⁷⁸ One significant reform along these lines would be to amend the immigration law to give judges greater discretion to provide immigrants more chances to come to court, as the law allowed prior to 1990.⁷⁹ Even if the law is not changed, EOIR could work to train judges to more carefully scrutinize notice issues at the first hearing to ensure that proper notice was provided before issuing any removal orders, making sure that DHS has met its burden to prove by clear, unequivocal, and convincing evidence that a person has received proper notice.

Finally, this report supports the creation of an independent structure for the immigration courts.⁸⁰ The federal tax and bankruptcy courts provide precedent for creating specialized federal courts under Article I of the United States Constitution.⁸¹ Such an independent court structure would help to reduce the prevalence of unwarranted *in absentia* removal orders by giving immigration judges more authority over their dockets and individual case decisions.⁸² As an independent court, judges would feel less pressure to meet case quotas and approve removal orders, allowing them to focus proper attention on notice deficiencies. Judges would also have more flexibility to use court continuances to give respondents further opportunity to come to court.

Endnotes

1. The findings in this report were first published in Ingrid Eagly and Steven Shafer, “Measuring *In Absentia* Removal in Immigration Court,” *University of Pennsylvania Law Review* 168, no. 4 (2020): 817-876.
2. In the final presidential campaign debate in 2020, President Trump claimed that “less than 1%” of immigrants “come back” to court. “Debate Transcript: Trump, Biden Final Presidential Debate Moderated by Kristen Welker,” *USA Today*, October 23, 2020, [\[https://www.usatoday.com/story/news/politics/elections/2020/10/23/debate-transcript-trump-biden-final-presidential-debate-nashville/3740152001/\]](https://www.usatoday.com/story/news/politics/elections/2020/10/23/debate-transcript-trump-biden-final-presidential-debate-nashville/3740152001/) [https://perma.cc/8WA-G443]. President Trump made similar remarks throughout his term in office. See e.g., Remarks During a Roundtable Discussion on Tax Reform in Cleveland, Ohio, 2018 Daily Compilation of Presidential Documents, May 5, 2018, 2 (“Our immigration laws are a disgrace We give them, like, trials. That’s the good news. The bad news is, they never show up for the trial. . . . Nobody ever shows up.”); Remarks Prior to a Working Lunch with President Kersti Kaljulaid of Estonia, President Raimonds Vejonis of Latvia, and President Dalia Grybauskaite of Lithuania and an Exchange with Reporters, 2018 Daily Compilation of Presidential Documents, April 3, 2018, 3 (“We cannot have people flowing into our country illegally, disappearing, and, by the way, never showing up to court.”); Remarks at the American Farm Bureau Federation’s 100th Annual Convention in New Orleans, Louisiana, 2019 Daily Compilation of Presidential Documents, January 14, 2019, 6 (“Tell me, what percentage of people come back [for their trial]? Would you say 100 percent? No, you’re a little off. Like, how about 2 percent? [Laughter] . . . Two percent come back. Those 2 percent are not going to make America great again, that I can tell you. [Laughter]”); Remarks at the National Federation of Independent Businesses 75th Anniversary Celebration, 2018 Daily Compilation of Presidential Documents, June 19, 2018, 5 (“Do you know, if a person comes in and puts one foot on our ground . . . they let the person go; they say show back up to court in 1 year from now. One year. . . . But here’s the thing: That in itself is ridiculous. Like 3 percent come back.”).
3. For example, amid claims that migrants will not come to court, President Trump called for \$4.2 billion in additional funding to dramatically increase the federal government’s capacity to detain immigrants. See “President Donald J. Trump Calls on Congress to Secure Our Borders and Protect the American People,” White House, January 8, 2019, [\[https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-calls-congress-secure-borders-protect-american-people/\]](https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-calls-congress-secure-borders-protect-american-people/) [https://perma.cc/M7EG-RZ98].
4. On November 9, 2018, President Trump issued a proclamation drastically reducing access to asylum, supported in part by a claim that “many released aliens fail to appear for hearings.” Proclamation No. 9822, 83 Fed. Reg. 57,661 (November 9, 2018).
5. See, e.g., “Remarks by President Trump in Cabinet Meeting,” White House, January 2, 2019, [\[https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-cabinet-meeting-12/\]](https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-cabinet-meeting-12/) [https://perma.cc/6WJH-M6J7] (arguing that “[t]he United States needs a physical barrier, needs a wall, to stop illegal immigration” and claiming that without a wall asylum seekers will enter the country and instead of coming to court will “vanish[] and escape[] the law”).
6. “Evolution of the U.S. Immigration Court System: Pre-1983,” Executive Office for Immigration Review, U.S. Department of Justice, April 30, 2015, [\[https://www.justice.gov/eoir/evolution-pre-1983\]](https://www.justice.gov/eoir/evolution-pre-1983) [https://perma.cc/QCT8-SHHV].
7. “Evolution of the U.S. Immigration Court System: Post-1983,” Executive Office for Immigration Review, U.S. Department of Justice, April 30, 2015, [\[https://www.justice.gov/eoir/evolution-post-1983\]](https://www.justice.gov/eoir/evolution-post-1983) [https://perma.cc/ZJF2-VR4J].
8. Immigration and Nationality Act (I.N.A.) § 242(B)(c)(3), 8 U.S.C. § 1252(b) (1988); see also William R. Robie, Chief Immigration Judge, Executive Office for Immigration Review, to All Immigration Judges, Operating Policy and Procedure Memorandum 84-2: Cases in Which Respondents/Applicants Fail to Appear for Hearing, March 7, 1984, 1, [\[http://libguides.law.ucla.edu/ld.php?content_id=38258649\]](http://libguides.law.ucla.edu/ld.php?content_id=38258649) [https://perma.cc/W2WH-WDP9] (describing operating policy and procedures for how immigration judges may proceed if a respondent fails to appear).
9. See Immigration Act of 1990, Pub. L. No. 101-649, § 545(a), 104 Stat. 4978, 5063 (codified as amended at 8 U.S.C. § 1229a(b)(5) (a) (2018)) (providing that any noncitizen “who . . . does not attend a proceeding under section 242, shall be ordered deported under section 242(b)(1) in absentia”).
10. The term removal has been used since 1997 to refer to the decision of an immigration judge to order an individual removed from the United States. Prior to April 1997, removal proceedings were separated into distinct procedures for exclusion and deportation. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 308(d)(4)(B), 110 Stat. 3009-546, 3009-585 (amending a section of the immigration law by “striking ‘exclusion or deportation’ and inserting ‘removal’”).
11. Executive Office for Immigration Review, U.S. Department of Justice, *FY 2013 Statistics Yearbook*, 2014, Glossary of Terms, 7, [\[https://www.justice.gov/sites/default/files/eoir/legacy/2014/04/16/fy13syb.pdf\]](https://www.justice.gov/sites/default/files/eoir/legacy/2014/04/16/fy13syb.pdf) [https://perma.cc/U3WF-W7S3] [hereinafter *EOIR 2013 Yearbook*].
12. I.N.A. § 240(b)(5)(A), 8 U.S.C. § 1229a(b)(5)(A) (2018); see also 8 C.F.R. § 1003.26 (2019) (defining *in absentia* hearings and identifying factors sufficient to order a respondent deported *in absentia*). EOIR defines an *in absentia* order as “[a]n order issued when an immigration judge determines that a removable alien received the required notice about their removal hearing and failed to appear.” *EOIR 2013 Yearbook*, 7.
13. See generally I.N.A. § 212(a)(6)(B), 8 U.S.C. § 1182(a)(6)(B) (providing that failure to appear without reasonable cause renders a noncitizen inadmissible for five years); I.N.A. § 240(b)(7), 8 U.S.C. § 1229a(b)(7) (stating that failure to appear for a removal hearing bars a noncitizen from relief for ten years).
14. S. Rep. No. 104-48, 32 (1995); see also *ibid.* (“Congress should consider requiring that all aggravated felons be detained pending deportation. Such a step may be necessary because of the high rate of no-shows for those criminal aliens released on bond.”). The resulting mandatory detention rules for those with convictions are codified at I.N.A. § 236(c), 8 U.S.C. § 1226(c).
15. Brief for Petitioners at 19, *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491), 2002 WL 31016560 (arguing that “more than 20% of criminal aliens who were released on bond or otherwise not kept in custody throughout their deportation proceedings failed to appear for those proceedings”).

16. Demore v. Kim, 538 U.S. 510, 519-20 (2003); see also *ibid.* at 519 (“Once released, more than 20% of deportable criminal aliens failed to appear for their removal hearings.”).
17. “Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review,” U.S. Department of Justice, October 12, 2017, <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review> [<https://perma.cc/675Y-TW7U>].
18. *Ibid.* See also “Attorney General Sessions Delivers Remarks on Immigration Enforcement,” U.S. Department of Justice, April 11, 2018, <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-immigration-enforcement> [<https://perma.cc/ZBN7-55FZ>] (claiming that “loopholes in our laws [are] being exploited by illegal aliens” who, after release from detention, “simply disappear[]—never show[] up for their hearings in immigration court”).
19. In announcing the MPP on December 20, 2018, then-DHS Secretary Kirstjen Nielsen claimed that without the new program asylum seekers would simply “disappear into the United States, where many skip their court dates.” U.S. Department of Homeland Security, “Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration,” press release, December 20, 2018, <https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration> [<https://perma.cc/ZSS3-3SWB>] (internal quotation marks omitted); see also U.S. Department of Homeland Security, “Migrant Protection Protocols,” press release, January 24, 2019, <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> [<https://perma.cc/KZ4H4-D3SR>] (justifying the Trump administration’s MPP program based in part on the claim that migrants released into the country “disappear before an immigration judge can determine the merits of any claim”).
20. See, e.g., Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45,486, 45,494 (proposed September 7, 2018) (codified at 8 C.F.R. pts. 212, 236; 45 C.F.R. pt. 410) (“While statistics specific to family units have not been compiled, the reality is that a significant number of aliens who are not in detention either fail to appear at the required proceedings or never actually seek asylum relief, thus remaining illegally in the United States.”); see also “Acting Secretary of Homeland Security Kevin K. McAleenan on the DHS-HHS Federal Rule on Flores Agreement,” U.S. Department of Homeland Security, August 21, 2019, <https://www.dhs.gov/news/2019/08/21/acting-secretary-mcaleenan-dhs-hhs-federal-rule-flores-agreement> [<https://perma.cc/82YS-V9E4>] (quoting the Acting Secretary of Homeland Security Kevin K. McAleenan claiming that the majority of removal orders issued to families have been issued *in absentia*, thus benefitting those with “meritless claims” for asylum).
21. See, e.g., Matter of Lei, 22 I. & N. Dec. 113, 121 (B.I.A. 1998) (Rosenberg, Board Member, concurring in part and dissenting in part) (“It is difficult to imagine what could be more prejudicial to a respondent charged with being deportable from the United States than denial of an opportunity to be present at his deportation hearing where he might provide any defenses to the charges against him, or advance any claims he may have for relief from deportation.”); Matter of Villalba-Sinaloa, 21 I. & N. Dec. 842, 847-48 n.2 (B.I.A. 1997) (Rosenberg, Board Member, dissenting) (urging the majority to consider constitutional concerns when interpreting the statutory provision for *in absentia* removal).
22. Failure to appear is often treated in state court systems as a misdemeanor crime to be adjudicated separately from the merits of the underlying case. See, e.g., Ariz. Rev. Stat. Ann. § 13-2506(A)(1), (B) (2019); Cal. Penal Code § 1320(a) (2019).
23. Fed. R. Crim. P. 43(a); see also *Crosby v. United States*, 506 U.S. 255, 262 (1993) (“The language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial *in absentia* of a defendant who is not present at the beginning of trial.”). If, however, the defendant fails to appear after already appearing at the beginning of the trial, the trial may continue under certain circumstances. Fed. R. Crim. P. 43(c).
24. See Jennifer Lee Koh, “Removal in the Shadows of Immigration Court,” *Southern California Law Review* 90, no. 2 (2017): 181, 218 (explaining that unlike in criminal court, a respondent’s failure to appear in immigration court constitutes an “automatic loss for the noncitizen”).
25. See generally “Statistics Yearbook,” Executive Office for Immigration Review, U.S. Department of Justice, updated August 30, 2019, <https://www.justice.gov/eoir/statistical-year-book> [<https://perma.cc/X6GZ-BGQ4>] (containing links to Statistics Yearbooks from fiscal year 2000 through fiscal year 2018).
26. We note that the EOIR’s 2018 Yearbook included measurements of total *in absentia* removals, but for the first time eliminated a calculation of the *in absentia* removal rate. Compare Executive Office for Immigration Review, U.S. Department of Justice, *Statistics Yearbook: Fiscal Year 2018, 2019*, 33, <https://www.justice.gov/eoir/file/1198896/download> [<https://perma.cc/EVP7-SN2D>] (providing data on the number of *in absentia* orders issued in fiscal years 2014–2018), with Executive Office for Immigration Review, U.S. Department of Justice, *Statistics Yearbook: Fiscal Year 2017, 2018*, 33, <https://www.justice.gov/eoir/page/file/1107056/download> [<https://perma.cc/DC4B-YUDQ>] (reporting *in absentia* rates in addition to the numbers of *in absentia* orders).
27. The authors acknowledge the foundational work of other researchers that has also contributed to public understanding of appearance rates in immigration court, including the Transactional Records Access Clearinghouse (TRAC), the Catholic Legal Immigration Network, the Asylum Seeker Advocacy Project, and the Vera Institute of Justice. See, e.g., “Details on Deportation Proceedings in Immigration Court,” TRAC Immigration, updated December 2020, <https://trac.syr.edu/phptools/immigration/nta> [<https://perma.cc/D2KV-UV05>] (select “Hearing Attendance,” “Immigration Court State,” and “Month and Year Case Began,” and click link for “Not Present at Last Hearing (*Absentia Decision*)” (organizing *in absentia* totals by state and time period); “Priority Immigration Court Cases: Women with Children,” TRAC Immigration, updated May 2018, <https://trac.syr.edu/phptools/immigration/mwc> [<https://perma.cc/6THA-MWUX>]; Asylum Seeker Advocacy Project and Catholic Legal Immigration Network, Inc., *Denied a Day in Court: The Government’s Use of *In Absentia* Removal Orders Against Families Seeking Asylum*, 2019, 15, <https://asylumadvocacy.org/wp-content/uploads/2018/04/Denied-a-Day-in-Court-2019-Update.pdf> [<https://perma.cc/96EB-CTR8>] [hereinafter *Denied a Day in Court*] (discussing how families may miss court hearings in part due to lack of notice); Eileen Sullivan, et al., *Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program* (Vera Institute of Justice, 2000), 33, 36, <https://www.vera.org/publications/testing-community-supervision-for-the-ins-an-evaluation-of-the-appearance-assistance-program> [<https://perma.cc/2AWQ-66ML>] (finding that roughly 90% of noncitizens who were supervised appeared in court, compared with 71% of nonparticipants); Vera Institute of Justice, “Evidence Shows That Most Immigrants Appear for Immigr-

tion Court Hearings,” October 2020, <https://www.vera.org/publications/immigrant-court-appearance-fact-sheet> [<https://perma.cc/LD7B-25TG>] (summarizing research on appearance rates).

28. These data were made available for download to researchers by EOIR. See “Executive Office for Immigration Review,” U.S. Department of Justice, accessed January 23, 2021, <https://www.justice.gov/eoir> [<https://perma.cc/L2AV-VLYR>] (providing a link to download court data under the heading “EOIR Case Data”). We analyzed data tables made available by EOIR as of November 2, 2018.
29. EOIR defines an “initial case completion” as the first dispositive decision issued by the immigration judge in a case. *EOIR 2013 Yearbook*, 7. Under this approach, EOIR does not count decisions to change venue or transfer a case as an initial case completion.
30. Ibid., P1 (calculating the “*in absentia* rate” as the percentage of initial immigration judge completions that end in *in absentia* removal); see also Executive Office for Immigration Review, U.S. Department of Justice, *FY 2014 Statistics Yearbook*, 2015, P1, <https://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/03/16/fy14syb.pdf> [<https://perma.cc/U8DF-4JVS>]; Executive Office for Immigration Review, U.S. Department of Justice, *FY 2015 Statistics Yearbook*, 2016, P1, <https://www.justice.gov/eoir/page/file/fysb15/download> [<https://perma.cc/WH27-CH6J>]; Executive Office for Immigration Review, U.S. Department of Justice, *FY 2016 Statistics Yearbook*, 2017, B2 & tbl.4, <https://www.justice.gov/eoir/page/file/fysb16/download> [<https://perma.cc/VT6Z-P5UM>]. Note that while the EOIR 2017 Yearbook uses a similar approach, EOIR narrowed its definition of relevant case types and its calculation of relevant immigration judge completions.
31. Brian M. O’Leary, Chief Immigration Judge, Executive Office for Immigration Review, to All Immigration Judges, All Court Administrators, All Attorney Advisors and Judicial Law Clerks, and All Immigration Court Staff, Operating Policies and Procedures Memorandum 13-01: Continuances and Administrative Closure 2-3, March 7, 2013, https://libguides.law.ucla.edu/ld.php?content_id=38258569 [<https://perma.cc/643J-CE6J>].
32. Ibid., 2 (instructing immigration judges to grant requests for administrative closure “in appropriate circumstances”); see also Executive Office for Immigration Review, U.S. Department of Justice, *Immigration Court Practice Manual*, 2018, 86, <https://www.justice.gov/eoir/page/file/1084851/download> [<https://perma.cc/57QI-C32K>] (“Once a case has been administratively closed, the court will not take any action on the case until a request to recalendaring is filed by one of the parties.”). In 2018, the Attorney General issued a decision to greatly restrict the practice of administrative closure. *Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018). However, on August 29, 2019, the Fourth Circuit Court of Appeals abrogated *Castro-Tum*, finding that the immigration law unambiguously permits immigration judges to control their own dockets. *Romero v. Barr*, 937 F.3d 282, 286, 292-94 (4th Cir. 2019).
33. See U.S. Government Accountability Office, *Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438, 2017, 22, <https://www.gao.gov/assets/690/685022.pdf> [<https://perma.cc/54GQ-LE2C>] (finding that EOIR’s case backlog more than doubled between fiscal years 2006 and 2015).
34. Transcript of Oral Argument at 52, *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) (No. 17-459) (Frederick Liu, Assistant to the Solicitor General, Department of Justice, responding to Justice Anthony M. Kennedy).
35. Each time a hearing ends, the immigration court enters an “adjournment code” that describes the reason why the hearing was adjourned. One of these codes indicates that notice was sent or served incorrectly. See MaryBeth Keller, Chief Immigration Judge, Executive Office for Immigration Review, to All Immigration Judges, All Court Administrators, All Attorney Advisors and Judicial Law Clerks, All Support Staff, Operating Policies and Procedures Memorandum 17-02: Definitions and Use of Adjournment, Call-Up, and Case Identification Codes, October 5, 2017, 3, https://libguides.law.ucla.edu/ld.php?content_id=38258359 [<https://perma.cc/LTH2-DE7A>] (including Adjournment Code 10, to be used when an “[a]ttorney and/or alien does not appear at the scheduled hearing due to the notice of hearing containing inaccurate information, or, alien/attorney appears but has not received adequate notice of hearing of the proceedings”).
36. Analyzing never-detained cases, we found that 11,121 out of a total of 1,285,947 initial hearings, or .86%, were adjourned due to lack of notice. This calculation measures the number of hearings that were adjourned with code 10, “Notice Sent/Served Incorrectly.” Use of adjournment code 10 in the EOIR data dates back to the 1980s.
37. Analyzing both completed and pending cases, we found that 5,981 out of the 11,121 hearings adjourned for lack of notice at the initial-hearing stage did not end *in absentia*, compared to 5,140 that did result in an *in absentia* order.
38. I.N.A. § 240(b)(5)(A), 8 U.S.C. § 1229a(b)(5)(A) (2018).
39. Of the 1,155,469 initial completions in our All Custody Removal Sample, only 4,344 cases (0.37%) were excluded from the analysis due to lack of hearing-level data.
40. I.N.A. § 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C).
41. Of the 316,089 cases where initial completion occurred through an *in absentia* removal order, 18% ($n = 56,877$) of those respondents sought to reopen their cases by filing motions to reopen.
42. Judges granted 84% of these motions ($n = 47,952$). Overall, 15% of those ordered removed *in absentia* had a successful motion to reopen ($n = 47,952$ of 316,089).
43. A motion to reopen based on lack of notice of the hearing can be brought at any time. See I.N.A. § 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C); 8 C.F.R. § 1003.23(b)(4)(ii) (2019) (noting that an alien can file a motion to reopen at “any time”). Of course, individuals who do not obtain counsel or otherwise learn about the motion to reopen process may never bring such a motion in court. Additionally, although cases with *in absentia* orders may be reopened, *in absentia* orders cannot be appealed. *Matter of Guzman-Arqueru*, 22 I. & N. Dec. 722 (B.I.A. 1999) (holding that the Board of Immigration Appeals has no jurisdiction over direct appeals of *in absentia* orders).
44. See I.N.A. § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (“[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings.”); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 554 (9th Cir. 1990) (“[A]liens have a due process right to obtain counsel of their choice at their own

expense.”).

45. Of the 316,089 *in absentia* orders issued in removal proceedings at the initial case completion over the 11-year period of our study, only 47,350 were represented by counsel.
46. Of the 839,380 immigration judge initial case completions not issued *in absentia* in removal proceedings over the 11-year period of our study, 719,226 were represented by counsel.
47. Of the 47,952 respondents who successfully reopened their cases after an initial *in absentia* order, 40,303 were represented by counsel at their most recent proceeding.
48. Individuals motivated to fight their case may also be more likely to seek out an attorney. Yet serious notice deficits and confusion about immigration court would suggest that even motivated individuals may not get the chance to engage the process.
49. Persons released awaiting their immigration court hearings are often told to report periodically to a deportation officer.
50. See, e.g., Tatiana Sanchez, “Confusion Erupts as Dozens Show Up for Fake Court Date at SF Immigration Court,” *San Francisco Chronicle*, January 31, 2019, <https://www.sfchronicle.com/bayarea/article/Confusion-erupts-as-dozens-show-up-for-fake-13579045.php> [https://perma.cc/BHJ2-CQ3X] (reporting that some attorneys contend that ICE is sending notices to appear “with court dates it knows are not real”).
51. See *Denied a Day in Court*, 15.
52. Mark Pasierb, Chief Clerk of Immigration Court, to All Immigration Judges, All Court Administrators, All Attorney Advisors and Judicial Law Clerks, and All Immigration Court Staff, memorandum, June 17, 2008, 6, https://libguides.law.ucla.edu/ld.php?content_id=52153727 [https://perma.cc/3CUT-QHWZ] (“EOIR-33/ICs are accepted even if no Notice to Appear has been filed.”).
53. See, e.g., “AILA-EOIR Liaison Meeting Agenda Questions and Answers” (October 21, 2008), 3, <https://www.justice.gov/sites/default/files/oir/legacy/2009/01/29/eoiraila102108.pdf> [https://perma.cc/D8SK-8NEL] (reporting rejections of changes of address forms in cases where the notice to appear had not yet been filed with the court).
54. Asylum is a form of discretionary relief available to individuals who qualify as refugees by demonstrating past persecution or a “well-founded fear of persecution” based on the noncitizen’s race, religion, nationality, political opinion, and/or membership in a particular social group. I.N.A. § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2018); I.N.A. § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A). Applicants for asylum may also be considered for relief under withholding of removal and protection under the United Nations Convention Against Torture by satisfying more stringent standards. See I.N.A. § 241(b)(3), 8 U.S.C. § 1231(b)(3) (providing statutory requirements for demonstrating eligibility for withholding of removal); 8 C.F.R. §§ 1208.16, 1208.17, 1208.18 (discussing the standards for withholding of removal and deferral of removal under the Convention Against Torture).
55. Cancellation of removal is a form of relief available to both lawful permanent residents and undocumented individuals who have lived for a minimum number of years in the United States and who satisfy certain requirements. I.N.A. § 240A(a)-(b), 8 U.S.C. § 1229b(a)-(b).
56. Adjustment of status is a form of relief available to any noncitizen who is determined eligible for lawful permanent resident status based on a visa petition approved by the United States Citizenship and Immigration Services. I.N.A. § 245, 8 U.S.C. § 1255.
57. I.N.A. § 240(c)(4), 8 U.S.C. § 1229a(c)(4).
58. EOIR Form I-589 includes an application for asylum and withholding of removal, and also offers the opportunity for an application of withholding of removal under the Convention Against Torture. See U.S. Citizenship and Immigration Services, Department of Homeland Security, and Executive Office for Immigration Review, U.S. Department of Justice, “I-589, Application for Asylum and for Withholding of Removal,” updated September 30, 2019, <https://www.uscis.gov/i-589> [https://perma.cc/6M-JU-W5NY] (listing the information that an applicant is required to provide to apply for asylum and withholding of removal). We use the term “asylum application” to refer to all three forms of relief.
59. For purposes of our analysis, we did not consider voluntary departure to be a form of relief.
60. During the study period, there were 829,083 completed and pending cases with applications for relief on file ($n = 549,053$ initial completions with such applications, and $n = 431,752$ initial immigration judge decisions with filed applications). Of these individuals, only 43,250 had an *in absentia* removal order, leading to *in absentia* rates of 5% for all matters, 8% for initial case completions, and 10% for immigration judge decisions.
61. See Oren Root, National Director, Appearance Assistance Program, Vera Institute of Justice, “The Appearance Assistance Program: An Alternative to Detention for Noncitizens in U.S. Immigration Removal Proceedings,” April 2000, 2, <https://www.vera.org/publications/appearance-assistance-program-alternative-to-detention> [https://perma.cc/T7FW-WXYA] (arguing that individuals with claims for relief are “good candidates for supervised release, as they have an incentive to appear at their hearings”).
62. In 2018, EOIR began to occasionally report in press releases and other documents statistics on *in absentia* rate among those seeking asylum. See, e.g., U.S. Department of Justice, “Executive Office for Immigration Review Releases Court Statistics, Announces Transparency Initiative,” press release, May 9, 2018, <https://www.justice.gov/opa/pr/executive-office-immigration-review-releases-court-statistics-announces-transparency> [https://perma.cc/T3EA-3JAK].
63. “EOIR Immigration Court Listing,” Executive Office of Immigration Review, U.S. Department of Justice, updated January 22, 2001, <https://www.justice.gov/oir/eoir-immigration-court-listing> [https://perma.cc/T69X-KN6C].
64. “Office of the Chief Immigration Judge,” Executive Office of Immigration Review, U.S. Department of Justice, updated December 7, 2020, <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge> [https://perma.cc/GWA9-P86E].
65. Ani Ucar, “Leaked Report Shows the Utter Dysfunction of Baltimore’s Immigration Court,” *Vice News*, October 3, 2018, https://news.vice.com/en_us/article/xw94ea/leaked-report-shows-the-utter-dysfunction-of-baltimore-s-immigration-court [https://

66. Ibid. (internal quotation marks omitted).
67. To address the potential relationship between delays in court scheduling and *in absentia* removal, we narrowed our analysis from all initial case completions to only never-detained initial case completions with no prior change of venue or transfer ($n = 745,031$ of 1,155,469). Of the remaining 745,031 initial case completions, we excluded 4,678 cases (less than 1%) with missing or erroneous NTAs. Finally, to focus on more active cases, we narrowed the analysis further, excluding the 3% of remaining cases ($n = 21,638$) with NTAs dated prior to 2006. By taking these steps, we attempt to better isolate the potential impact of delays in receiving a hearing notice on court appearances.
68. Ingrid V. Eagly and Steven Shafer, “A National Study of Access to Counsel in Immigration Court,” *University of Pennsylvania Law Review* 164, no. 1 (2015): 42.
69. Ibid., 40 (“In the busiest twenty nondetained court jurisdictions, representation rates reached as high as 87% in New York City and 78% in San Francisco. At the low end of these twenty high-volume nondetained jurisdictions, only 47% of immigrants in Atlanta and Kansas City secured representation.”).
70. Ingrid Eagly and Steven Shafer, “Measuring *In Absentia* Removal in Immigration Court,” *University of Pennsylvania Law Review* 168, no. 4 (2020): 870–71 & fig.6.
71. This high representation rate reflects the 2014 establishment of a project known as the New York Immigrant Family Unity Project, which provides free legal representation to any individual in New York’s immigration court who is unable to afford counsel. “New York Immigrant Family Unity Project,” Bronx Defenders, accessed January 23, 2021, <https://www.bronxdefenders.org/programs/new-york-immigrant-family-unity-project> [<https://perma.cc/DZ26-62X3>].
72. Ingrid Eagly and Steven Shafer, “Measuring *In Absentia* Removal in Immigration Court,” *University of Pennsylvania Law Review* 168, no. 4 (2020): 870–71 & fig.6.
73. Ibid., 869.
74. Ibid., 865.
75. Ibid., 869.
76. “The Biden Plan for Securing Our Values as a Nation of Immigrants,” Biden-Harris, accessed January 23, 2021, <https://joebiden.com/immigration/> [<https://perma.cc/Y2Y9-HWVD>].
77. Alissa Fishbane, Aurelie Ouss, and Anuj K. Shah, “Behavioral Nudges Reduce Failure to Appear for Court,” *Science* 370, no. 6517 (2020).
78. See note 37, *supra*.
79. See generally Iris Gomez, “The Consequences of Nonappearance: Interpreting New Section 242B of the Immigration and Nationality Act,” *San Diego Law Review* 30, no. 1 (1993): 75, 78–80 (explaining how the immigration law gave judges greater discretion on how to treat missed court appearances prior to 1990).
80. In 2018, Senators Mazie K. Hirono, Kirsten Gillibrand, and Kamala Harris introduced the Immigration Court Improvement Act, a bill that would insulate immigration judges from top-down political interference. “Sen. Mazie K. Hirono, Hirono, Gillibrand, Harris Introduce Bill to Insulate Immigration Judges from Political Interference,” press release, April 18, 2018, 1, <https://hirono.senate.gov/news/press-releases/hirono-gillibrand-harris-introduce-bill-to-insulate-immigration-judges-from-political-interference> [<https://perma.cc/CPR4-748M>].
81. The Federal Bar Association (FBA) recently completed a report proposing model legislation to establish an Article I immigration court. See Federal Bar Association, *Congress Should Establish an Article I Immigration Court*, accessed January 23, 2021, <https://www.fedbar.org/government-relations/policy-priorities/article-i-immigration-court> [<https://perma.cc/CQ5D-C2AU>]. The FBA proposal is supported by the union representing immigration judges, the National Association of Immigration Judges. See Hon. A. Ashley Tabaddor, President, National Association of Immigration Judges, to Elizabeth Stevens, President, Federal Bar Association, Immigration Law Section, letter, March 15, 2018, https://www.naij-usa.org/images/uploads/publications/NAIJ_endorses_FBA_Article_I_proposal_3-15-18.pdf [<https://perma.cc/LC29-BVH3>] (endorsing the Federal Bar Association’s proposed legislation due to the “proven . . . conflicts of interest” that arise when immigration courts can be used as “political pawn[s] by various administrations on both sides of the aisle”).
82. Although the creation of an Article I immigration court would solve many problems within the court system, as Amit Jain has warned, such a change must be accompanied by other procedural and substantive forms. Amit Jain, “Bureaucrats in Robes: Immigration ‘Judges’ and the Trappings of ‘Courts,’” *Georgetown Immigration Law Journal* 33, no. 2 (2019): 324.