



## Testimony

Before the Subcommittee on Border  
Security and Immigration, Committee on  
the Judiciary, U.S. Senate

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# IMMIGRATION COURTS

## Observations on Restructuring Options and Actions Needed to Address Long-Standing Management Challenges

Statement of Rebecca Gambler, Director, Homeland  
Security and Justice

# GAO Highlights

Highlights of [GAO-18-469T](#), a testimony before the Subcommittee on Border Security and Immigration, Committee on the Judiciary, U.S. Senate

## Why GAO Did This Study

DOJ's EOIR is responsible for conducting immigration court proceedings, appellate reviews, and administrative hearings to fairly, expeditiously, and uniformly administer and interpret U.S. immigration laws and regulations.

This statement addresses (1) scenarios that experts and stakeholders have proposed for restructuring EOIR's immigration court system and the reasons they offered for or against these proposals; and (2) how EOIR manages and oversees the immigration courts, including hiring and performance assessment, among other things.

This statement is based on a report GAO issued in June 2017, with selected updates conducted through April 2018 to obtain information from EOIR on actions it has taken to address the report's recommendations. GAO's report incorporated information obtained by reviewing EOIR documentation, analyzing EOIR data, and interviewing agency officials and immigration court experts and stakeholders. For the selected updates, GAO reviewed EOIR documentation.

## What GAO Recommends

In its June 2017 report GAO made 11 recommendations to improve EOIR's hiring process and performance assessment, among other things. EOIR generally concurred with the recommendations, has implemented 1, and reported actions planned or underway to address the remaining 10.

View [GAO-18-469T](#). For more information, contact Rebecca Gambler, (202) 512-8777, [gambler@gaio.gov](mailto:gambler@gaio.gov).

April 18, 2018

## IMMIGRATION COURTS

### Observations on Restructuring Options and Actions Needed to Address Long-Standing Management Challenges

## What GAO Found

In June 2017, GAO reported that some immigration court experts and stakeholders have recommended restructuring the Executive Office for Immigration Review's (EOIR) administrative review and appeals functions within the immigration court system—immigration courts and Board of Immigration Appeals—to improve its effectiveness and efficiency. The 10 experts and stakeholders GAO interviewed stated that they generally supported one of the following scenarios for restructuring the immigration court system, all of which would require a statutory change to implement:

- a court system outside of the executive branch to replace EOIR's immigration court system, including both trial and appellate tribunals;
- a new, independent administrative agency within the executive branch to carry out EOIR's quasi-judicial functions with both trial-level immigration judges and an appellate level review board; or
- a hybrid approach, placing trial-level immigration judges in an independent administrative agency within the executive branch, and an appellate-level tribunal outside of the executive branch.

Six of the 10 experts and stakeholders GAO interviewed supported restructuring the immigration court system into a court independent of the executive branch. Experts and stakeholders offered several reasons for each of the proposed scenarios, such as potentially improving workforce professionalism and credibility. They also provided reasons against restructuring options, including that restructuring may not resolve existing management challenges, such as difficulties related to hiring immigration judges.

GAO also reported in June 2017 that EOIR could take several actions to address management challenges. EOIR has since taken some steps to address these challenges, but additional actions are needed. For example, GAO found that EOIR did not have efficient practices for hiring immigration judges, which contributed to judges being staffed below authorized levels. EOIR hiring data showed that on average from February 2014 through August 2016, EOIR took more than 21 months to hire an immigration judge. GAO recommended that EOIR assess the immigration judge hiring process to identify opportunities for efficiency. As of January 2018, EOIR had increased the number of its judges but remained below its authorized level for fiscal year 2017. Hiring additional judges is a positive step; however, to fully address GAO's recommendation, EOIR needs to assess its hiring process to identify opportunities for efficiency.

In June 2017, GAO also reported on ways EOIR could enhance its video conferencing (VTC) program, through which judges conduct hearings by VTC. GAO found that EOIR had not, in accordance with best practices, established a mechanism to solicit feedback and comments about VTC from those who use it regularly to assess whether it meets user needs. GAO recommended EOIR develop and implement such a mechanism. EOIR concurred and implemented this recommendation in December 2017 by establishing a mechanism on its public website to solicit feedback from respondents regarding their satisfaction with VTC hearings. This effort should help EOIR ensure VTC hearings it conducts meet all user needs.

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Chairman Cornyn, Ranking Member Durbin, and Members of the Subcommittee:

I am pleased to be here today to discuss our work on expert and stakeholder proposals for restructuring the immigration court system and management challenges facing the Department of Justice's (DOJ) Executive Office for Immigration Review (EOIR). As you know, EOIR is responsible for conducting immigration court proceedings, appellate reviews, and administrative hearings to fairly, expeditiously, and uniformly administer and interpret U.S. immigration laws and regulations. Each year, the Department of Homeland Security (DHS) initiates hundreds of thousands of cases with the U.S. immigration court system to decide whether respondents—foreign nationals charged on statutory grounds of inadmissibility or deportability—are removable as charged; and, if so, should be ordered removed from the United States or granted any requested relief or protection from removal and permitted to lawfully remain in the country.

A significant and growing case backlog—the number of cases pending at the start of each fiscal year—before the immigration courts has been the subject of attention by Congress, immigration court experts and stakeholders, and others. In June 2017, we reported that the immigration courts' case backlog more than doubled from fiscal years 2006 through 2015, reaching a backlog of about 437,000 cases pending in 2015.<sup>1</sup> Further, our analysis showed that initial case completion time increased more than fivefold over this 10-year period.<sup>2</sup> For example, the median number of days to complete a removal case, which comprised 97 percent of EOIR's caseload for this time period, increased by 700 percent from 42 days in fiscal year 2006 to 336 days in fiscal year 2015. Since we completed our work, DOJ has indicated that the case backlog remains a challenge. For example, a December 2017 memorandum from the

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<sup>1</sup>GAO, *Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, [GAO-17-438](#) (Washington D.C.: June 1, 2017).

<sup>2</sup>Initial completion time refers to the time period between the date EOIR receives a charging document ordering an individual's appearance to the date an immigration judge issues an initial ruling on the case.

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Attorney General indicated that there were well above a half million cases pending before the immigration courts.<sup>3</sup>

To address the case backlog and other challenges, various organizations, such as the American Bar Association, have recommended, among other things, management improvements; incremental reform of the immigration courts within the existing EOIR structure; and major structural changes, such as creating an immigration court system independent of any executive branch department or agency. Experts and stakeholders, such as individuals affiliated with professional legal organizations and former EOIR immigration judges, have also proposed changing the immigration court system's structure, organizational location among the three branches of government, and aspects of its operations.

EOIR's quasi-judicial functions are carried out by the immigration court system, which includes 58 immigration courts located nationwide that are overseen by the Office of the Chief Immigration Judge, whose immigration judges preside over removal proceedings to determine respondents' removability and eligibility for any relief being sought, and the Board of Immigration Appeals (BIA), whose members hear and issue decisions regarding appeals of immigration judges' decisions and certain DHS decisions.<sup>4</sup> Additionally, the Office of the Chief Administrative Hearing Officer adjudicates immigration-related employment and document fraud cases.

In June 2017, we reported on, among other things, (1) scenarios that experts and stakeholders have proposed for restructuring EOIR's immigration court system and the reasons they offered for or against these proposals; and (2) how EOIR manages and oversees immigration court operations, including workforce planning, hiring, performance assessment, and technology utilization.<sup>5</sup> This statement summarizes

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<sup>3</sup>Department of Justice, Office of the Attorney General, *Renewing Our Commitment to the Timely and Efficient Adjudication of Immigration Cases to Serve the National Interest*, Memorandum for the Executive Office for Immigration Review (Washington, D.C.: Dec. 5, 2017).

<sup>4</sup>The term "quasi-judicial" generally characterizes the adjudicatory function(s) of an administrative agency, such as EOIR, involving the exercise of discretion, judicial in its nature, in connection with the resolution of matters presided over by its officers or employees through the consideration of evidence and application of law to fact(s) on a case-by-case basis, thus exercising independent judgment and discretion consistent with relevant legal authorities.

<sup>5</sup>[GAO-17-438](#).

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information on immigration court restructuring and EOIR's management of the immigration courts from that report as well as actions EOIR has taken, as of April 2018, to address resulting recommendations for addressing management challenges.

For the June 2017 report, we identified scenarios that experts and stakeholders have proposed for restructuring the immigration court system and their reasons for or against these proposals. To identify these scenarios, we reviewed publications and interviewed individuals affiliated with eight entities and two former immigration judges, all selected based on their expertise in immigration court issues. In selecting these 10 experts and stakeholders, we considered, among other things, their depth of experience with the immigration court system and the relevance of their published work to immigration court restructuring. We also considered input from our identified experts and stakeholders, as well as EOIR, on any additional experts or stakeholders we should interview. To ensure a diversity of perspectives regarding proposed scenarios for restructuring the immigration court system, we selected experts and stakeholders from a variety of organizations, including federal agencies, immigration lawyer and respondent advocacy groups and individuals, and the immigration judges' union.

To assess EOIR's workforce planning, hiring, performance assessment, and technology utilization, we analyzed relevant documentation, such as contracts for workforce planning services; EOIR data on, among other things, immigration judge hiring; and interviewed EOIR and DHS officials from headquarters and six immigration courts. More detailed information on our objectives, scope, and methodology is contained in our June 2017 report. Additionally, after the issuance of our report through April 2018 we obtained and analyzed information and documentation on actions EOIR has taken to address our recommendations. The work upon which this statement is based was conducted in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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## Experts and Stakeholders Have Proposed Restructuring EOIR's Immigration Court System

As we reported in June 2017, some immigration court experts and stakeholders have recommended restructuring EOIR's administrative review and appeals functions within the immigration court system—immigration courts and BIA—and the Office of the Chief Administrative Hearing Officer, to improve the effectiveness and efficiency of the system or, among other things, increase the perceived independence of the system and professionalism and credibility of the workforce.

We found that the 10 experts and stakeholders we interviewed generally supported one of the following scenarios for restructuring the immigration court system, all of which would require a statutory change to implement:

- a court system independent (i.e., outside) of the executive branch to replace EOIR's immigration court system, including both trial and appellate tribunals;
- a new, independent administrative agency within the executive branch to carry out EOIR's quasi-judicial functions with both trial-level immigration judges and an appellate level review board; or
- a hybrid approach, placing trial-level immigration judges in an independent administrative agency within the executive branch, and an appellate-level tribunal outside of the executive branch.<sup>6</sup>

Six of the 10 experts and stakeholders we interviewed supported restructuring the immigration court system into a court independent of the executive branch. Two of the experts and stakeholders we contacted supported a new independent administrative agency within the executive branch. One of the experts and stakeholders supported the hybrid scenario, placing trial-level immigration judges in an independent, administrative agency within the executive branch, and an appellate-level tribunal outside of the executive branch.

As we reported in June 2017, experts and stakeholders offered several reasons for each of the proposed scenarios, such as potentially

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<sup>6</sup>In reviewing publications related to immigration court restructuring, we identified a fourth scenario that was not raised by the experts and stakeholders we interviewed in which trial level adjudicators would be placed in an independent administrative agency and the appellate level tribunal in an Article III immigration court. This fourth scenario is largely similar to the hybrid approach, but the Article III immigration court would replace the BIA and U.S. Courts of Appeals review with one appellate review versus solely replacing the BIA's administrative review.

increasing judicial autonomy over courtrooms and dockets; as well as provided reasons against restructuring options, such as that restructuring may not resolve existing management challenges. These reasons for and against each of the scenarios are summarized in table 1 and discussed further below. We are not taking a position on any of these restructuring proposals, or on any of the reasons offered for or against them. We present the information we obtained from the experts and stakeholders to inform policymakers about proposals that have been put forth regarding restructuring the immigration court system.

**Table 1: Number of Experts and Stakeholders Citing Reasons For and Against Each Proposed Immigration Court Restructuring Scenario**

Reasons for and against each scenario as cited by experts and stakeholders	Scenario: court system independent of the executive branch	Scenario: new, independent administrative agency	Scenario: hybrid of independent court outside of the executive branch and an administrative agency
<b>Reasons for</b>			
May increase the perceived independence of the immigration court	6	1	1
May give immigration judges and Board of Immigration Appeals members more judicial autonomy over their courtrooms and dockets	4	-	-
May improve workforce professionalism and credibility	4	1	-
May enhance organizational capacity and accountability	2	1	-
<b>Reasons against</b>			
May complicate the appointment of immigration judges	2	-	-
May result in administrative challenges	2	2	1
May impede the immigration court system's ability to procure resources	3	1	1
Trial level may become more disconnected from the appellate level	-	-	1
May not resolve existing management challenges or case backlog	2	1	-

Source: GAO analysis of expert and stakeholder testimony and documentation. | GAO-18-469T

Note: The reasons for and against each of the scenarios represent our synthesis of expert and stakeholder perspectives on the advantages and disadvantages of the scenarios.

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We found in our June 2017 report that experts and stakeholders we interviewed cited several reasons for the proposed restructuring scenarios, as described in table 1 and below.

- **Independence:** Six of the 10 experts and stakeholders we interviewed stated that establishing a court system independent (i.e., outside) of the executive branch could increase the perceived independence of the system. For example, 1 of the 10 experts and stakeholders we interviewed explained that the public's perception of the immigration court system's independence might improve with a restructuring that removes the quasi-judicial functions of the immigration courts and the BIA from DOJ, because DOJ is also responsible for representing the government in appeals to the U.S. Circuit Courts of Appeals by individuals seeking review of final orders of removal. Another 1 of the 10 experts and stakeholders we interviewed explained that under the existing immigration court system, respondents may perceive, due to the number of immigration judges who are former DHS attorneys and the co-location of some immigration courts with DHS U.S. Immigration and Customs Enforcement's Office of the Principal Legal Advisor offices, that immigration judges and DHS attorneys are working together.<sup>7</sup> Two of the 10 experts and stakeholders we interviewed also proposed that an immigration court system independent of the executive branch would be less susceptible to political pressures within the executive branch. Experts and stakeholders cited similar independence-related reasons for supporting the administrative agency and hybrid scenarios.
- **Judicial autonomy:** Four of the 10 experts and stakeholders we interviewed stated that a court system independent of the executive branch might give immigration judges and BIA members more judicial autonomy over their courtrooms and dockets. For example, 1 of the 10 experts and stakeholders we interviewed stated that immigration judges in an independent court system would be able to file complaints against private bar attorneys directly with the state bar authority instead of filing the complaint with DOJ first, as required for immigration judges acting in their official capacity.<sup>8</sup> EOIR officials explained that while immigration judges cannot directly file a

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<sup>7</sup>Within DHS, trial attorneys from U.S. Immigration and Customs Enforcement's Office of the Principal Legal Advisor are charged with representing the U.S. government as civil prosecutors in removal proceedings before EOIR immigration judges. See 6 U.S.C. § 252(c).

<sup>8</sup>8 C.F.R. § 1003.104(a)(1).



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complaint with the state bar authority, EOIR's Disciplinary Counsel, which is charged with investigating these complaints, can file a complaint with the state bar on behalf of the immigration judge.

- **Workforce professionalism or credibility:** Experts and stakeholders also stated reasons why a court system independent of the executive branch might also improve the professionalism or credibility of the immigration court system's workforce. For example, 1 of the 10 experts and stakeholders we interviewed explained that if the judge career path was improved under a restructuring such that immigration judges were able to advance to more prestigious judgeships, this could assist in attracting candidates to the immigration bench. Regarding the hybrid scenario, 1 of the 10 experts and stakeholders we interviewed noted that this proposal may attract a more diverse and balanced pool of candidates for immigration judge positions.
- **Organizational capacity or accountability:** Experts and stakeholders who supported a court system independent of the executive branch also cited enhanced organizational capacity or accountability as a reason for adopting this scenario. One of the 10 experts and stakeholders we interviewed explained that this type of restructuring may allow the immigration court system to improve its organizational capacity by changing the way it staffs its managerial and supervisory positions. For example, this individual explained that instead of placing immigration judges in managerial positions, EOIR could, as an independent court system, more easily attract and fill managerial positions with individuals who have experience in court management and public administration instead of placing immigration judges in these positions. Similarly, this same individual also noted that if the restructured immigration court system was placed within the purview of the Administrative Office of the U.S. Courts, which provides a wide range of support services to the federal judiciary (including administrative, technological and legal services), it could use its expertise in court management to assist with managing the system.<sup>9</sup>

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<sup>9</sup>In November 2016, the Judicial Conference of the United States informed GAO of its long-standing position that if Congress determines there is a need to create an Article I Immigration Court, such court should be established in the executive branch; and stated that it opposes placement of an Article I Immigration Court in the federal judiciary or the administration of an Article I immigration court by the federal judiciary. The Judicial Conference noted that it does not take a position on whether or not Congress should create such a court; rather, its comments relate to the placement of the court, if it were to be established.

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In terms of enhancing organizational accountability, 1 of the 10 experts and stakeholders we interviewed explained that an independent court system could also increase the transparency of the performance evaluation system for immigration judges by incorporating feedback from court stakeholders, such as DHS and private bar attorneys, on the judges' performance as well as increasing the transparency of the process for making complaints against immigration judges. According to this individual, the complaint process for other federal judges is more transparent and the judges are given an opportunity to address the complaint and appeal any decisions that resulted from the complaint.

We also found in our June 2017 report that the experts and stakeholders we interviewed cited several reasons against the proposed restructuring scenarios, as described in table 1 and below.

- **Appointment of immigration judges:** Two of the 10 experts and stakeholders we interviewed noted that requiring the presidential nomination and Senate confirmation of immigration judges under an independent court system could further complicate and delay the hiring of new judges by making the appointment of additional judges more dependent on external parties.<sup>10</sup>
- **Administrative challenges:** Two of the 10 experts and stakeholders we interviewed stated that it may be difficult to establish and administer a court system independent of the executive branch. Specifically, these experts and stakeholders expressed concern that the Administrative Office of the U.S. Courts may be reluctant to assume the vast responsibility of administering a newly created court system.<sup>11</sup> Regarding administrative challenges associated with the establishment of an independent administrative agency, 1 of the 10 experts and stakeholders we interviewed explained that this scenario might be overly complicated to implement since EOIR would need to develop its own administrative functions outside of DOJ. According to another 1 of the 10 experts and stakeholders we interviewed, creating a hybrid court system may further complicate the administration of the immigration court system and potentially result in difficulties for respondents.

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<sup>10</sup>One of the experts and stakeholders explained that the appointment of judges to staggered 15-year terms could help alleviate this potential challenge.

<sup>11</sup>As previously noted, while the Judicial Conference of the United States does not take a position on whether or not Congress should restructure the immigration court system, it opposes efforts to require the federal judiciary to administer such a court.

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- **Procurement of resources:** Five of the 10 experts and stakeholders we interviewed expressed the concern that a restructured immigration court system, regardless of the scenario, would not be able to procure sufficient resources outside of DOJ. For example, 1 of the 10 experts and stakeholders noted that a restructured independent court or administrative agency might have less leverage outside of DOJ to compete for resources.
  - **Trial level disconnection from the appellate level:** One of the 10 experts and stakeholders we interviewed stated that if the hybrid scenario were to be adopted, the trial level may become more disconnected from the appellate level, due to the placement of the immigration courts within the executive branch and the appellate body outside of the executive branch.
  - **Resolution of existing management challenges or case backlog:** Two of the 10 experts and stakeholders we contacted stated that a court system independent of the executive branch may not address the immigration courts' management challenges, such as the case backlog. For example, 1 of the 10 experts and stakeholders stated that the immigration court system would likely have a large caseload regardless of how it is structured.

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## EOIR Has Initiated Actions to Improve Its Management of the Immigration Courts, but Additional Steps Are Needed to Address Long-Standing Challenges

We also reported in June 2017 that EOIR could take several actions to address long-standing management and operational challenges and reduce the case backlog. In particular, we identified challenges related to, and made 11 recommendations to improve, EOIR's workforce planning, hiring, performance assessment, and technology utilization. EOIR generally concurred with our recommendations, and, has initiated actions to address them. Overall, EOIR has fully implemented 1 recommendation but needs to take additional steps to fully implement the remaining 10 recommendations to help strengthen the agency's management and help reduce the case backlog.

**Workforce Planning.** In June 2017, we reported that EOIR could help address its case backlog and staffing challenges, such as by hiring more immigration judges to meet its authorized number of judges and through better workforce planning and hiring practices. During the course of our review we found that EOIR estimated staffing needs using an informal approach that did not account for long-term staffing needs, reflect EOIR's performance goals, or account for differences in the complexity of court cases. For example, in developing its staffing estimate, EOIR did not calculate staffing needs beyond the next fiscal year or take into account resources needed to achieve the agency's case completion goals.

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Furthermore, we found that, according to EOIR data, approximately 39 percent of all immigration judges were eligible to retire as of June 2017, but EOIR had not systematically accounted for these impending retirements in its staffing estimate.

At the time of our review, EOIR had begun to take steps to account for long-term staffing needs, such as by initiating a workforce planning report and a study on the time it takes court staff to complete key activities. However, we found that these efforts did not align with key principles of strategic workforce planning that would help EOIR better address current and future staffing needs.<sup>12</sup> EOIR officials also stated that the agency had begun to develop a strategic plan for fiscal years 2018 through 2023 that could address its human capital needs. We recommended that EOIR develop and implement a strategic workforce plan that addresses key principles of strategic workforce planning.

EOIR agreed with our recommendation. In February 2018, EOIR officials told us that they had established a committee and working group to examine the agency's workforce needs and would include workforce planning as a key component in EOIR's forthcoming strategic plan. Specifically, EOIR officials stated that the agency had established the Immigration Court Staffing Committee in April 2017 to examine how to best leverage its existing judicial and court staff workload model to address its short- and long-term staffing needs, assess the critical skills and competencies needed to achieve future programmatic results, and develop strategies to address human capital gaps, among other things. In February 2018, EOIR officials stated that the agency replaced this committee, which had completed its work, with a smaller working group of human resource employees charged with addressing the agency's strategic workforce planning. Additionally, EOIR officials stated that the agency was developing a strategic plan that includes human capital planning as a critical component, which will be used to guide workforce planning for the agency. These are positive steps, but to fully address our recommendation, EOIR needs to continue to develop, and then implement a strategic workforce plan that: (1) addresses the agency's short- and long-term staffing needs; (2) identifies the critical skills and competencies needed to achieve future programmatic results; and (3)

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<sup>12</sup>Strategic workforce planning focuses on developing long-term strategies for acquiring, developing, and retaining an organization's total workforce to meet the needs of the future. Key principles of strategic workforce planning include, for example, determining critical skills and competencies needed to achieve current and future programmatic results.

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includes strategies to address human capital gaps. Once this strategic workforce plan is completed, EOIR needs to monitor and evaluate the agency's progress toward its human capital goals.

**Hiring.** Additionally, in our June 2017 report, we found that EOIR did not have efficient practices for hiring new immigration judges, which has contributed to immigration judges being staffed below authorized levels and to staffing shortfalls. For example, in fiscal year 2016, EOIR was allocated 374 immigration judge positions and had 289 judges on board at the end of the fiscal year.<sup>13</sup> EOIR officials attributed these gaps to delays in the hiring process. Our analysis of EOIR hiring data supported their conclusion. Specifically, we found that from February 2014 through August 2016, EOIR took an average of 647 days to hire an immigration judge—more than 21 months. As a result, we recommended that EOIR (1) assess the immigration judge hiring process to identify opportunities for efficiency; (2) use the assessment results to develop a hiring strategy that targets short- and long-term human capital needs; and (3) implement any corrective actions related to the hiring process resulting from this assessment.

In response to our report, EOIR stated that it concurred with our recommendation and was implementing a new hiring plan as announced by the Attorney General in April 2017 intended to streamline hiring. Among other things, EOIR stated that the new hiring plan sets clear deadlines for assessing applicants moving through different stages of the process and for making decisions on advancing applicants to the next stage, and allows for temporary appointments for selected judges pending full background investigations. In February 2018, EOIR indicated to us that it had begun to use the process outlined in its hiring plan to fill judge vacancies. The Attorney General also announced in April 2017 that the agency would commit to hire an additional 50 judges in 2018 and 75 additional judges in 2019. In January 2018, EOIR officials told us that the

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<sup>13</sup>EOIR's fiscal year 2016 appropriation included funds for 55 new Immigration Judge Teams to be hired and on board by November 2016. See Explanatory Statement, 161 Cong. Rec. H9693, H9738 (daily ed. Dec. 17, 2015), accompanying Division B—Commerce, Justice, Science, and Related Agencies Appropriations Act, 2016 (Pub. L. No. 114-113, div. B, 129 Stat. 2242, 2286-2333 (2015)). In December 2015, EOIR's Director indicated that the authorization of 55 new immigration judges for fiscal year 2016 would result in about 374 immigration judges nationwide if all such positions were filled. See Oversight of the Executive Office for Immigration Review: Hearing Before the Subcomm. on Immigration and Border Security of the H. Comm. on the Judiciary, No. 114-57, 114th Cong. 1st Sess., pg.15 (Dec. 3, 2015).

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agency had a total of 330 immigration judges, an increase of 41 judges since September 2016. Hiring these additional judges is a positive step; however, EOIR remains below its fiscal year 2017 authorized level of 384 immigration judges based on funding provided in fiscal years 2016 and 2017. Additionally, the Consolidated Appropriations Act, 2018 provided funding for EOIR to hire at least 100 additional immigration judge teams, including judges and supporting staff, with a goal of fielding 484 immigration judge teams nationwide by 2019.<sup>14</sup> To fully address our recommendation, EOIR will need to continue to improve its hiring process by (1) assessing the prior hiring process to identify opportunities for efficiency; (2) developing a hiring strategy targeting short- and long-term human capital needs; and (3) implementing corrective actions in response to the results of its assessment of the hiring process.

**Performance Assessment.** Regarding EOIR's performance assessment, we reported in June 2017 that EOIR had previously established performance monitoring activities and measures to assess aspects of the immigration courts, but it had eliminated several of these performance assessment mechanisms. EOIR also had goals for some cases it adjudicated, such as respondents in detention, but no longer had goals for most cases, including some cases it had prioritized for adjudication.<sup>15</sup> For example, we found that EOIR did not have performance measures or goals for completing cases in which the respondent is not detained (non-detained cases), which comprised 83 percent of immigration courts' total caseload from fiscal year 2010 through fiscal year 2015. To help EOIR more effectively monitor its performance and fully evaluate whether the immigration courts are achieving EOIR's mission, we recommended that EOIR establish and monitor comprehensive case completion goals, including a goal for completing non-detained cases not captured by performance measures, and goals for cases it considers a priority.

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<sup>14</sup>See Explanatory Statement, 164 Cong. Rec. H2045, H2090 (daily ed. March 22, 2018), accompanying Division B—Commerce, Justice, Science, and Related Agencies Appropriations Act, 2018 (Pub. L. No. 115-141, div. B). The President's fiscal year 2019 budget proposed funding to allow EOIR to hire 75 new immigration judge teams.

<sup>15</sup>While removal proceedings are pending, respondents may be detained in the custody of U.S. Immigration and Customs Enforcement. The Immigration and Nationality Act, as amended, provides DHS with broad discretion (subject to certain legal standards) to detain, or release aliens on bond, conditional parole, or terms of supervision, depending on the circumstances and statutory basis for detention. The law requires DHS to detain particular categories of aliens, such as those deemed inadmissible for certain criminal convictions or terrorist activity. See 8 U.S.C. §§ 1225, 1226, 1226a, 1231.

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EOIR agreed with this recommendation and has taken steps to address it. For example, EOIR issued guidance in January 2018 to all immigration court staff that established the agency's goals for each immigration court in adjudicating cases. In particular, EOIR identified in this guidance a case completion goal for non-detained cases: courts must complete 85 percent of all non-detained removal cases that do not qualify as a "status case" within 1 year of filing of the Notice to Appear (NTA) in court, reopening or recalendaring of the case, remand from the Board of Immigration Appeals, or notification of release from custody.<sup>16</sup> According to this guidance, EOIR has also retained case completion goals for other categories it considers a priority, such as cases in which the respondent is detained and credible fear reviews.<sup>17</sup> In its January 2018 guidance, EOIR stated that it will track these measures and the courts' performance in meeting them as well as regularly auditing these measures. To fully address this recommendation, EOIR needs to monitor courts' performance in meeting these goals.

In June 2017, we also reported that EOIR collected information on the extent and reasons why immigration judges issue continuances—temporary adjournments of case proceedings until a different day or time—but did not systematically assess these data to identify and address potential operational challenges affecting the immigration courts or areas where immigration judges could benefit from additional guidance or training.<sup>18</sup> An immigration judge may continue a case for good cause shown, such as to allow respondents to obtain legal representation or DHS to complete required background investigations and security

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<sup>16</sup>A Notice to Appear is a charging document ordering an individual's appearance before an immigration judge to respond to removal charges. According to EOIR's guidance, a status case is (1) one in which an immigration judge is required to continue the case pursuant to binding authority in order to await the adjudication of an application or petition by U.S. Citizenship and Immigration Services, (2) one in which the immigration judge is required to reserve a decision rather than completing the case pursuant to law or policy, or (3) one which is subject to a deadline established by a federal court order. A "removal" case includes a case in removal proceedings, in addition to any reopened, recalendared, or remanded cases in exclusion or deportation proceedings.

<sup>17</sup>For credible fear cases, a respondent who an asylum officer determined does not have a credible fear of persecution in his or her home country is to be ordered removed. In that circumstance, the individual may seek review of the asylum officer's negative determination by an immigration judge. This review must be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the adverse determination. (8 U.S.C. § 1225(b)(1)(B)(iii)(III)).

<sup>18</sup>Immigration judges may adjourn a case for a variety of reasons, either on their own volition or for good cause shown by the respondent or DHS. 8 C.F.R. § 1240.6.

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checks.<sup>19</sup> Our analysis of continuance records from fiscal year 2006 through fiscal year 2015 showed that the use of continuances had grown over time. Specifically, all types of continuances increased by 23 percent from fiscal year 2006 through fiscal year 2015 and operational continuances, such as those caused by a lack of foreign language interpretation or a video-teleconference (VTC) malfunction, increased by 33 percent over this same time period. We recommended that EOIR systematically analyze immigration court continuance data to identify and address any operational challenges faced by courts or areas for additional guidance or training.

EOIR agreed with this recommendation and, in July 2017, issued updated guidance for immigration judges on fair and efficient docket management relating to the use of continuances. For instance, according to this guidance, judges must annotate the case worksheet on disposition of the case with a continuance code describing the reason for the continuance and court staff must ensure that each continuance code is accurately entered into the agency's case management system for all cases. EOIR also issued guidance in October 2017 updating case continuance codes and their definitions to assist immigration judges in recording this information on the case worksheet. These are positive steps, and analyzing the use of continuances on a systematic basis would give EOIR greater insight into more widespread operational issues that the courts may be facing. To fully address our recommendation, EOIR will need to systematically analyze immigration court continuance data to identify and address any operational challenges faced by courts or areas for additional guidance or training.

We also reported in June 2017 that EOIR could improve the reliability of its case management data and reports on case completion times by ensuring that court staff accurately record NTAs in a timely manner. We found that EOIR did not have guidance or data integrity efforts to ensure the timely and accurate recording of NTAs in its case management system, and that at least 16 percent of NTA dates were unreliable. EOIR uses NTA dates to calculate case completion times, which are used to

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<sup>19</sup>See 8 C.F.R. § 1003.29. See also Aliens and Nationality; Rules of Procedure for Proceedings Before Immigration Judges, 52 Fed. Reg. 2931 (Jan. 29, 1987). Immigration judges cannot grant applications for relief subject to identity, law enforcement, or security investigations or examinations until after DHS has completed, and reported to the immigration judge any relevant information from, the appropriate background investigations and security checks. 8 C.F.R. § 1003.47(g).



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assess court performance. The agency reports this information publicly in DOJ's Annual Performance Report. We concluded that improving the reliability of NTA data would allow EOIR to provide more accurate information on case completion times to Congress and the public. We recommended that EOIR update its policies and procedures to promote the timely and accurate recording of NTAs. In response to our report, EOIR stated that it partially concurred with our recommendation and stated that it would continue to monitor the timeliness and accuracy of NTA recording, and implement corrective actions as needed. In January 2018, as part of its policy on case completion goals, EOIR also created a goal that 100 percent of all electronic and paper records be accurate and complete. This goal is a positive step, and updating policies and procedures to remind staff about the importance of timely and accurate recording of all NTAs would provide EOIR greater assurance that this goal could be consistently met. To fully address our recommendation, EOIR will need to update its policies and procedures to ensure the timely and accurate recording of NTAs.

**Technology Utilization.** We also made several recommendations to EOIR in our June 2017 report to improve its technology utilization, including the agency's oversight of the ongoing development of a comprehensive electronic-filing (e-filing) capability—a means of transmitting documents and other information to immigration courts through an electronic medium, rather than on paper. EOIR identified the implementation of an e-filing system as a goal in 2001, but has not, as of April 2018, fully implemented this system. In 2001, EOIR issued an executive staff briefing for an e-filing system that stated that only through a fully electronic case management and filing system would the agency be able to accomplish its goals.<sup>20</sup> This briefing also cited several benefits of an e-filing system, including, among other things, reducing the data-entry, filing, and other administrative tasks associated with processing paper case files; and improving communication with external court stakeholders, such as respondents and attorneys, providing the ability to file court documents from private home and office computers. As we reported in June 2017, EOIR initiated a comprehensive e-filing effort in 2016—the EOIR Court and Appeals System (ECAS)—for which EOIR

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<sup>20</sup>In 2001, the former EOIR Director charged an executive-level working group with analyzing the information technology needs of the agency to include the development of an e-filing system. This briefing presented the findings and recommendations of this working group, and EOIR provided it to us in response to our request for an e-filing system concept of operations.

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had documented policies and procedures governing how its primary ECAS oversight body—the ECAS Executive Committee—would oversee ECAS through the development of a proposed ECAS solution. However, we found that EOIR had not yet designated an entity to oversee ECAS after selection of a proposed solution during critical stages of its development and implementation.

In our June 2017 report, we recommended that in order to help ensure EOIR meets its cost and schedule expectations for ECAS, the agency identify and establish the appropriate entity to oversee ECAS through full implementation. EOIR concurred and stated that it had selected and convened the EOIR Investment Review Board to serve as the ECAS oversight body with the Office of Information Technology directly responsible for the management of the ECAS program. EOIR officials told us in February 2018 that the board convened in October 2017 and January 2018 to discuss, among other things, the ECAS program. However, as we reported in June 2017, EOIR officials previously told us that the EOIR Investment Review Board was never intended to oversee ECAS implementation due to the detailed nature of this system's implementation. EOIR has recently provided us with documentation related to its oversight of ECAS, which we are reviewing to help determine the extent to which EOIR has met the intent of our recommendation. Additionally, we recommended in June 2017 EOIR develop and implement a plan that is consistent with best practices for overseeing ECAS to better position the agency to identify and address any risks and implement ECAS in accordance with its cost, schedule, and operational expectations. As of April 2018, EOIR has not indicated that it has developed such a plan.

In June 2017 we also reported on ways EOIR could enhance its VTC program. EOIR is authorized by statute to hold immigration removal proceedings through VTC.<sup>21</sup> According to EOIR officials, EOIR largely uses VTC for hearings for detained individuals, including both master

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<sup>21</sup>EOIR is authorized to hold immigration removal proceedings: (1) in person; (2) in the absence of the respondent, where agreed to by the parties; (3) through video conference (i.e., VTC), in which case consent need not be obtained from either party; or (4) through telephone conference, which requires consent of the respondent if it is an evidentiary hearing on the merits. See 8 U.S.C. § 1229a(b)(2).

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calendar and individual merits hearings.<sup>22</sup> We reported in June 2017 that officials from all six of the immigration courts we visited identified challenges related to VTC hearings, including difficulties maintaining connectivity, hearing respondents, exchanging paper documents, conducting accurate foreign language interpretation, and assessing the demeanor and credibility of respondents and witnesses. We further found that EOIR had not, in accordance with best practices, (1) evaluated its VTC program to ensure that it is outcome-neutral, or (2) established a mechanism to solicit feedback and comments about VTC from those who use it regularly to assess whether it meets user needs.<sup>23</sup>

Therefore, we recommended that EOIR take three actions to provide further assurances that its use of VTC in immigration hearings is outcome-neutral, including that it collect more complete and reliable data related to its VTC use (e.g., the number of hearings it conducts by VTC) and use the data to assess any effects of VTC on immigration hearings. EOIR partially concurred with these actions and has since taken some steps to implement these recommendations, such as piloting a project to collect data on respondent appeals related to the use of VTC in their cases. Additionally, EOIR officials told us in August 2017 that the agency is studying how to collect more complete and reliable data on the number and type of hearings it conducts through VTC and use these and other data to assess any effects of VTC on immigration hearings.

We also recommended that EOIR develop and implement a mechanism to solicit and monitor feedback from respondents regarding their satisfaction and experiences with VTC hearings. EOIR concurred and implemented this recommendation in December 2017 by establishing a mechanism on its public website to solicit open-ended feedback from respondents regarding their satisfaction with VTC hearings, including the audio and visual quality of the hearing. According to EOIR officials, a group of individuals within EOIR's Office of the Chief Immigration Judge is responsible for monitoring and addressing feedback received through this

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<sup>22</sup>Master calendar hearings are generally used to schedule individual merits hearings and address other administrative matters. Individual merits hearings generally address the specific facts and circumstances of the case, including any assessments of respondent and witness credibility.

<sup>23</sup>Center for Legal and Court Technologies and the Administrative Conference of the United States, *Report to the Administrative Conference of the United States: Best Practices for Using Video Teleconferencing for Hearings and Related Proceedings* (Washington D.C.: 2014).

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portal. These efforts should help EOIR ensure VTC hearings it conducts meet all user needs and identify and address technical issues with VTC hearings.

Chairman Cornyn and Ranking Member Durbin, this completes my prepared statement. I would be happy to respond to any questions you or the members of the committee may have.

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## GAO Contact and Staff Acknowledgments

If you or your staff have any questions about this testimony, please contact Rebecca Gambler at (202) 512-8777 or [gambler@gao.gov](mailto:gambler@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. GAO staff who made key contributions to this testimony are Taylor Matheson (Assistant Director), Kathleen Donovan, Sasan J. “Jon” Najmi, Robin Nye, and Erin O’Brien.

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