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## IN-AND-OUT JUSTICE: HOW THE ACCELERATION OF FAMILIES THROUGH IMMIGRATION COURT VIOLATES DUE PROCESS

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**Abstract.** Since November 2018, the Department of Justice has prioritized the scheduling of the cases of thousands of families in immigration courts who have been labeled as “Family Units.” This policy requires that the cases be completed within one year of the filing of the Notice to Appear. Affected families are fleeing violence in their home countries, meaning that they may be eligible for protection in the United States. Under this policy, traumatized families must find an attorney, collect all the necessary evidence for their cases, and be prepared to argue their case in court in one-third of the time of the average immigration case. In the policy’s first year, less than three percent of families affected were granted any form of legal protection in the United States. This Article argues that the prioritization policy violates the Procedural Due Process rights of immigrant families. Immigrant families have the due process right to a full and fair hearing, and their hearings are neither full nor fair when rushed. The policy gives insufficient time for families to gather the evidence to prove their case and to recover from trauma such that they will be able to articulate their claims before the Immigration Judge. Prioritization of family cases should be abandoned as official policy and should not be used by future Administrations as a solution to the structural problems plaguing the immigration courts.

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## INTRODUCTION

Families who are seeking refuge in the United States are on a ticking clock like never before. In November 2018, the Department of Justice published a memo titled “Tracking and Expedition of ‘Family Unit’ Cases”<sup>1</sup> (commonly called the “FAMU Memo” or “FAMU Policy” by practitioners<sup>2</sup>), which requires that families’ cases be completed within one year or less.<sup>3</sup> As a result, families who recently arrived in the United States must find an attorney, apply for asylum, gather the necessary evidence, and prepare for trial in one-third of the time—or less—of other cases.<sup>4</sup> From September 2018 to January 2020, over 100,000 cases were labeled as Family Unit cases.<sup>5</sup> Of those, 44,503 cases were completed.<sup>6</sup> Of the completed cases, only 1,271—less than *three percent*—were granted some form of protection from deportation.<sup>7</sup>

The stakes could not be higher for families caught in this cycle. Families fleeing from Central America<sup>8</sup> are coming to the United States to escape violence comparable to active war zones.<sup>9</sup> Gangs with the power of quasi-governments attack and kill those whom they see as working against them, including children who resist joining the gangs<sup>10</sup> and people who report crimes to the police.<sup>11</sup> Many flee severe domestic and gender-based violence and a judicial system completely lacking the resources to protect them.<sup>12</sup> Still others flee abuse for their sexual orientation or gender identity.<sup>13</sup> A

<sup>1</sup> EXEC. OFFICE FOR IMMIGRATION REVIEW, TRACKING AND EXPEDITION OF “FAMILY UNIT” CASES (Nov. 16, 2018) [hereinafter “FAMU Memo”], <https://www.justice.gov/eoir/page/file/1112036/download> [<https://perma.cc/MR93-MFL9>].

<sup>2</sup> See Jeffrey S. Chase, EOIR Creates More Obstacles for Families, OPINIONS/ANALYSIS ON IMMIGRATION LAW (Dec. 13, 2018), <https://www.jeffreyschase.com/blog/2018/12/13/eoirs-creates-more-obstacles-for-families> [<https://perma.cc/UP3G-QX2A>]. Cf. U.S. DEP’T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE RAPID DNA OPERATIONAL USE (2019), [https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-rapiddna-june2019\\_1.pdf](https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-rapiddna-june2019_1.pdf) [<https://perma.cc/C8G2-NBE8>]. This Article will abbreviate the policy to expedite family unit cases as the “FAMU Policy” or the “FAMU Memo.”

<sup>3</sup> FAMU Memo, *supra* note 1, at 1.

<sup>4</sup> Chase, *supra* note 2.

<sup>5</sup> EXEC. OFFICE FOR IMMIGRATION REVIEW, ADJUDICATION STATISTICS: “FAMILY UNIT” DATA FOR SELECT COURTS (2019), <https://www.justice.gov/eoir/page/file/1187416/download> [<https://perma.cc/ZZD5-XAFL>].

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> While this policy is not directly targeted at one nationality, it disproportionately affects Central American families. See Complaint at 37 ¶ 119, *Las Americas Immigrant Advocacy Ctr. v. Trump*, 451 F. Supp. 3d 1191 (D. Or. 2020) (No. 3:19-CV-02051-IM), [https://www.splcenter.org/sites/default/files/ecf\\_1\\_las\\_americas\\_v.\\_trump\\_no.\\_19-cv-02051-sb\\_d\\_or.pdf](https://www.splcenter.org/sites/default/files/ecf_1_las_americas_v._trump_no._19-cv-02051-sb_d_or.pdf) [<https://perma.cc/AB2S-K5UM>]; U.S. DEP’T OF JUSTICE, STATISTICS YEARBOOK FISCAL YEAR 2018, at 30 (2018).

<sup>9</sup> *War zones: Violence in Central America is similar to what MSF sees in global conflict areas*, DOCTORS WITHOUT BORDERS (Sept. 10, 2019), <https://www.doctorswithoutborders.ca/war-zones-violence-central-america-similar-what-msf-sees-global-conflict-areas> [<https://perma.cc/G5RY-C46N>].

<sup>10</sup> Annie Hylton and Sarah Salvadore, “*They Said We Would Pay With Our Lives*”, SLATE (Aug. 31, 2016), <https://slate.com/human-interest/2016/08/as-central-american-gangs-target-younger-kids-more-minors-are-fleeing-to-the-u-s.html> [<https://perma.cc/TM7T-MDJH>].

<sup>11</sup> Steven Dudley and Héctor Silva Ávalos, *MS13 Violence: Method or Madness?*, INSIGHT CRIME (Feb. 13, 2018), <https://www.insightcrime.org/investigations/ms13-violence-method-madness> [<https://perma.cc/ML6W-V3GB>].

<sup>12</sup> See, e.g., Cecilia Menjivar and Shannon Drysdale Walsh, *The Architecture of Femicide: The State, Inequalities, and*

recent Human Rights Watch report shows that many people who have been deported from the United States to El Salvador have been killed upon their return.<sup>14</sup> The report shows “a clear link between the killing or harm to the deportee upon return and the reasons they had fled El Salvador in the first place.”<sup>15</sup> Fully and fairly evaluating asylum seekers’ cases could prevent similar deaths and harm in the future.

The policy of expediting family unit cases in immigration court violates the due process rights of families. On its face, the expedition of family cases seems to promote efficiency and the completion of cases in a timely manner. However, this acceleration violates families’ right to be heard at a meaningful time and in a meaningful manner due to the difficulty of obtaining evidence in asylum cases and the time necessary to build rapport with traumatized clients. All of these difficulties are amplified in the current chaos of the immigration court system.

While this Article specifically examines the acceleration of families’ cases under the November 2018 FAMU Memo published by the Trump Administration, the problems with the acceleration policy are relevant beyond this Memo and beyond this Administration. Indeed, the Obama Administration also attempted to prioritize family cases in immigration court in an effort to promote efficiency in the courts.<sup>16</sup> Because of the policy’s repeated use, prioritization of family cases is a strategy that will inevitably be present in policy discussions by future presidential administrations as policymakers grapple with how to make a dent in the immigration court backlog. For this reason, a focus on why prioritization and acceleration violates asylum seekers’ due process rights of asylum seekers goes beyond the 2020 election cycle. It is a “solution” that should not be repeated by any future Administration.

The FAMU Policy goes to the heart of fairness in the court system. Many policies implemented since 2016 hurt immigrants and asylum seekers. The FAMU Policy must be recognized as one of these policies and challenged by both attorneys representing asylum seekers and attorneys engaged in impact litigation. The inability of families to put together a case to meaningfully explain why they deserve to remain in the United States is fundamentally unfair. Everyone has the right to present their claims in court. A policy that deprives them of that right must be challenged.

Part I of this Article will describe what is currently happening in immigration courts. It will discuss the forms of relief from removal that exist for families who are affected by the acceleration policy and explain how a case makes its way through immigration court. Moreover, it will describe the flaws that existed prior to 2016 in the immigration courts and how the Trump Administration has exacerbated those flaws. It will also examine the expedition of family unit cases through immigration

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*Everyday Gender Violence in Honduras*, 52(2) *LATIN AM. RES. REV.* 221, 226-29 (2017) (noting that despite the prevalence of femicide and other forms of gender-based violence in Honduras, these cases rarely make it to court).

<sup>13</sup> AMNESTY INTERNATIONAL, *NO SAFE PLACE: SALVADORANS, GUATEMALANS AND HONDURANS SEEKING ASYLUM IN MEXICO BASED ON THEIR SEXUAL ORIENTATION AND/OR GENDER IDENTITY* (2017), <https://www.amnestyusa.org/wp-content/uploads/2017/11/No-Safe-Place-Briefing-ENG-1.pdf> [<https://perma.cc/92JC-Y9JG>].

<sup>14</sup> HUMAN RIGHTS WATCH, *DEPORTED TO DANGER: UNITED STATES DEPORTATION POLICIES EXPOSE SALVADORANS TO DEATH AND ABUSE*, 27 (2020), <https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-and> [<https://perma.cc/DS5C-CSP4>] (reporting “138 cases of [El Salvadorean deportees] killed between 2013 and 2019 after being deported from the United States”).

<sup>15</sup> *Id.* at 2.

<sup>16</sup> See description *infra* Part I.D.

court, including Obama-era policies and the new FAMU Policy currently in place. Part II will explain the due process rights that are afforded to immigrants in removal proceedings. It will illustrate the right to a full and fair hearing that is due all immigrants in removal proceedings and examine the test from *Mathews v. Eldridge* that is generally applied to questions of procedural due process. It will also describe the “no prejudice” test that predates *Mathews* and how the federal circuits where the policy has been implemented have applied the test in the context of asylum seekers in removal proceedings. Although case law varies across the country, due process ultimately requires a meaningful opportunity to be heard. Part III will then argue that, particularly in the current climate of immigration courts, the acceleration of families’ cases violates asylum seekers’ due process rights and prejudices their cases. It will describe how the acceleration of families’ cases through immigration court impairs their ability to collect evidence and build rapport with their attorney so they can fully present their case. These two issues, in turn, prevent their hearings from being *meaningful* as required by due process. Additionally, this lack of a meaningful hearing ultimately prejudices the asylum seekers, as more time would provide the opportunity to collect evidence and prepare to testify despite the impacts of trauma. Finally, Part IV will address questions and logical conclusions associated with the FAMU Policy. It will briefly discuss proposals for a sufficient amount of time in an asylum case. Ultimately, this question requires analysis beyond the question of the FAMU Policy.

The protections of due process apply—and must be applied—regardless of whether the asylum seeker would ultimately win their case. Recent changes in the laws are making many asylum cases increasingly difficult to win.<sup>17</sup> However, the comparative likelihood of success on the merits is not the focus of due process analysis. Every asylum seeker, and every family, deserves the opportunity to be heard at a meaningful time and in a meaningful manner, regardless of the strength of their case under current precedent. While accelerating a class of cases that may not appear to be strong on the merits is a tempting solution to the problems facing the immigration court system, it is not a fair solution. The problems facing the immigration court system are significant and must be solved, but trampling the due process rights of vulnerable families is not the answer.

#### I. IMMIGRATION COURT, TRUMP, AND CASE PRIORITIZATION

In order to understand why the FAMU Policy violates due process, it is necessary to understand the immigration court system and what immigrants and their attorneys face in these complex cases. This Part will briefly explain what the immigrants most affected by the FAMU Policy may apply for under current immigration law, including asylum, withholding of removal, protection under the Convention Against Torture, and, for some children, Special Immigrant Juvenile Status. It will then illustrate how a case advances through immigration court, including who is present during the hearings, the different phases of a case, and how appeals work. Next, it will describe how the Trump Administration has exacerbated problems that were already latent in the immigration court system before 2016. Finally, this Part will recount the history of the FAMU Memo that is at issue in this Article.

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<sup>17</sup> See, e.g., *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019) and *Matter of A-B-*, 27 I&N Dec. 316, 319 (A.G. 2018) (both discussing recent changes to law that require asylum applicants to (1) show they are members of a social group, and (2) that membership was the “central reason for their persecution”).

A. *Relief from Removal for Recently Arrived Families*

Asylum is a crucial form of protection for anyone—including families—fleeing persecution. To qualify for asylum, a person must show that they are “unable or unwilling to return to, and [are] unable or unwilling to avail [themselves] of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>18</sup> Asylum applicants must demonstrate that they<sup>19</sup> (1) have suffered or have a well-founded fear of suffering persecution, and (2) that the persecution is “on account of”<sup>20</sup> (3) a protected ground. The definition of persecution<sup>21</sup> as well as the contours of the protected grounds<sup>22</sup> have been expanded and explained by case law in the several decades since the United States ratified the Refugee Convention.<sup>23</sup> If an asylum seeker’s persecutor is a private actor, they will also need to demonstrate that the government of their country is “unable or unwilling” to protect them from their persecutor<sup>24</sup> and that it is not feasible for them to relocate within their country.<sup>25</sup> An immigrant who is granted asylum is authorized to stay in the United States without fear of being removed to their country, and is permitted to work, apply for their spouse and children to join them, and apply for lawful permanent residence (a “green card”) after one year of approval.<sup>26</sup> Five years after their permanent residence is approved, they are eligible to apply for U.S. citizenship.<sup>27</sup>

Withholding of Removal is a similarly important protection. In a withholding case, an applicant must demonstrate that their “life or freedom would be threatened in [their] country” because of a protected ground.<sup>28</sup> If an immigrant has shown that they have suffered past persecution,

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<sup>18</sup> 8 U.S.C. § 1101(a)(42)(A) (2020).

<sup>19</sup> This paper will use the singular *they* throughout to respect and include people of all gender identities, especially because many people seek asylum because of persecution in their countries on account of their sexual orientation and/or gender identity. See generally HUMAN RIGHTS CAMPAIGN, *LGBTQ Asylum Seekers and Refugees Must Be Welcome Here* (Jan. 28, 2019), <https://www.hrc.org/blog/lgbtq-asylum-seekers-and-refugees-must-be-welcome-here> [<https://perma.cc/9Q65-Y6B9>].

<sup>20</sup> This is often referred to as the nexus requirement. See generally Christian Cameron, *Why Do You Prosecute Me? Proving the Nexus Requirement for Asylum*, 18 U. MIAMI INT’L & COMP. L. REV. 233 (2011).

<sup>21</sup> See, e.g., *Guo v. Sessions*, 897 F.3d 1208, 1213 (9th Cir. 2018) (“Persecution is an extreme concept and has been defined as the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive”) (internal citations omitted).

<sup>22</sup> See, e.g., *Alvarez Lagos v. Barr*, 927 F.3d 236, 236 (4th Cir. 2019) (discussing grounds for establishing a successful asylum claim); *Gashi v. Holder*, 702 F.3d 130, 130 (2d Cir. 2012) (discussing establishment of nexus requirement in May 2005); *Molina-Estrada v. INS*, 293 F.3d 1089, 1095 (9th Cir. 2002) (denying cancellation of removal in part because applicant for asylum did not demonstrate that gang members were acting upon their perceptions of his father’s political beliefs); *Matter of Kasinga*, 21 I&N Dec. 357, 357 (BIA 1996) (granting asylum because applicant had established that she was part of a social group of women who opposed female genital mutilation); *Matter of Acosta*, 19 I. & N. Dec. 211, 212 (BIA 1985) (denying an application for asylum in part because the applicant had not demonstrated “it [was] his own, *personal* political opinion that a persecutor [sought] to overcome by the infliction of harm or suffering”) (emphasis added).

<sup>23</sup> See Protocol: Protocol Relating to the Status of Refugees, art. 2, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

<sup>24</sup> See, e.g., *Orellana v. Barr*, 925 F.3d 145, 151 (4th Cir. 2019).

<sup>25</sup> See, e.g., *In re. M-Z-M-R-*, 26 I&N Dec. 28, 32-33 (B.I.A. 2012).

<sup>26</sup> 8 U.S.C. § 1159(b) (2020).

<sup>27</sup> *Id.*

<sup>28</sup> 8 U.S.C. § 1231(b)(3)(A) (2020).

there is a presumption that their life or freedom would be threatened.<sup>29</sup> In its elements, Withholding of Removal is distinct from asylum in two ways. First, applicants for withholding must show that it is *more likely than not* they will suffer persecution.<sup>30</sup> In asylum cases, this likelihood can be as low as a one-in-ten chance.<sup>31</sup> Second, there is no time restriction on applying for Withholding of Removal. In an asylum case, by contrast, an applicant must apply for asylum within one year of arriving in the United States or within one year of changed circumstances.<sup>32</sup> Withholding of Removal is also unlike asylum in that it *must* be granted if the elements are met.<sup>33</sup> If an Immigration Judge (IJ) grants Withholding of Removal, an immigrant may stay in the United States and work, but there is no opportunity to receive lawful permanent residence or apply for family members to join the applicant.<sup>34</sup>

Protection under the Convention Against Torture (CAT) provides another form of relief from removal. In order to qualify for relief under CAT, an applicant must establish that it is more likely than not that they would be tortured if removed to the designated country of removal.<sup>35</sup> Torture is defined as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him . . . a confession, punishing him for an act he . . . has committed or is suspected of having committed, or intimidating . . . him. . . .”<sup>36</sup> This torture must be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>37</sup> When determining whether an applicant merits this protection, “all evidence relevant to the possibility of future torture shall be considered,” including country conditions and evidence of “gross, flagrant, or mass violations of rights within the country.”<sup>38</sup> Similar to Withholding of Removal, those who are granted protection under the Convention Against Torture may remain in the United States and receive work authorization, but they do not receive a path to permanent residency and can never petition for family members.<sup>39</sup>

Special Immigrant Juvenile Status (SIJS) is a form of protection for children who have been “abused, abandoned, or neglected by one or both parents.”<sup>40</sup> The SIJS application process is unique in immigration because it combines state court proceedings and federal agency decision-making. SIJS

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<sup>29</sup> 8 C.F.R. § 208.16(b)(1)(i) (2020).

<sup>30</sup> 8 C.F.R. § 208.16(b)(1)(iii) (2020).

<sup>31</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

<sup>32</sup> 8 U.S.C. § 1159(a)(2)(B) (2020).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> 8 C.F.R. § 208.16(c)(2), (4) (2020).

<sup>36</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 23 I.L.M. 1027, 1465 U.N.T.S. 85.

<sup>37</sup> 8 C.F.R. § 208.18(a)(1).

<sup>38</sup> *In re J-E-*, 23 I&N Dec. 291, 303 (B.I.A. 2002). See 8 C.F.R. § 208.16(c)(3).

<sup>39</sup> *Immigration Basics: Relief Under CAT*, IMMIGR. EQUAL.,

<https://immigrationequality.org/asylum/asylum-manual/immigration-basics-relief-under-cat/> [https://perma.cc/Q9ZN-3NRV].

<sup>40</sup> I.N.A. § 101(a)(27)(J)(i); see also *What is Special Immigrant Juvenile Status (SIJS)?*, SAFE PASSAGE PROJECT, <https://www.safepassageproject.org/what-is-sijs-status> [https://perma.cc/8QBE-9F6H].

cases proceed differently through court than those cases where children are either not eligible or do not find an attorney to help them apply for it, so this form of relief will not be further addressed.

B. *How a Case Proceeds Through Immigration Court*

An immigrant's removal<sup>41</sup> proceedings begin with the Notice to Appear (NTA), the charging document in immigration proceedings.<sup>42</sup> After the issuance of an NTA, the immigrant has their first hearing in court.<sup>43</sup> The immigration court might be located very far away from where the immigrant lives because there is only one immigration court in many states.<sup>44</sup> For example, a single court in Arlington serves all of Virginia, and it can take three hours or more to reach Arlington from the state's rural areas.

The first hearing in court is a Master Calendar Hearing.<sup>45</sup> The Master Calendar Hearing is an opportunity to take pleadings, set briefing schedules, and schedule hearings on the merits of the case, known as Individual Hearings (the "trial" in immigration court).<sup>46</sup> In the Author's experience, Master Calendar Hearings are often short, and many immigrants (as many as fifty) are scheduled for the same time in front of a judge. As a matter of simplifying the process, some judges, including those in front of whom the Author has practiced, will hear from immigrants who are represented by counsel first, and then hear from immigrants who are appearing *pro se*.

At immigration court hearings, there are several people in the courtroom. Those people include the immigrant (the "respondent"), their attorney (if they are lucky),<sup>47</sup> the interpreter, the Immigration and Customs Enforcement (ICE) Trial Attorney, and the IJ. In immigration court, ICE, a branch of the Department of Homeland Security, is the government's representative.<sup>48</sup> The IJ is an employee of the Executive Office of Immigration Review (EOIR), a branch of the Department of

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<sup>41</sup> Although removal proceedings are colloquially called "deportation," this Article will use the proper term of "removal" or "removal proceedings" because "deportation proceedings" refer to a specific historic form of hearings in immigration court. See *Chapter 1: Introduction to Removal Proceedings*, IMMIGR. LEGAL RESOURCE CTR., INADMISSIBILITY & DEPORTABILITY §§ 1.4, 1.6 (2015), [https://www.ilrc.org/sites/default/files/sample-pdf/removal\\_defense-1st-2015-ch\\_01.pdf](https://www.ilrc.org/sites/default/files/sample-pdf/removal_defense-1st-2015-ch_01.pdf) [<https://perma.cc/BPF9-UBA3>] (explaining that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 combined the framework dividing "exclusion" and "deportation" proceedings into "removal" proceedings).

<sup>42</sup> See *Fact Sheet: Immigration Courts*, NAT'L IMMIGR. F. (Aug. 7, 2018), <https://immigrationforum.org/article/fact-sheet-immigration-courts> [<https://perma.cc/4C6T-RQEV>] ("A Notice to Appear (NTA) is the charging document issued by the Department of Homeland Security (DHS) to initiate removal proceedings").

<sup>43</sup> See 8 C.F.R. § 1003.14(a) (2020) ("Jurisdiction vests, and proceedings before an IJ commence, when a charging document is filed with the Immigration Court by the Service."); *Cf.* *United States v. Cortez*, 930 F.3d 350, 359–61 (4th Cir. 2019) (discussing the initiation of removal proceedings).

<sup>44</sup> For a complete list of immigration court locations, see *EOIR Immigration Court Listing*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/eoir/eoir-immigration-court-listing> [<https://perma.cc/4ZHX-FMVW>].

<sup>45</sup> Immigration Legal Resource Center Attorneys, *Representing Clients at the Master Calendar*, [https://www.ilrc.org/sites/default/files/resources/rep\\_clnts\\_mstr\\_cal\\_hearing-20181220.pdf](https://www.ilrc.org/sites/default/files/resources/rep_clnts_mstr_cal_hearing-20181220.pdf) [<https://perma.cc/V9DB-6JJT>].

<sup>46</sup> *Id.*

<sup>47</sup> See, *infra*, notes 55–65.

<sup>48</sup> See *Office of the Principal Legal Advisor (OPLA)*, U.S. IMMIGRAT. AND CUSTOMS ENF'T, <https://www.ice.gov/opla> [<https://perma.cc/S3UH-N2T4>].



Justice. IJs are often hired from the ranks of ICE trial attorneys.<sup>49</sup> In contrast, few IJs have public interest or academic backgrounds.<sup>50</sup>

In this time between Master Calendar Hearings, many immigrants try to find representation in their hearings.<sup>51</sup> There is no right to counsel at the government's expense in immigration.<sup>52</sup> If an immigrant cannot afford a private attorney, and there is not a nonprofit legal services provider or a law school clinic<sup>53</sup> available to accept the immigrant for representation, they will be forced to represent themselves in court.

Once a date is set for an immigrant's Individual Hearing, it is the immigrant's responsibility to assemble all the necessary evidence to make the case that they should not be removed from the United States.<sup>54</sup> Although an asylum applicant's testimony alone *can* be enough to make out a claim for asylum,<sup>55</sup> other evidence is necessary to build a strong and persuasive case. Asylum applicants often present documents from their home country (if they can obtain them), such as medical records from when they were attacked, letters from witnesses who know what happened to the immigrant, and legal documents such as birth certificates, orders of protection, and death certificates.<sup>56</sup> Evidence from the United States can also be crucial to their case, including psychological evaluations<sup>57</sup> and physical evaluations<sup>58</sup> to corroborate an immigrant's account of persecution and torture. All of this evidence is also supplemented with additional research, including human rights reports, United Nations documents, news reports, academic articles, and expert affidavits to corroborate the claims

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<sup>49</sup> See Beth Fertig, *Presiding Under Pressure*, WNYC (May 21, 2019), <https://www.wnyc.org/story/presiding-under-pressure> [<https://perma.cc/HL2F-3SZA>] (“The Justice Department had a long history before Trump of hiring ICE attorneys as judges because of their immigration trial experience.”).

<sup>50</sup> See, e.g., Press Release, U.S. Dep’t of Just., Executive Office for Immigration Review Swears in 18 IJs (May 13, 2019), <https://www.justice.gov/eoir/page/file/1161951/download> [<https://perma.cc/85UG-HD6D>] (showing that of 18 recently sworn in IJs, none had come from a nonprofit or academic job – though many had worked in the military or as prosecutors).

<sup>51</sup> David Hausman & Jayashri Srikantiah, *Time, Due Process, and Representation: An Empirical and Legal Analysis of Continuances in Immigration Court*, 84 FORDHAM L. REV. 1823, 1827 (2016).

<sup>52</sup> 8 U.S.C. § 1362 (2020).

<sup>53</sup> Law school clinics can be crucial to representing immigrants in underserved areas of the country. See, e.g., Meredith Hobbs, *GSU Law Starts First Immigration Clinic in Georgia*, LAW.COM (Sep. 26, 2020, 2:40 PM), <https://www.law.com/dailyreportonline/2019/08/13/gsu-law-starts-first-immigration-clinic-in-georgia/> [<https://perma.cc/B33A-B75Q>].

<sup>54</sup> 8 C.F.R. § 1208.13(a) (“The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act.”).

<sup>55</sup> 8 C.F.R. § 1208.13(a) (“The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration”). *But see In re Y-B-*, 21 I&N Dec. 1136, 1137 (B.I.A. 1998).

<sup>56</sup> See, e.g., *In re Kasinga*, 21 I&N Dec. 357, 360 (B.I.A. 1996); see also Agata Szypszak, *Where in the World is Dr. Detchakandi? A Story of Fact Investigation*, 6 CLINICAL L. REV. 517, 521 (2000) (describing the difficulties of obtaining this evidence).

<sup>57</sup> See *PHR Asylum Program*, PHYSICIANS FOR HUMAN RIGHTS, <https://phr.org/issues/asylum-and-persecution/phr-asylum-program> [<https://perma.cc/EA6S-T2DS>] (offering pro bono psychological evaluations of asylum seekers because the need is otherwise unsupported).

<sup>58</sup> See, e.g., Apoorva Mittal, *Inside the world of asylum forensic exams*, CHICAGO READER (Aug. 28, 2019), <https://www.chicagoreader.com/chicago/asylum-forensic-exams/Content> [<https://perma.cc/5675-CVFS>].

made by asylum applicants.<sup>59</sup>

The Individual Hearing is the trial in immigration court. At the Individual Hearing, the immigrant is responsible for making the case for why they should not be removed from the country. Asylum applicants must testify about the details of their asylum case, which can include how they were assaulted for their sexual orientation or gender identity, how they were beaten and strangled by a spouse or partner, or how they were tortured for their religious or political beliefs. Individual Hearings are complex and emotional hearings where IJs must weigh all of the evidence in front of them to make a decision on an applicant's decision.<sup>60</sup> IJs often give their decisions orally at the conclusion of the Individual Hearing but can also issue a written decision.<sup>61</sup>

After the Individual Hearing, either party can appeal. The first appeal goes to the Board of Immigration Appeals (BIA). The BIA, also a part of EOIR, is a national board that hears appeals from across the United States. If either the government or immigrant is still unsatisfied with the result at the BIA, they can petition to the court of appeals in the circuit where the case originated.

### C. Problems in Immigration Courts

Litigating in immigration court has been compared to handling "death penalty cases in a traffic court setting."<sup>62</sup> While this may seem like hyperbole, it captures the feeling that the "procedure is insufficient to handle the substance of the law."<sup>63</sup> There are several flaws inherent in the immigration court system, many of which have been exacerbated by the Trump Administration's policies.

#### 1. Problems with the immigration courts pre-2016

First, immigration courts are woefully understaffed and simply do not have enough judges or support staff to handle their current caseloads.<sup>64</sup> The incredible task facing IJs was described by Chief Judge Walker of the Second Circuit Court of Appeals when he testified before the Senate Judiciary Committee in 2006:

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<sup>59</sup> See, e.g., *Gathungu v. Holder*, 725 F.3d 900, 908-09 (8th Cir. 2013); *In re S-P-*, 21 I&N Dec. 486, 491 (BIA 1996); *In re Kasinga*, 21 I&N Dec. 357, 360 (B.I.A. 1996); *Bah v. Mukasey*, 529 F.3d 99, 114 (2d Cir. 2008). For more on one asylum seeker's particular struggle through the immigration court system, and the personal struggles of gathering the evidence necessary for an asylum claim, see generally DAVID NGARURI KENNEY & PHILIP G. SCHRAG, *ASYLUM DENIED: A REFUGEE'S STRUGGLE FOR SAFETY IN AMERICA* (2008).

<sup>60</sup> See Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1655 (2010).

<sup>61</sup> BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL 49 (2016).

<sup>62</sup> Hon. Mark A. Drummond, "Death Penalty Cases in a Traffic Court Setting": *Lessons from the Front Lines of Today's Immigration Courts*, AM. BAR ASS'N (Jan. 15, 2019), <https://www.americanbar.org/groups/litigation/publications/litigation-news/practice-points/death-penalty-cases-traffic-court-setting-lessons-front-lines-immigration-courts> [<https://perma.cc/AT22-25AA>].

<sup>63</sup> Jill E Family, *The Procedural Fortress of US Immigration Law*, 3 BIRKBECK L. REV. 177, 184 (2015).

<sup>64</sup> See generally AM. IMMIGRAT. COUNCIL, *EMPTY BENCHES: UNDERFUNDING OF IMMIGRATION COURTS UNDERMINES JUSTICE* (2015), [https://www.americanimmigrationcouncil.org/sites/default/files/research/empty\\_benches\\_underfunding\\_of\\_immigration\\_courts\\_undermines\\_justice.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/empty_benches_underfunding_of_immigration_courts_undermines_justice.pdf) [<https://perma.cc/7QBV-VVR7>].

## IN-AND-OUT JUSTICE

I fail to see how IJs can be expected to make thorough and competent findings of fact and conclusions of law under these circumstances. This is especially true given the unique nature of immigration hearings. Aliens frequently do not speak English, so the IJ must work with a translator, and the IJ must go over particular testimony several times before he can be confident that he is getting an accurate answer from the alien. Hearings, particularly in asylum cases, are highly fact intensive and depend upon the presentation and consideration of numerous details and documents to determine issues of credibility and to reach factual conclusions.<sup>65</sup>

At the time of Judge Walker's testimony, IJs often complained of incredible rates of burnout, which were "higher than those experienced by prison wardens and emergency room physicians."<sup>66</sup> These rates of burnout were attributed to, among other things, "too little time per case; the pressure to provide immediate, detailed, oral decisions, even in complex cases, with no time to research the law or country conditions, no time to reflect, and no transcripts."<sup>67</sup>

Second, immigration law is incredibly complex, often involving difficult definitions and implicating international law such as the Refugee Convention and the United Nations Convention Against Torture. Immigration law also combines federal statutes, federal regulations, Department memos, decisions by administrative bodies, and circuit splits in case law. As described *supra*, too many immigrants unfortunately contest their removal in court *pro se*, and this complexity makes it difficult for those proceeding *pro se* to effectively present their case. This also means that attorneys who represent immigrants in this setting must be well-versed in these different areas of law and have sufficient time to research new developments and build their cases to fit with the complexity of this law.

Third, in the midst of this complexity, immigrants do not have the right to an attorney at the government expense.<sup>68</sup> Unfortunately, many immigrants cannot afford the exorbitant fees charged by immigration attorneys,<sup>69</sup> and many non-profits are at capacity or unavailable in many regions across the country, particularly rural areas.<sup>70</sup> This has forced many immigrants to proceed *pro se* in complex litigation that, in many cases, presents life-or-death consequences. This ultimately makes the system less efficient, as judges must take the time to explain the law to immigrants while also acting as fact finders.

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<sup>65</sup> *Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Hon. John M. Walker, Jr., C.J., U.S. Court of Appeals for the Second Circuit), <https://www.judiciary.senate.gov/imo/media/doc/Walker%20Testimony%20040306.pdf> [<https://perma.cc/96GF-CVWE>].

<sup>66</sup> Legomsky, *supra* note 60, at 1655.

<sup>67</sup> *Id.*

<sup>68</sup> 8 U.S.C. § 1362 (2020).

<sup>69</sup> *See, e.g.*, Bob Egelko, *Young Immigrants Who Can't Afford Lawyer Will Have To Go Without, Court Says*, SF GATE (Jan. 29, 2018, 5:28 PM), <https://www.sfgate.com/nation/article/Young-immigrants-who-can-t-afford-lawyer-will-12534763.php> [<https://perma.cc/Y66P-QUP4>] (explaining that providing lawyers for the 100,000-plus minors arrested at or near the border in a typical year would cost \$276 million).

<sup>70</sup> *See* Erwin de Leon & Robert Roach, *Immigrant Legal-Aid Organizations in the United States*, URB. INST. 4 (2013), <https://www.urban.org/sites/default/files/publication/24066/412928-Immigrant-Legal-Aid-Organizations-in-the-United-States.pdf> [<https://perma.cc/X7AF-242Q>] (explaining that the ratio between nonprofits that provide legal aid to undocumented immigrants and potential clients is considerably higher than in other nonprofit contexts).

Many immigration legal nonprofits are often at or near capacity to take on new cases. A 2011 study showed that in New York City, success in immigration court was highly dependent on access to representation.<sup>71</sup> Of immigrants who were unrepresented, only 13% had successful outcomes in their cases, while 74% of those who were represented were ultimately successful.<sup>72</sup> This reality about the advantage of having representation in immigration court led to the creation of two programs, the New York Immigrant Family Unity Project<sup>73</sup> and Immigrant Justice Corps,<sup>74</sup> that represent families in the state of New York and across the country in various immigration matters and proceedings. In other parts of the country, bar associations,<sup>75</sup> law school clinics,<sup>76</sup> and local governments<sup>77</sup> have also stepped in to ensure that immigrants are represented. Despite these efforts, the odds that an immigrant has legal representation vary drastically by state, ranging from 36% of immigrants represented in South Carolina to 85% in Hawaii.<sup>78</sup>

All these flaws in the immigration court system combine to create the current crisis and backlog that the immigration court faces. The actions of the Trump Administration have only exacerbated this crisis, by certain means intentionally inflicted on the immigration courts and others having indirect effects.

## 2. Trump policies that were intended to affect the immigration courts

The Trump Administration, particularly through action by the Attorney General, has enacted many changes to the immigration court system. Many of these decisions were designed to take away discretion and independence from IJs. A few of the most notable of these decisions will be discussed in turn.

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<sup>71</sup> Peter L. Markowitz et al., *Assessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, 33 CARDOZO L. REV. 357 (2011); see also Nina Bernstein, *In City of Lawyers, Many Immigrants Fighting Deportation Go It Alone*, N.Y. TIMES (Mar. 12, 2009), <https://www.nytimes.com/2009/03/13/nyregion/13immigration.html> [<https://perma.cc/V598-8L63>] (discussing a lack of pro bono and non-profit immigration attorneys compared to a well-staffed Department of Homeland Security).

<sup>72</sup> MARKOWITZ, *supra* note 71, at 363-364.

<sup>73</sup> *New York Immigrant Family Unity Project*, THE BRONX DEF'S., <https://www.bronxdefenders.org/programs/new-york-immigrant-family-unity-project/> [<https://perma.cc/AZM5-CE86>] (last visited Sept. 26, 2020).

<sup>74</sup> *Our Mission*, IMMIGRANT JUST. CORPS, <https://justicecorps.org/our-mission> [<https://perma.cc/DV3L-2YR3>] (last visited Sept. 26, 2020).

<sup>75</sup> See, e.g., *GAIN's Beginnings*, GA. ASYLUM & IMMIGR. NETWORK, <https://georgiaasylum.org/about-us/our-beginnings> [<https://perma.cc/XDW6-MZMG>] (last visited Sept. 26, 2020) (discussing how the asylum program was started in part through the efforts of the Atlanta Bar Association).

<sup>76</sup> See generally *Public Interest Clinics*, AM. BAR ASS'N, [https://www.americanbar.org/groups/center-pro-bono/resources/directory\\_of\\_law\\_school\\_public\\_interest\\_pro\\_bono\\_programs/definitions/pi\\_pi\\_clinics](https://www.americanbar.org/groups/center-pro-bono/resources/directory_of_law_school_public_interest_pro_bono_programs/definitions/pi_pi_clinics) [<https://perma.cc/VSR9-4EVP>] (last visited Sept. 26, 2020).

<sup>77</sup> See Antonio Olivo, *Virginia's Largest County Could Be Next To Help Undocumented Immigrants Fight Deportation*, WASH. POST (Apr. 10, 2019), [https://www.washingtonpost.com/local/virginia-politics/fairfax-county-considers-fund-to-help-undocumented-immigrants-fight-deportation/2019/04/10/0b1e1c30-5adb-11e9-a00e-050dc7b82693\\_story.html](https://www.washingtonpost.com/local/virginia-politics/fairfax-county-considers-fund-to-help-undocumented-immigrants-fight-deportation/2019/04/10/0b1e1c30-5adb-11e9-a00e-050dc7b82693_story.html) [<https://perma.cc/YUA2-6M4F>] (discussing how areas in the Washington region have allocated hundreds of thousands of dollars for immigrant legal assistance).

<sup>78</sup> See *Individuals in Immigration Court by Their Address*, TRAC IMMIGR. (Feb. 2019), <https://trac.syr.edu/phptools/immigration/addressrep> [<https://perma.cc/BX9B-T9DJ>].

First, the former Attorney General made it more difficult for IJs to control their own dockets. Prior to a decision by Attorney General Jefferson Sessions, IJs were able to use powers such as administrative closure to manage their dockets.<sup>79</sup> Administrative closure “temporarily pause[s] removal proceedings,” which can be a useful tool when an immigrant has another case pending or in other specific circumstances.<sup>80</sup> In *Castro-Tum*, the Attorney General decided<sup>81</sup> that “IJs and the BIA lack general authority to administratively close cases and restrict[ed] administrative closure to circumstances where it is explicitly provided for by regulation or settlement agreement.”<sup>82</sup> While IJs in the Fourth Circuit can no longer rely on *Castro-Tum*,<sup>83</sup> the decision still applies in immigration courts across the rest of the country. Hundreds of judges still cannot administratively close cases to help manage their dockets.

Second, former Attorney General Sessions instituted case completion quotas for all IJs. As part of their performance reviews, IJs are required to complete 700 cases per year and be remanded in fewer than 15 percent of cases per year.<sup>84</sup> The National Association of Immigration Judges decried these quotas, “warn[ing] that quotas could undermine judicial independence and erode due process rights for immigrants.”<sup>85</sup> On average, these quotas require that IJs make a final decision—granting a case or issuing an order of removal—in approximately three cases every day.<sup>86</sup> Deciding three cases every day is impossible in an eight-hour workday when immigration attorneys advise that Individual Hearings last four hours.<sup>87</sup>

These policies directly impact the independence of IJs, depriving IJs of the tools to manage their dockets and take the time necessary to weigh the evidence before them.

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<sup>79</sup> See AMERICAN IMMIGRATION COUNCIL & AMERICAN CIVIL LIBERTIES UNION, ADMINISTRATIVE CLOSURE POST-CASTRO-TUM (2018), [https://www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/administrative\\_closure\\_post-castro-tum.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/administrative_closure_post-castro-tum.pdf) [<https://perma.cc/S3CC-BFJY>].

<sup>80</sup> *Id.*; Matter of Castro-Tum, 27 I&N Dec. 271 (A.G. 2018), *overruled by* Romero v. Barr, 937 F.3d 282, 296-97 (4th Cir. 2019).

<sup>81</sup> Among many powers over immigration, the Attorney General has the capacity to refer precedential immigration decisions to himself for review, and in rewriting these decisions, the Attorney General can rewrite immigration law to fit their own views. See generally AMERICAN IMMIGRATION COUNCIL & AMERICAN CIVIL LIBERTIES UNION, *supra* note 79.

<sup>82</sup> AMERICAN IMMIGRATION COUNCIL & AMERICAN CIVIL LIBERTIES UNION, *supra* note 79, at 1.

<sup>83</sup> See Romero, 937 F.3d at 296-97.

<sup>84</sup> Victoria Neilson, DOJ Requires IJs To Meet Quotas, CATH. LEGAL IMMIGR. NETWORK, INC. (Apr. 27, 2018), <https://cliniclegal.org/resources/doj-requires-immigration-judges-meet-quotas> [<https://perma.cc/ZZ43-3XUT>].

<sup>85</sup> Joel Rose, Justice Department Rolls Out Quotas For IJs, NPR (Apr. 3, 2018, 1:09 PM), <https://www.npr.org/2018/04/03/599158232/justice-department-rolls-out-quotas-for-immigration-judges> [<https://perma.cc/BKM9-T989>].

<sup>86</sup> Neilson, *supra* note 84.

<sup>87</sup> See, e.g., How Long Do Immigration Court Cases Take?, CARLOS BATARA IMMIGR. ATT’Y., <https://www.bataraimmigrationlaw.com/questions-and-answers/index-deportation/how-long-immigration-court-cases-take> [<https://perma.cc/ST2X-FU4L>] (last visited Sept. 26, 2020) (explaining that Individual Hearings can take about four hours). This estimate is consistent with my own experiences in immigration court, where these hearings often last anywhere between two to four, or more, hours.

## 3. Trump policies that indirectly affected the immigration courts

Since 2016, several other policies instituted and actions taken by the Trump Administration have broadly impacted immigration courts. While the full extent of their impact is still yet to be seen, these policies will inevitably increase the backlogs in immigration courts.

First, the partial government shutdown in 2019 that lasted 35 days added thousands of cases to the immigration court backlog because they had to be rescheduled.<sup>88</sup> During the shutdown, all IJs except those working detained dockets were furloughed. This “halt[ed] nearly all immigration court cases and put[] three in four immigration judges on furlough. Hearings on asylum cases, deportation, and appeals against orders of removal were delayed indefinitely, pending a ‘reset’ upon the government’s reopening that shuffled tens of thousands of cases to the back of the line.”<sup>89</sup> The government shutdown, while not a decision taken with immigration courts in mind, had a major impact on the courts and will affect their caseloads for several years to come.

Second, the Administration’s change in enforcement priorities adds to the number of people who will end up in immigration court proceedings. The Administration has ramped up immigration enforcement in a number of ways since Trump took office. The first was the President’s 2017 executive order which made anyone without status a priority for removal.<sup>90</sup> Additionally, the Administration has increased enforcement at sensitive locations such as courthouses.<sup>91</sup> ICE arrests in courthouses have occurred nationwide,<sup>92</sup> in cases where survivors of domestic violence<sup>93</sup> and human trafficking<sup>94</sup> have been among those arrested. These arrests have had a chilling effect on the courts,

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<sup>88</sup> See Kate Smith, *The Shutdown is Over, but Immigration Courts Are in “Total Chaos”*, CBS NEWS (Jan. 29, 2019, 5:09 PM), <https://www.cbsnews.com/news/immigration-court-government-shutdown-pushed-immigration-court-total-chaos-2019-01-29/> [<https://perma.cc/T53S-42H2>] (reporting that almost 90,000 immigration hearings were canceled because of the shutdown).

<sup>89</sup> Scott Bixby, *Judges Say Trump’s Shutdown Broke Immigration System for Years*, DAILY BEAST (Jan. 30, 2019 10:43 AM), <https://www.thedailybeast.com/judges-say-trumps-shutdown-broke-immigration-system-for-years> [<https://perma.cc/W39V-SEGC>].

<sup>90</sup> Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017); see also AM. IMMIGR. LAWYERS ASS’N, COGS IN THE DEPORTATION MACHINE: HOW POLICY CHANGES BY THE TRUMP ADMINISTRATION HAVE TOUCHED EVERY MAJOR AREA OF ENFORCEMENT 6 (2018), <https://www.aila.org/File/DownloadEmbeddedFile/75231> [<https://perma.cc/XEN5-YZCC>] (explaining how during his first month in office, President Trump and his administration established new enforcement policies calling for enforcement against all removable individuals).

<sup>91</sup> IMMIGRANT DEFENSE PROJECT ET AL., SAFEGUARDING THE INTEGRITY OF OUR COURTS: THE IMPACT OF ICE COURTHOUSE OPERATIONS IN NEW YORK STATE 75 (2019), <https://www.immigrantdefenseproject.org/wp-content/uploads/Safeguarding-the-Integrity-of-Our-Courts-Final-Report.pdf> [<https://perma.cc/RUE6-3DRC>] (“Since the start of the Trump Administration, we’ve seen an outrageous 1700% increase in ICE arrests and attempted arrests in and around courts in New York.”).

<sup>92</sup> See generally AMERICAN CIVIL LIBERTIES UNION, FREEZING OUT JUSTICE: HOW IMMIGRATION ARRESTS AT COURTHOUSES ARE UNDERMINING THE JUSTICE SYSTEM (2018), [https://www.aclu.org/sites/default/files/field\\_document/rep18-icecourthouse-combined-rel01.pdf](https://www.aclu.org/sites/default/files/field_document/rep18-icecourthouse-combined-rel01.pdf) [<https://perma.cc/4K4B-XP8>].

<sup>93</sup> Mark Joseph Stern, *ICE Agents Are Using Pennsylvania’s Courthouses as a Stalking Ground. The State Supreme Court Can Stop Them*, SLATE (Jan. 31, 2019, 5:48 PM), <https://slate.com/news-and-politics/2019/01/ice-agents-pennsylvania-courthouse-arrests-domestic-violence-victims.html> [<https://perma.cc/JN3N-UEJ2>].

<sup>94</sup> Beth Fertig, *When ICE Shows Up in Human Trafficking Court*, WNYC (Jun. 22, 2017), <https://www.wnyc.org/story/when-ice-shows-court> [<https://perma.cc/UXW8-UY2>].

detering those in need of judicial protection from going to court.<sup>95</sup> Furthermore, many of the people who are arrested in and around courthouses will be placed in immigration court proceedings, only adding to the caseloads of immigration courts.

Third, the shift by U.S. Citizenship and Immigration Services (USCIS) from a services agency to an enforcement agency will add more cases to the backlog. USCIS is the branch of the Department of Homeland Security where immigrants with and without status alike apply for visas and other forms of immigration status, including but not limited to protections for survivors of crime, domestic violence, and human trafficking.<sup>96</sup> In June 2018, USCIS announced a new policy under which denied cases may be followed by the issuance of an NTA, the document that begins removal proceedings.<sup>97</sup> Although it is still unclear how many NTAs have been issued as a result, the policy is certain to add more cases to EOIR's docket, and inevitably to the case backlog.

#### D. Expedition of Family Cases in Immigration Court

Prioritization of families' cases is not a new policy strategy. In the summer of 2014, thousands of children and families crossed the southern border.<sup>98</sup> In response, in July 2014, "Juan P. Osuna, the director of the Executive Office for Immigration Review (EOIR), announced new policies for children and families in deportation proceedings: the immigration courts would prioritize the cases of both unaccompanied children and families with children."<sup>99</sup> Subsequently, when immigrants were apprehended at the border and designated as "adults with children," this label followed them to immigration court, and their cases were scheduled accordingly.<sup>100</sup> This

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<sup>95</sup> ANGELA IRVINE ET AL., THE CHILLING EFFECT OF ICE COURTHOUSE ARRESTS: HOW IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE) RAIDS DETER IMMIGRANTS FROM ATTENDING CHILD WELFARE, DOMESTIC VIOLENCE, ADULT CRIMINAL, AND YOUTH COURT HEARINGS (2019), <https://static1.squarespace.com/static/58ba8c479f7456dff8fb4e29/t/5dae6ba65642ea5d1cef9705/1571711914510/ice.report.final.21oct2019.pdf> [<https://perma.cc/6R3S-39TB>].

<sup>96</sup> See *Victims of Human Trafficking: T Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVICES (May 10, 2018), <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status/victims-human-trafficking-t-nonimmigrant-status> [<https://perma.cc/L3RS-Y6KG>] (providing instructions for victims of human trafficking to apply for status through USCIS); see also *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVICES (June 12, 2018), <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status> [<https://perma.cc/7VUC-B7AB>] (providing instructions for victims of certain crimes to apply for status through USCIS). For more on immigration protections for survivors of domestic violence, see generally J. Nicole Alanko, "Helpfulness" Is a Two-Way Street: How the Commonwealth of Virginia Can Support Undocumented Survivors of Domestic Violence, 16 HASTINGS RACE & POVERTY L.J. 35 (2019).

<sup>97</sup> AILA POLICY BRIEF: EXPANDED NTA GUIDANCE WILL HAVE DEVASTATING EFFECTS ON SURVIVORS OF DOMESTIC ABUSE, TRAFFICKING, AND OTHER SERIOUS CRIMES 1-2 (2018), <https://www.aila.org/File/DownloadEmbeddedFile/78262> [<https://perma.cc/FGU6-DFNW>].

<sup>98</sup> See Diana Villiers Negroponte, *The Surge in Unaccompanied Children from Central America: A Humanitarian Crisis at Our Border*, BROOKINGS INST. (July 2, 2014), <https://www.brookings.edu/blog/up-front/2014/07/02/the-surge-in-unaccompanied-children-from-central-america-a-humanitarian-crisis-at-our-border> [<https://perma.cc/8Y2X-RJE4>] (reporting 47,017 children apprehended at the U.S./Mexico border in the first eight months of FY2014).

<sup>99</sup> Hausman & Srikantiah, *supra* note 51, at 1824.

<sup>100</sup> *Id.* at 1826 n.14.

categorization and prioritization of cases was implemented nationwide.<sup>101</sup> IJs “were instructed to give expedited consideration to priority docket cases.”<sup>102</sup> This became known as the “rocket dockets.”<sup>103</sup>

The rocket dockets forced attorneys for children and families to scramble to come up with a way to respond to the overwhelming need for representation.<sup>104</sup> Many cases that were already pending but did not fit into the Administration’s priorities were pushed back to November 29, 2019,<sup>105</sup> after which they were then rescheduled to 2021.<sup>106</sup> Even at the time, the acceleration of families’ cases was criticized as potentially violating the rights of arriving asylum seekers.<sup>107</sup> Despite the prioritization, the backlog in immigration courts increased from 408,037 in 2014 to 629,051 in 2017 when President Trump took office.<sup>108</sup> Because the prioritization did not produce the desired results, the policy was abandoned in 2017.<sup>109</sup>

In December 2017, then-Attorney General Jeff Sessions published a memorandum for the EOIR to highlight the office’s policy priorities. In particular, Attorney General Sessions announced EOIR’s focus on “fairly, expeditiously, and uniformly administering the immigration laws.”<sup>110</sup> This memo was followed by another memo from the EOIR in January 2018, which derived its authority from the Attorney General’s memorandum as well as the Bush-era regulations.<sup>111</sup> This latter memo, however, still explicitly required that all prioritizations and acceleration of cases comport with due

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<sup>101</sup> *Id.* at 1824.

<sup>102</sup> *Id.*

<sup>103</sup> Kirk Semple, *Advocates in New York Scramble as Child Deportation Cases Are Accelerated*, N.Y. TIMES (Aug. 4, 2014), <https://www.nytimes.com/2014/08/05/nyregion/advocates-scramble-as-new-york-accelerates-child-deportation-cases.html> [<https://perma.cc/MZD6-DNKU>].

<sup>104</sup> *Id.*

<sup>105</sup> *Ballooning Wait Times for Hearing Dates in Overworked Immigration Courts*, TRAC IMMIGR. (Sept. 21, 2015), <https://trac.syr.edu/immigration/reports/405> [<https://perma.cc/TB4D-5PUZ>].

<sup>106</sup> Bonnie Petrie, *Black Friday At Immigration Court: Migrants Mistakenly Show Up For 5-Year-Old Court Date*, TEXAS PUBLIC RADIO (November 30, 2019), <https://www.tpr.org/post/black-friday-immigration-court-migrants-mistakenly-show-5-year-old-court-date> [<https://perma.cc/XXZ9-RU2X>].

<sup>107</sup> *See generally* Jayashri Srikantiah, *The Immigration “Rocket Docket”: Understanding the Due Process Implications*, STANFORD LAW SCHOOL (Aug. 15, 2014), <https://law.stanford.edu/2014/08/15/the-immigration-rocket-docket-understanding-the-due-process-implications> [<https://perma.cc/YE7T-6BFG>] (describing how an accelerated docket may interfere with an individual’s right to an attorney by affording them insufficient time to obtain one).

<sup>108</sup> *Immigration Court Backlog Tool*, TRAC IMMIGRATION, [https://trac.syr.edu/phptools/immigration/court\\_backlog](https://trac.syr.edu/phptools/immigration/court_backlog) [<https://perma.cc/VCQ4-AL95>] (select “Entire US” under Fiscal Year pane and then, on the time series graph, hover over the column for Fiscal Year “14” and “17”).

<sup>109</sup> *See* FAMU Memo, *supra* note 1, at 2 (explaining that because prioritizing family unit cases did not increase EOIR’s case completion productivity, EOIR deprioritized them in January 2017).

<sup>110</sup> Memorandum for the Executive Office for Immigration Review from the Office of the Attorney General (Dec. 5, 2017), <https://www.justice.gov/eoir/file/1041196/download> [<https://perma.cc/Z5GC-F7RC>].

<sup>111</sup> Memorandum to the Office of the Chief IJ, All IJs, All Court Administrators, All Immigration Court Staff from James R. McHenry III (Jan. 17, 2018), <https://www.justice.gov/eoir/page/file/1026721/download> [<https://perma.cc/P9P3-TY4A>] [hereinafter “Case Priorities Memo”] (citing the Office of the Attorney General memorandum and 8 C.F.R. § 1003.0(b)(1)(ii, iv)); *see also* Authorities Delegated to the Director of the Executive Office for Immigration Review, and the Chief IJ, 72 Fed. Reg. 53676 (Sept. 20, 2007) (to be codified at 8 C.F.R. pt. 1003) (adding the cited provisions to 8 C.F.R. § 1003.0).



process.<sup>112</sup>

In November 2018, the EOIR published a memo entitled “Tracking and Expedition of ‘Family Unit’ Cases.” As its authority, this memo cited the January 2018 memo and regulations giving EOIR the authority to set case priorities.<sup>113</sup> It reprioritized the cases of families in immigration court who had been deemed as “family units” by Customs and Border Patrol. Unlike the Obama-era prioritization, this new memo required that any case determined to be a FAMU case “must be completed within one year or less,”<sup>114</sup> meaning specifically that they must be completed within one year of the date that the NTA is filed with the court.<sup>115</sup> This memo has thus far only applied to ten immigration courts across the country: Atlanta, Baltimore, Chicago, Denver, Houston, Los Angeles, Miami, New Orleans, New York City, and San Francisco.<sup>116</sup> However, this policy may expand to apply nationwide.<sup>117</sup>

The prioritization of family cases in immigration court differs from other accelerated cases and statutory timelines in important respects. First, families who fall under the FAMU Policy are at a very different stage in their cases than families and individuals who are subject to expedited removal. Expedited removal “is a process by which low-level immigration officers can quickly deport certain noncitizens who are undocumented or have committed fraud or misrepresentation.”<sup>118</sup> Expedited removal is used as a means to remove people who are caught at the southern border.<sup>119</sup> However, those caught at the border are entitled to a credible fear interview (CFI) “to ensure that the United States does not summarily deport bona fide asylum seekers and that they have an opportunity to have their eligibility assessed by an immigration court.”<sup>120</sup> If an individual is determined to have a credible fear of returning to their home country, they are then referred to immigration court, and the immigration court process begins.<sup>121</sup> Those who fail to pass a credible fear screening remain in the expedited removal process. Undoubtedly, there are serious flaws in the expedited removal process and the administration of the credible fear interviews.<sup>122</sup> Even so, the families who are subject to the FAMU Policy have passed this initial screening and are put on a track to be able to establish their

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<sup>112</sup> Case Priorities Memo, *supra* note 111.

<sup>113</sup> See FAMU Memo, *supra* note 1, at 1 (citing Case Priorities Memo and 8 C.F.R. § 1003.0(1)(ii)).

<sup>114</sup> *Id.*

<sup>115</sup> Complaint at 44, *Las Americas*, No. 3:19-cv-02051-SB.

<sup>116</sup> FAMU Memo, *supra* note 1, at 1.

<sup>117</sup> See Complaint at 43, *Las Americas*, No. 3:19-cv-02051-SB (“On information and belief, Defendants intend to expand the FAMU Directive to apply across all immigration courts. . .”).

<sup>118</sup> AM. IMMIGR. COUNCIL, A PRIMER ON EXPEDITED REMOVAL 1 (July 2019), [https://www.americanimmigrationcouncil.org/sites/default/files/research/primer\\_on\\_expedited\\_removal.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/primer_on_expedited_removal.pdf) [<https://perma.cc/7NJD-QTDA>].

<sup>119</sup> *Id.*

<sup>120</sup> HUMAN RIGHTS FIRST, ALLOWING CBP TO CONDUCT CREDIBLE FEAR INTERVIEWS UNDERMINES SAFEGUARDS TO PROTECT REFUGEES 1 (Apr. 2019), [https://www.humanrightsfirst.org/sites/default/files/CBP\\_Credible\\_Fear.pdf](https://www.humanrightsfirst.org/sites/default/files/CBP_Credible_Fear.pdf) [<https://perma.cc/H98Z-6DRB>].

<sup>121</sup> See *Credible Fear FAQ*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening> [<https://perma.cc/5BXG-MTMY>] (explaining that if an asylum officer determines that an individual has a credible fear, their case is referred to an IJ for a full hearing on the claim).

<sup>122</sup> See *generally* HUMAN RIGHTS FIRST, *supra* note 120 (highlighting ways in which the credible fear interview process fails to protect the rights of potential asylees).

claims. As such, this opportunity should be protected while nonetheless scrutinizing the broader process.

Second, the acceleration of families' cases under the FAMU Policy imposes tighter time restrictions than other restrictions established in immigration law. The Immigration and Nationality Act (INA) states that, "in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed."<sup>123</sup> The importance of completing asylum applications expeditiously was reinforced by an EOIR memo published just days after the FAMU Memo.<sup>124</sup> The language of the INA clearly states that the 180-day period begins *after* an individual has submitted an asylum application.<sup>125</sup> Generally speaking, an asylum application must be filed within one year of arriving in the United States,<sup>126</sup> meaning that applicants statutorily are entitled to approximately one year and six months to prepare their case before final adjudication. This stands in stark contrast to the FAMU Memo, which requires that the cases simply be completed within one year of filing the NTA.<sup>127</sup> Under this policy, the clock starts ticking for recently-arrived families before they have ever been to court and before they ever know how to find an attorney, further reducing the time available to them to prepare their case.<sup>128</sup> While this Article focuses on challenging the FAMU Memo on the basis of due process, there may be other legal challenges to this memo as well.<sup>129</sup>

It is within this context that practitioners must challenge the removal of recently arrived families: immigrants do not have the right to an attorney, immigration court staff are overworked and overwhelmed, and IJs are restricted in the management of their dockets. As a result of rushed trial dates and deadlines, families' rights to due process are being routinely violated.

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<sup>123</sup> 8 U.S.C. § 1158(d)(5)(A)(iii) (2020).

<sup>124</sup> See Memorandum from James R. McHenry III to All of EOIR (Nov. 19, 2018), Guidance Regarding the Adjudication of Asylum Applications Consistent with INA § 208(d)(5)(A)(iii), <https://www.justice.gov/eoir/page/file/1112581/download> [<https://perma.cc/96DN-Z9JX>] (explaining that timely processing of asylum cases "will ensure that aliens with meritorious claims will not have to wait any longer than necessary to receive benefits associated with asylee status while aliens with unmeritorious claims will be allowed to depart voluntarily or removed as expeditiously as possible").

<sup>125</sup> 8 U.S.C. § 1158(d)(5)(A)(iii) (2020).

<sup>126</sup> 8 U.S.C. § 1158(a)(2)(B) (2020).

<sup>127</sup> See FAMU Memo, *supra* note 1, at 1 (reporting that "these cases are being docketed in an expeditious manner with the expectation that they will be completed within one year or less").

<sup>128</sup> See Complaint at 52, *Las Americas*, No. 3:19-cv-02051-SB (explaining that respondents often only first learn about their rights or how to find counsel during their first court appearance).

<sup>129</sup> An examination of other legal bases for challenging the FAMU Memo is beyond the scope of this Article. However, in December 2019, the Southern Poverty Law Center filed a complaint to challenge several asylum-related policies, including the FAMU Policy. See *generally id.*

## II. SUMMARY OF DUE PROCESS IN IMMIGRATION COURT

Those who are physically present in the United States, even if their presence is “unlawful, involuntary, or transitory,”<sup>130</sup> possess due process rights.<sup>131</sup> In the context of a removal hearing, immigrants who have “passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness. . . .”<sup>132</sup> The Supreme Court has recognized since 1950 that due process in removal proceedings requires a full and fair hearing.<sup>133</sup> In *Wong Yang Sung v. McGrath* the Supreme Court stated that

[w]hen the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself.<sup>134</sup>

Relatedly, due process requires the opportunity to present evidence and cross-examine the government.<sup>135</sup> These rights are codified in the INA.<sup>136</sup> Despite a 2018 decision by the Attorney General that appears to weaken these protections, the statute has not been amended by Congress nor have the courts changed the requirements of due process under *Mathews v. Eldridge*.<sup>137</sup>

While it is clear that immigrants have these rights, what test the courts use to determine whether these rights have been violated is not as straightforward as it may seem. Generally speaking, in cases where someone’s procedural due process rights are being infringed, the three-part test from *Mathews* governs. *Mathews* requires courts to examine, first,

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<sup>130</sup> *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

<sup>131</sup> *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

<sup>132</sup> *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

<sup>133</sup> *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49-51 (1950), *superseded by statute*, Supplemental Appropriation Act of 1951, Pub. L. No. 843, 64 Stat. 1044, 1048, *repealed by* Immigration and Nationality Act of 1952, Pub. L. No. 414, § 403(a)(47), 66 Stat. 163, 279.

<sup>134</sup> 339 U.S. 33, 50 (1950).

<sup>135</sup> *See Oshodi v. Holder*, 729 F.3d 883, 889 (9th Cir. 2013) (“A vital hallmark of a full and fair hearing is the opportunity to present evidence and testimony on one’s behalf.”); *Shoaira v. Ashcroft*, 377 F.3d 837, 842 (8th Cir. 2004) (“For a deportation hearing to be fair, an IJ must allow a reasonable opportunity to examine the evidence and present witnesses.”).

<sup>136</sup> *See* 8 U.S.C. 1229a(b)(4)(B) (2020).

<sup>137</sup> In March 2018, former Attorney General Jeff Sessions issued a one-page decision in *Matter of E-F-H-L-*, vacating a decision by the Board which restated and reiterated the right to a trial in asylum. *See Matter of E-F-H-L-*, 27 I. & N. Dec. 226 (U.S. Att’y Gen. 2018), *vacating* 26 I. & N. Dec. 319 (B.I.A. 2014). The Attorney General stated that he was vacating the decision because the asylum case for which the decision was originally sought was withdrawn, and made no other statements regarding the right to an asylum hearing. For more analysis on this case and its implications beyond asylum cases, *see* Jeffrey Chase, *The AG’s Strange Decision in Matter of E-F-H-L-*, OPINIONS/ANALYSIS ON IMMIGRATION LAW (Mar. 10, 2018), <https://www.jeffreychase.com/blog/2018/3/10/the-ags-strange-decision-in-matter-of-e-f-h-l-> [https://perma.cc/6DAF-25NS].

The private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>138</sup>

*Mathews* was not an immigration case, but its test has since been applied in the immigration context in *Landon v. Plasencia*.<sup>139</sup> While *Plasencia* brought the *Mathews* test to immigration, it is not applied uniformly in all immigration cases.

In the context of asylum seekers who are arguing that their due process right to a full and fair hearing has been violated in court, circuits where the 2018 FAMU Memo is in effect<sup>140</sup> and the BIA apply similar variations of the “no prejudice” test. The contours of this test are not identical across the circuits. In most circuits, it requires an asylum seeker to show that they were denied a “full and fair opportunity present her claims,”<sup>141</sup> denied an opportunity “to be heard at a meaningful time and in a meaningful manner,”<sup>142</sup> or were subject to a hearing that was “so fundamentally unfair that the alien was prevented from reasonably presenting his case.”<sup>143</sup> When such a violation is found, the asylum seeker must next show prejudice. Prejudice is generally shown “when the rights of [an] alien have been transgressed in such a way as is likely to impact the results of the proceedings.”<sup>144</sup>

The various circuits have found violations of due process in many similar situations. The Second Circuit has held that an asylum seeker is denied a full and fair hearing when there is a lack of interpretation from English into a noncitizen's native language<sup>145</sup> and when an immigrant is deprived of the opportunity to present evidence.<sup>146</sup> The Seventh Circuit has found due process violations when asylum seekers are unable to testify on their own behalf, particularly when IJs “bar[] complete chunks of oral testimony that would support the applicant's claim.”<sup>147</sup> The Seventh Circuit has also found

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<sup>138</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>139</sup> 459 U.S. 21, 34 (1982).

<sup>140</sup> The 2018 Memo specifies that the expedition applies to ten cities: Atlanta, Baltimore, Chicago, Denver, Houston, Los Angeles, Miami, New Orleans, New York City, and San Francisco. FAMU Memo, *supra* note 1, at 1. For this reason, this Article will focus on precedent from the Second, Fourth, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits.

<sup>141</sup> *Burger v. Gonzales*, 498 F.3d 131, 134 (2d Cir. 2007) (citing *Xiao Ji Chen v. United States Department of Justice*, 434 F.3d 144, 155 (2d Cir. 2006), *reh'g granted, vacated on other grounds*, 471 F.3d 315 (2d Cir. 2006)).

<sup>142</sup> *See Ali v. Mukasey*, 529 F.3d 478, 490 (2d Cir. 2008) (quoting *Burger*, 498 F.3d at 134); *Getachew v. INS*, 25 F.3d 841, 845 (9th Cir. 1994) (quoting *Mathews*, 424 U.S. at 333). Interestingly, this standard comes from *Mathews*, although the full *Mathews* test is not applied.

<sup>143</sup> *Plateros-Cortez v. INS*, 804 F.2d 1127, 1132 (9th Cir. 1986) (quoting *Lopez v. INS*, 775 F.2d 1015, 1017 (9th Cir. 1985)).

<sup>144</sup> *Jacinto v. INS*, 208 F.3d 725, 728 (9th Cir. 2000).

<sup>145</sup> *Augustin v. Sava*, 735 F.2d 32, 37-38 (2d Cir. 1984).

<sup>146</sup> *See Akhtar v. Reno*, 123 F. Supp. 2d 191, 198 (S.D.N.Y. 2000) (requiring an individual making a due process challenge stemming from a failure to present evidence to show that “[1] he was prevented from having a reasonable opportunity to present evidence, and (2) any such error resulted in prejudice (that is, affected the outcome of the proceeding”).

<sup>147</sup> *See Kerciku v. INS*, 314 F.3d 913, 918 (7th Cir. 2003).

violations of due process where expert testimony<sup>148</sup> and corroborating testimony<sup>149</sup> have not been admitted.

Similar to the Seventh Circuit, the Ninth Circuit has found due process violations in several cases where the IJ did not allow an immigrant to testify or excluded the testimony of corroborating witnesses and experts. In *Colmenar v. INS*, the Ninth Circuit remanded the case back to the IJ for a new hearing because the asylum seeker did not have a sufficient opportunity to support his claim that he was persecuted on account of his political opinion.<sup>150</sup> In another case, the Ninth Circuit found a due process violation when the IJ refused to admit the testimony of experts and others who could corroborate the asylum seeker's claims.<sup>151</sup> In *Lopez-Umanzor v. Gonzales*,<sup>152</sup> the Ninth Circuit stated that due process "prohibit[s] an [immigration judge] from declining to hear relevant testimony because of a prejudgment about the witness's 'credibility or the probative value of [the] testimony.'"<sup>153</sup> Finally, the Ninth Circuit has ruled that prejudice does not "demand absolute certainty; rather prejudice is shown if the violation '*potentially* . . . affects the outcome of the proceedings.'"<sup>154</sup>

The Fourth Circuit is comparatively reluctant to find violations of the right to a full and fair hearing. In *Rusu v. INS*, the court examined whether an asylum hearing conducted via videoconferencing violated an immigrant's due process rights.<sup>155</sup> The court acknowledged the added difficulty of making credibility determinations, as well as the diminished effectiveness of attorneys when videoconferencing is used.<sup>156</sup> Even so, the court found no violation because the asylum seeker had "a meaningful *opportunity* to present his claim. The Immigration and Naturalization Service and the courts were under no obligation to ensure that Rusu made a meaningful presentation—that was properly left to Rusu and his lawyer."<sup>157</sup> The court went on to describe the problems that Rusu suffered as "self-inflicted."<sup>158</sup>

Finally, the Eleventh Circuit deviates from the precedent of the rest of the circuits, perceiving the standard for the "no prejudice" test to be higher than other circuits and requires that an asylum applicant "show that he was deprived of liberty without due process of law, and that the

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<sup>148</sup> *Rodriguez Galicia v. Gonzales*, 422 F.3d 529, 539-40 (7th Cir. 2005).

<sup>149</sup> *See Podio v. INS*, 153 F.3d 506, 510-11 (7th Cir. 1998) (holding that an IJ's refusal allow an applicant's siblings to testify and corroborate applicant's claims of past persecution and a well-founded fear of future persecution deprived applicant of a fair hearing).

<sup>150</sup> 210 F.3d 967, 972-73 (9th Cir. 2000).

<sup>151</sup> *See Zolotukhin v. Gonzales*, 417 F.3d 1073, 1075-76 (9th Cir. 2005) (holding that the IJ's exclusion of testimony by family members and experts denied petitioner the opportunity to present evidence on his behalf); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1057-58 (9th Cir. 2005) (holding that the IJ's exclusion of expert testimony violated due process.); *Kaur v. Ashcroft*, 388 F.3d 734, 737-38 (9th Cir. 2004) (holding that the IJ's exclusion of testimony by petitioner's son denied her a full and fair hearing).

<sup>152</sup> 405 F.3d 1049 (9th Cir. 2005).

<sup>153</sup> *Id.* at 1056 (quoting *Kaur v. Ashcroft*, 388 F.3d 734, 737 (9th Cir. 2004)).

<sup>154</sup> *Zolotukhin v. Gonzales*, 417 F.3d 1073, 1077 (9th Cir. 2005) (quoting *Agyeman v. INS*, 296 F.3d 871, 884 (9th Cir. 2002)).

<sup>155</sup> 296 F.3d 316, 321 (4th Cir. 2002).

<sup>156</sup> *Id.* at 322-23.

<sup>157</sup> *Id.* at 323-24.

<sup>158</sup> *Id.* at 324.

asserted error caused him *substantial* prejudice.”<sup>159</sup> This heightened standard is evident in the Eleventh Circuit’s case law, which shows an unwillingness to find due process violations in the context of procedures implemented by the Department of Justice across cases. In *Gonzalez-Oropeza v. United States Attorney General*,<sup>160</sup> the Eleventh Circuit found no due process violation when an asylum applicant’s case was affirmed through an affirmance without opinion by the BIA.<sup>161</sup> This is particularly relevant, as the acceleration of family cases is a widely (if not universally) applied policy by the Department of Justice.

### III. THE FAMU POLICY VIOLATES THE DUE PROCESS RIGHTS OF IMMIGRANTS

The FAMU Policy violates the due process rights of immigrant families seeking asylum because it deprives them of the opportunity to have a full and fair hearing on the merits of their cases. The inability to fully present their cases before the immigration courts ultimately results in prejudice to these families. The following Sections will analyze the impacts of the FAMU Policy through the lens of case law across the circuits where the policy has been implemented. Understandably, some case law will be more favorable than others with respect to due process. Even taking into account these differences across circuits, the FAMU Policy nonetheless violates the due process rights of immigrant families and ultimately prejudices their cases. For individual practitioners representing asylum seekers, these arguments can be bolstered by the individual facts and circumstances of each case.

The acceleration of immigrant families’ cases leads to two specific problems that create violations of the right to a full and fair hearing: the increased difficulty of obtaining necessary evidence and the effects of trauma. These problems will be examined in turn, and this Section will show how each of these problems results in a violation of due process, as well as prejudice to the immigrants’ cases.

#### A. *Insufficient Time to Gather Evidence Violates Due Process*

The acceleration of family unit cases makes it extremely difficult for asylum seekers to collect the evidence that they need in their cases. As described *supra*, immigration law places the burden on the asylum seeker to demonstrate that they are eligible for such relief.<sup>162</sup> It is thus the responsibility of asylum seekers, and their attorneys, to collect all of the evidence necessary to prove their case. This Section will first describe the statutory and precedential requirements around corroborating evidence, and then discuss practical difficulties of obtaining this evidence. This Section will conclude by explaining how these difficulties create circumstances in which the FAMU Policy violates families’ due process rights.

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<sup>159</sup> *Gonzalez-Oropeza v. U.S. Att’y Gen.*, 321 F.3d 1331, 1333 (11th Cir. 2003) (emphasis added) (citing *Matthews v. Diaz*, 426 U.S. 67, 77 (1976)), *overruled on separate grounds by* *Patel v. United States Attorney General*, No. 17-10636, 2020 U.S. App. LEXIS 26347, at \*3 (11th Cir. Aug. 19, 2020). The Eleventh Circuit’s heightened standard for prejudice can be traced back to Fifth Circuit precedent. *See, e.g., U.S. v. Lober*, 630 F.2d 335, 337-38 (5th Cir. 1980).

<sup>160</sup> 321 F.3d 1331 (11th Cir. 2003).

<sup>161</sup> *Id.* at 1333.

<sup>162</sup> 8 C.F.R. § 1208.13(a) (2020).

## 1. The legal importance of corroborating evidence

Although an applicant's testimony may be sufficient to meet their burden in theory,<sup>163</sup> this is not the case in practice. In 2005, Congress passed the REAL ID Act,<sup>164</sup> which "drastically expanded the codified standards by which immigration adjudicators evaluate the veracity of an asylum applicant's claim."<sup>165</sup> Now, "where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence *must* be provided unless the applicant does not have the evidence and cannot reasonably obtain it."<sup>166</sup>

Furthermore, an IJ can deny an applicant's case because they did not provide the corroborating evidence that an IJ believed was needed, even without advance notice of the desired evidence or a continuance to obtain that evidence.<sup>167</sup> In *Matter of L-A-C-*, the BIA analyzed the requirements under the REAL ID Act with respect to corroboration and what procedures an IJ must follow before denying a case. Through statutory interpretation and pre-existing case law, the BIA found no requirement that an IJ articulate the specific evidence that should be provided, nor did they find a requirement that the judge offer a continuance.<sup>168</sup> In essence, the requirements of the REAL ID Act are notice enough to provide the necessary evidence.<sup>169</sup>

In many cases, corroborating and supporting evidence makes the difference between receiving protection and not. In *Alvarez Lagos v. Barr*, the Fourth Circuit relied on the statements of two country conditions experts to decide that the agency erred in its determinations around the "nexus" requirement.<sup>170</sup> The court discussed how Ms. Lagos submitted "voluminous documentary evidence," which included the testimony of one country conditions expert and the affidavit of another.<sup>171</sup> On issues related to nexus and an imputed political opinion claim, her "experts were clear and unrebutted."<sup>172</sup> The court cited her experts' opinions throughout their decision and found that they were persuasive.<sup>173</sup> Similarly, in *Hernandez-Chacon*, the Second Circuit found that the BIA and IJ did not adequately consider Ms. Hernandez-Chacon's political opinion claims in light of the

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<sup>163</sup> 8 C.F.R. § 1208.13(a) (2020) ("The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration"). *But see* *Matter of Y-B-*, 21 I&N Dec. 1136, 1139 (BIA 1998) (holding that the applicant's testimony did not meet the burden of proof despite the absence of an adverse credibility finding).

<sup>164</sup> Pub. L. No. 109-13, 119 Stat. 231 (codified as amended in scattered sections of 8 U.S.C.).

<sup>165</sup> Melanie A. Conroy, *Real Bias: How REAL ID's Credibility and Corroboration Requirements Impair Sexual Minority Asylum Applicants*, BERKELEY J. GENDER, L. & JUST. 1, 1 (2009).

<sup>166</sup> 8 U.S.C. § 1159(b)(1)(B)(ii) (2020) (emphasis added).

<sup>167</sup> *Matter of L-A-C-*, 26 I&N Dec. 516 (BIA 2015). This standard has been adopted by at least one Circuit Court. *See* *Wei Sun v. Sessions*, 882 F.3d 23 (2d Cir. 2018) (ruling that an immigration judge is not required to give applicant notice of evidence needed). *But see* *Ren v. Holder*, 648 F.3d 1079, 1092 (9th Cir. 2011) ("It would make no sense to ask whether the applicant can obtain the information unless he is to be given a chance to do so. . . . An applicant must be given notice of the corroboration required, and an opportunity to either provide that corroboration. . . .").

<sup>168</sup> *Matter of L-A-C-*, 26 I&N Dec. 516, 520-21 (BIA 2015).

<sup>169</sup> *See* *Rapheal v. Mukasey*, 533 F.3d 521, 530 (7th Cir. 2008) ("[T]he REAL ID Act clearly states that corroborative evidence may be required, placing immigrants on notice of the consequences for failing to provide corroborating evidence.").

<sup>170</sup> 927 F.3d 236, 248-52 (4th Cir. 2019).

<sup>171</sup> *Id.* at 244-45.

<sup>172</sup> *Id.* at 251.

<sup>173</sup> *Id.* at 250-52.

conditions in El Salvador.<sup>174</sup> In reaching this decision, the court relied heavily on evidence of country conditions submitted in the record, such as the declaration of a lawyer and human rights specialist, the U.S. State Department Country Report on Human Rights Practices for 2015 in El Salvador, and an article by the Associated Press.<sup>175</sup> Both circuit courts similarly relied on this type of evidence to reach important conclusions in Ms. Lagos’s and Ms. Hernandez-Chacon’s cases. If Ms. Lagos’s or Ms. Hernandez-Chacon’s attorneys did not have the time to collaborate with these experts to receive their affidavits and prepare them for trial, the outcomes in their cases would very likely have been different.

Similar to the absence of expert affidavits, a lack of sufficient country conditions evidence underlies the decisions in recent Attorney General decisions. In *Matter of E-R-A-L-*, the BIA found that the Respondent’s proposed social grouping of “Guatemalan landowners” and “landowners who resist drug cartels in Guatemala” was not cognizable based on the “evidence in the record.”<sup>176</sup> Specifically, the BIA built upon earlier case law, ruling that a social group’s “ultimate validity will depend on whether the particular facts, country and societal conditions, and individual circumstances establish” that a group is socially distinct in the society in question,<sup>177</sup> which can only be shown through country conditions reports and expert affidavits. Similarly, in *Matter of L-E-A-*, the Attorney General reinforced the notion that determinations of whether social groups are cognizable must be made on an individualized basis and examine the specific facts and cultural circumstances underlying the case.<sup>178</sup> Additionally, a lack of corroborating evidence was a basis for denial in *Matter of L-A-C-*.<sup>179</sup> In that case, the BIA determined that, even if the IJ had found the applicant credible, he submitted too little supporting evidence to corroborate his specific claim.<sup>180</sup>

These cases show the necessity that practitioners include evidence such as country conditions expert affidavits, foreign constitutions, and foreign family law statutes. All of this evidence is required by precedent and takes time to collect—time that families subject to the FAMU Policy do not have.

## 2. The realities of obtaining corroborating evidence

As a practical matter, obtaining evidence from an asylum seeker’s home country is not easy. Asylum seekers often do not leave their country with all the corroborating affidavits and documentation that an IJ may want to see.<sup>181</sup> Therefore, many asylum seekers attempt to obtain these documents remotely, often with the help of friends or family. Despite advances in technology that

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<sup>174</sup> *Hernandez Chacon v. Barr*, 948 F.3d 94, 104 (2d Cir. 2020).

<sup>175</sup> *Id.* at 99-100.

<sup>176</sup> 27 I&N Dec. 767, 768, 770-72 (B.I.A. 2020).

<sup>177</sup> *Id.* at 770.

<sup>178</sup> 27 I&N Dec. 581, 586 (Op. Att’y Gen. 2019).

<sup>179</sup> 26 I&N Dec. 516, 526-27 (B.I.A. 2015).

<sup>180</sup> *Id.* at 525.

<sup>181</sup> *See Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984) (“Authentic refugees rarely are able to offer direct corroboration of specific threats. . . . Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution.”); 151 CONG. REC. 9025 (2005) (statement of Sen. Brownback) (“[T]hose who flee a country often times don’t have time to gather up the proper documentation they may later need in an American immigration court.”).



may allow family members abroad to quickly send a statement via email or take a picture of a relevant document, these methods are not sufficient. Without an original document that the government can inspect, the document may be admitted into evidence but will be given very little weight by the IJ.<sup>182</sup> Therefore, attorneys must counsel their clients that their friends and family members must mail original copies of birth certificates, death certificates, affidavits, business records, and any other documents to them in the United States. Receiving mail from Central America or anywhere else in the world can take several weeks or months, and more time is needed once the document is received by an attorney in order to translate it for the immigration court.<sup>183</sup>

Additionally, many asylum seekers increasingly have digital evidence, such as photos of injuries taken on their cell phones, videos of attacks or political protests, and audio and text messages from persecutors. In the Author's experience, many asylum seekers leave these phones in their home country so that evidence they may have had at one point—including direct evidence of the words of a persecutor—is no longer available. Even where such evidence is available, there are so few procedures in place for electronic evidence that it is unclear if the court would admit it or give it proper weight.<sup>184</sup>

Attorneys must also help their clients secure physical, psychological, or gynecological evaluations in order to prove their case.<sup>185</sup> Physical and gynecological evaluations document scars and injuries that cannot be shown in the courtroom, such as scars from where someone was beaten by the police in their country or where they were subjected to female genital mutilation. Psychological evaluations can also corroborate an asylum seeker's testimony and explain why someone may not remember particular events. For example, upon hearing that an asylum applicant sustained repeated head injuries, a doctor's evaluation can explain to the court that traumatic brain injury could cause the asylum seeker to forget certain facts of their case. This could be critical to helping a judge find an asylum seeker to be credible.<sup>186</sup> These evaluations make a real difference. According to the human rights advocacy organization Physicians for Human Rights, immigrants who work with a forensic evaluator are granted asylum at a rate of approximately 90%, compared to a national average of about

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<sup>182</sup> See EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, IMMIGRATION COURT PRACTICE MANUAL 51 (2019), <https://www.justice.gov/eoir/file/1205666/download> [<https://perma.cc/WEW9-2NBA>] (noting that the applicant must make the originals of supporting documents available for review and “bring the originals to all individual calendar hearings”).

<sup>183</sup> *Id.* at 43-44 (“All documents filed with the Immigration Court must be in the English language and accompanied by a certified English translation”).

<sup>184</sup> As of the February 20, 2020 edition of the Immigration Court Practice Manual, there is no mention of procedures for video or audio evidence. See EOIR, IMMIGRATION COURT PRACTICE MANUAL (2020), <https://www.justice.gov/file/1250706/download> [<https://perma.cc/WEW9-2NBA>].

<sup>185</sup> See David Gangsei & Ana C. Deutsch, *Psychological Evaluation of Asylum Seekers as a Therapeutic Process*, 17 TORTURE 79, 79 (2007) (“Psychological evaluations of the consequences of torture can present information and evidence to asylum adjudicators which significantly increases understanding of the survivors’ background and experiences as well as their manner of self-presentation in the courtroom or interview.”).

<sup>186</sup> See, e.g., Jeffrey Chase, *The Importance of Expert Witnesses*, OPINIONS/ANALYSIS ON IMMIGRATION LAW (Aug. 24, 2017), <https://www.jeffreyschase.com/blog/2017/8/24/theimportance-of-expert-witnesses> [<https://perma.cc/6WRM-Q8NE>] (“[A] medical expert’s testimony might necessarily buttress an asylum applicant’s claim to have suffered past persecution. . . . Furthermore, a psychological expert might provide a medical explanation for problems with the applicant’s factual recall or demeanor, both of which are factors that can be relied on by an immigration judge to support an adverse credibility finding.”).

30%.<sup>187</sup> Those who are unable to obtain these evaluations are thus at a severe disadvantage compared to those with evaluations.

Obtaining these evaluations takes time. For instance, Physicians for Human Rights requires that evaluation requests be submitted at least 12 weeks (approximately three months) before the affidavit's submission is due to the court.<sup>188</sup> There is no guarantee that an evaluation will be found in that time or in a shorter period of time. In New York City, Individual Hearings for these priority cases are usually scheduled approximately two to three months after the last Master Calendar Hearing on the case, which is generally the hearing when the asylum application is submitted. This is barely enough time to obtain an evaluation and does not allow for human error, delay, or circumstances outside the control of an asylum seeker and their attorney.

Similar to evaluations, expert affidavits and testimony can also be crucial to an asylum application. Because many asylum applications implicate issues of how religious, ethnic, and sexual minority groups are treated in other countries, expert professionals offer a critical and necessary perspective on an asylum seeker's case.<sup>189</sup> Many of the elements of asylum, such as whether a given country's government is unable or unwilling to protect the applicant, require a deep and nuanced understanding of the country in question. While experts are in the best position to give this perspective to a case, it takes time to obtain an expert affidavit and prepare the expert to testify. Similar to medical and psychological evaluations, finding the best expert for the particular case and obtaining the expert's affidavit both take considerable time.

In addition to expert affidavits, evaluations, and direct evidence, country conditions research compiled by attorneys is now more important than ever before. Attorneys spend hours compiling research about the conditions in a country as they are often essential to a client's claim. This research includes US government and UN reports, news articles, academic articles, and much more. For instance, many IJs heavily rely on the State Department's Country Reports on Human Rights Practices.<sup>190</sup> However, the reliability of these reports has come into question in the last few years due to a State Department policy reducing the passages on discrimination and violence against women and sexual and ethnic minorities.<sup>191</sup> A 2018 report by Oxfam found that "[m]entions of women's

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<sup>187</sup> PHR *Asylum Program*, PHYSICIANS FOR HUMAN RIGHTS, <https://phr.org/issues/asylum-and-persecution/phr-asylum-program> [<https://perma.cc/W83T-TVUB>] (last visited Sept. 26, 2020).

<sup>188</sup> *How PHR can Help Your Client*, PHYSICIANS FOR HUMAN RIGHTS, <https://phr.org/issues/asylum-and-persecution/asylum-for-attorneys> [<https://perma.cc/J3EB-GMNS>] (last visited Sept. 26, 2020).

<sup>189</sup> See Kelcey Baker, Katherine Freeman, Gigi Warner & Deborah M. Weissman, *Part Three: The Role(s) of an Expert Witness*, in EXPERT WITNESSES IN U.S. ASYLUM CASES: A HANDBOOK 35-36 (2018), <https://law.unc.edu/wp-content/uploads/2019/10/expertwitnesshandbook.pdf> [<https://perma.cc/LVQ3-QNGQ>].

<sup>190</sup> See Susan K. Kerns, *Country Conditions Documentation in U.S. Asylum Cases: Leveling the Evidentiary Playing Field*, 8 INDIANA J. GLOBAL L. STUDIES 197, 197 (2000) (citing *Ladha v. INS*, 215 F.3d 889, 901 (9th Cir. 2000)); OXFAM, SINS OF OMISSION: WOMEN'S AND LGBTI RIGHTS REPORTING UNDER THE TRUMP ADMINISTRATION 3 (2018), <https://www.oxfamamerica.org/explore/research-publications/sins-of-omission> [<https://perma.cc/SK5F-EQ4N>] (“[T]hese reports are go-to resources for parties in asylum cases who seek to establish the dangers asylum seekers face in their home countries . . . .”); *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209, 213 (B.I.A. 2010), *abrogated on other grounds* by *Hui Lin Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012) (stating that Department of State Reports “are highly probative evidence and are usually the best source of information on conditions in foreign nations”).

<sup>191</sup> See generally Nahal Toosi, *State Department report will trim language on women's rights, discrimination*, POLITICO (Feb. 21, 2018, 10:03 PM EST), <https://www.politico.com/story/2018/02/21/department-women-rights-abortion-420361> [<https://perma.cc/AQ67-C55C>] (noting the removal of certain passages related to sexual discrimination could undermine the

rights and issues—such as references to domestic abuse or sexual harassment—were down 32 percent in the 2017 reports relative to 2016 and 29 percent relative to 2015.”<sup>192</sup> Even worse, “[c]ountries of origin of asylum seekers to the United States have seen their reporting on women’s rights and issues decline even more.”<sup>193</sup> This policy disproportionately impacts women and other minorities seeking asylum, especially in cases based on sexual and gender-based violence, because it makes it even more difficult for attorneys to find the evidence necessary to support their clients’ claims. Sufficient country conditions evidence – including reports from nongovernmental organizations, academics, and news agencies – must be submitted to counteract these omissions and takes many hours to find and compile.

3. Due process concerns with corroborating evidence under FAMU

With the pressure to hear families’ cases so quickly, it is virtually impossible to obtain all of the relevant and necessary evidence by the filing deadline. The FAMU Policy has created a situation akin to if IJs were to bar all expert testimony and other corroborating testimony. While in reality the individual IJ is not the one actively excluding the testimony, the Policy has created circumstances under which this evidence is necessarily excluded because it could not be obtained by the filing deadline or the hearing date. As a result, asylum seekers are denied a full hearing because they are unable to present the evidence necessary to support their claims. Asylum seekers cannot present to the court the full picture of what they experienced and the effect that the persecution had on them. Without documents from their home country, it is extremely difficult to corroborate an asylum seeker’s claims. Additionally, without a psychological or physical evaluation, the effects of the persecution are not apparent to the court. With these obstacles in place, asylum seekers lack the time to obtain the necessary evidence and are thus deprived of a full and fair hearing.

The inability to present the evidence necessary to support their claims prejudices asylum seekers. As described *supra*, this evidence helps them to corroborate their cases and bolster their credibility, while providing IJs the necessary perspective on the asylum seeker’s country of origin. This information goes directly to several elements of an asylum case, such as whether the asylum applicant was a member of a particular social group and whether the persecution was on account of a protected ground.<sup>194</sup> By depriving them of a meaningful opportunity to present this evidence, the FAMU Policy ultimately prejudices asylum seekers.

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reports’ impact and integrity).

<sup>192</sup> OXFAM, SINS OF OMISSION: WOMEN’S AND LGBTI RIGHTS REPORTING UNDER THE TRUMP ADMINISTRATION, 3 (2018), <https://www.oxfamamerica.org/explore/research-publications/sins-of-omission> [<https://perma.cc/K2JM-G8VE>].

<sup>193</sup> *Id.*; *see also id.* at 11 (“Consistent with last year’s findings, countries sending more asylum seekers to the United States see larger decreases in reporting on women’s issues/rights”).

<sup>194</sup> *See generally* Jeffrey Chase, *The Importance of Expert Witnesses*, OPINIONS/ANALYSIS ON IMMIGRATION LAW (Aug. 24, 2017), <https://www.jeffreyschase.com/blog/2017/8/24/theimportance-of-expert-witnesses> [<https://perma.cc/2RQZ-L6VV>] (“An asylum applicant may also offer a country expert to testify as to conditions in the applicant’s country of nationality that would provide objective support for the applicant’s subjective fear of persecution.”).

B. *Insufficient Time to Recover from Trauma Violates Due Process*

1. Trauma and asylum-seeking families

Families who have suffered trauma in their countries need time to recover and build rapport with their attorneys. As described by the American Psychological Association, trauma refers to an

emotional response to a terrible event like an accident, rape or natural disaster. Immediately after the event, shock and denial are typical. Longer term reactions include unpredictable emotions, flashbacks, strained relationships and even physical symptoms like headaches or nausea. While these feelings are normal, some people have difficulty moving on with their lives.<sup>195</sup>

For some asylum seekers, the trauma they have experienced may lead to posttraumatic stress disorder (PTSD). One clinical psychologist noted that “asylum seekers demonstrate higher rates of PTSD than refugees, suggesting that the instability associated with that lack of refugee status — and perhaps the stressors of the asylum process itself — contribute to poorer mental health outcomes.”<sup>196</sup>

In addition to the trauma asylum seekers experience from persecution, many also experience trauma while immigrating to, and upon arriving in, the United States. For example, “NGOS serving migrants 'estimate that a high percentage of girls, women, and LGBTI persons' experience sexual or gender-based violence 'during their journeys' from Central America to the United States.”<sup>197</sup> In Mexico, groups of migrants have experienced kidnappings at the hands of drug trafficking cartels and other organized crime organizations, who demand ransom payments and sometimes collude with human smugglers who were contracted to transport the migrants.<sup>198</sup> Asylum seekers can also experience trauma after they arrive in the United States, including while they are in detention<sup>199</sup> or in the communities where they live.<sup>200</sup>

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<sup>195</sup> *Trauma and Shock*, AM. PSYCHOL. ASS'N, <https://www.apa.org/topics/trauma> [<https://perma.cc/DP7Q-WDR6>] (last visited Sept. 26, 2020).

<sup>196</sup> Katherine Lee, *Seeking Sanctuary*, MONITOR ON PSYCHOL. (July / Aug., 2017), <https://www.apa.org/monitor/2017/07-08/sanctuary> [<https://perma.cc/7MGE-G8AJ>].

<sup>197</sup> KIDS IN NEED OF DEFENSE, CHILDHOOD CUT SHORT 28 (2017), [https://supportkind.org/wp-content/uploads/2017/06/Childhood-Cut-Short-KIND-SGBV-Report\\_June2017.pdf](https://supportkind.org/wp-content/uploads/2017/06/Childhood-Cut-Short-KIND-SGBV-Report_June2017.pdf) [<https://perma.cc/VBZ8-M6FF>].

<sup>198</sup> *Id.* at 29.

<sup>199</sup> *See, e.g., US: Trauma in Family Immigration Detention*, HUMAN RIGHTS WATCH (May 15, 2015), <https://www.hrw.org/news/2015/05/15/us-trauma-family-immigration-detention-0> [<https://perma.cc/8YCC-KJQT>] (“Mothers from 25 detained families, including 10 who had been locked up for 8 to 10 months, described to Human Rights Watch their family’s trauma, depression, and suicidal thoughts.”).

<sup>200</sup> *See* Krista M. Perreira & India Ornelas, *Painful Passages: Traumatic Experiences and Post-Traumatic Stress among Immigrant Latino Adolescents and their Primary Caregivers*, 47 INT’L MIGRATION REV. 976, 982 (2013) (noting that hardships encountered after arriving in the U.S., such as racial-ethnic discrimination, can “both increase the likelihood that they will experience trauma and that trauma will result in sub-clinical or clinical levels of PTSD symptoms.”).

## IN-AND-OUT JUSTICE

### 2. The effects of trauma on asylum cases

#### *i. How trauma impacts the attorney-client relationship*

The effects of trauma, irrespective of a PTSD diagnosis, “can interfere with the formation of strong client-attorney relationships by impairing the client’s capacity to trust others, process information, communicate, and respond to stressful situations.”<sup>201</sup> For example, when a client is asked about the traumatic event that they experienced, they may go into a “flight, fight, or freeze,”<sup>202</sup> reaction, making it difficult for them to answer their attorney’s questions or answer those questions in a chronological, organized way that is most helpful to the attorney. Trauma may also cause clients to be inconsistent over the course of several interviews with attorneys and their legal staff. Such inconsistencies in an asylum seeker’s testimony can be caused by PTSD<sup>203</sup> or even traumatic brain injury.<sup>204</sup> During the interview, those who have experienced trauma may refuse to answer questions, become loud or combative when being interviewed, or stop paying attention to a meeting altogether.<sup>205</sup> Additionally, clients who experience trauma may cancel meetings with very short notice or simply not show up.<sup>206</sup> While these responses from clients can be frustrating for attorneys, it is crucial to understand that clients engage in this behavior as a form of self-preservation, not because they are lying or because the meeting lacks importance to them.

Because of the impacts of trauma, attorneys must spend more time investing in the attorney-client relationship and building rapport with a client. In addition to gathering information necessary to make a claim, trauma-informed lawyering requires that attorneys make meetings predictable, manage clients’ emotions to ensure that they are not triggered by a conversation, and invest time during a meeting to talk about topics aside from the case in order to build rapport with their clients.<sup>207</sup> Attorneys must also give clients sufficient time to complete requested tasks, such as getting

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<sup>201</sup> National Child Trauma Stress Network, *The Impact of Trauma on the Attorney-Client Relationship*, AM. BAR ASS’N (Oct. 1, 2017), [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/child\\_law\\_practiceonline/child\\_law\\_practice/vol-36/sept-oct-2017/the-impact-of-trauma-on-the-attorney-client-relationship](https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/sept-oct-2017/the-impact-of-trauma-on-the-attorney-client-relationship) [https://perma.cc/M53W-GFCX].

<sup>202</sup> Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLINICAL L. REV. 359, 366 (2016).

<sup>203</sup> Landy F. Sparr & J. Douglas Bremner, *Post-traumatic Stress Disorder and Memory: Prescient Medicolegal Testimony at the International War Crimes Tribunal?*, 33 J. Am. Acad. Psychiatry L. 71, 71 (2005).

<sup>204</sup> See Will Stone, *Domestic Violence’s Overlooked Damage: Concussion And Brain Injury*, Kaiser Health News (June 1, 2018), <https://khn.org/news/domestic-violences-overlooked-damage-concussion-and-brain-injury> [https://perma.cc/HWQ3-AZJL] (describing how head injuries can impact memory); NEW YORK STATE OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, DOMESTIC ABUSE AND TRAUMATIC BRAIN INJURY, [https://opdv.ny.gov/professionals/tbi/dvandtbi\\_infoguide.pdf](https://opdv.ny.gov/professionals/tbi/dvandtbi_infoguide.pdf) [https://perma.cc/K6MV-NR23] (describing how traumatic brain injury can cause impairments in cognition, emotions, and communication, as well as memory loss).

<sup>205</sup> National Child Trauma Stress Network, *supra* note 201.

<sup>206</sup> See, e.g., Lynette M. Parker, *Increasing Law Students’ Effectiveness When Representing Traumatized Clients: A Case Study of the Katharine & George Alexander Community Law Center*, 21 GEO. IMMIGR. L.J. 163, 170 (2007).

<sup>207</sup> See NAT’L CENTER ON DOMESTIC VIOLENCE, TRAUMA, AND MENTAL HEALTH, TRAUMA-INFORMED LEGAL ADVOCACY: PRACTICE SCENARIOS SERIES (2015), [http://www.nationalcenterdvtraumamh.org/wp-content/uploads/2013/08/TILA\\_Traumatic\\_TriggersApr22.pdf](http://www.nationalcenterdvtraumamh.org/wp-content/uploads/2013/08/TILA_Traumatic_TriggersApr22.pdf) [https://perma.cc/KU3L-QZ5A]; see also Carol M. Suzuki, *Unpacking Pandora’s Box: Innovative Techniques for Effectively Counseling Asylum Applicants Suffering from Post-Traumatic Stress Disorder*, 4 HASTINGS RACE & POVERTY L.J. 235, 264-270 (2007) (discussing specific interview techniques when working with trauma survivors).

documents or attending a psychological evaluation. In some instances, clients are dealing with physical illnesses because their trauma manifests as physiological symptoms.<sup>208</sup> In sum, trauma can present effects on asylum seekers that may prevent them from working efficiently with their attorneys, even as this efficiency becomes essential to succeeding in such an accelerated and crucial process.<sup>209</sup>

*ii. How trauma impacts the hearing*

Trauma can also impact an asylum applicant during their hearing. Similar to client meetings with an attorney, a judge's questions can be emotionally triggering, leading clients to become combative, shut down altogether and refuse to answer questions, or get so emotional that answering questions becomes difficult.

This response can be exacerbated by an IJ's or ICE trial attorney's demeanor. Researchers who observed Individual Hearings in asylum seekers' cases in the 1980s found that trial attorneys at the INS (ICE's predecessor) "took an oppositional stance in every case."<sup>210</sup> According to the researchers, who observed 193 asylum hearings over an 18-month period, INS trial attorneys "conducted lengthy and aggressive cross-examinations,"<sup>211</sup> and were often "hostile, sarcastic, or disbelieving."<sup>212</sup> These observations are consistent with more recent documented observations and the author's own experience.<sup>213</sup> IJs have been documented to exhibit similar patterns of questioning.<sup>214</sup> Hostile and disbelieving attitudes run counter to trauma-informed practices, exacerbating asylum seekers' trauma responses.<sup>215</sup> In the face of such adverse questioning methods, asylum seekers' responses can lead to inconsistencies, unwillingness to continue with testimony, or hostility toward the ICE attorney or IJ. These behaviors can in turn lead to adverse credibility findings<sup>216</sup> and, ultimately, a removal order.

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<sup>208</sup> See generally Madhulika A. Gupta, *Review of somatic symptoms in post-traumatic stress disorder*, 25 INT'L REV. PSYCHIATRY 86, 86-87 (2013).

<sup>209</sup> A pattern of behavior where clients regularly miss appointments with their attorney, fail to schedule appointments, or arrive late (or not at all) to evaluations scheduled by the attorney is consistent with avoidance symptoms of PTSD. See Karen Musalo & Marcelle Rice, *The Implementation of the One-Year Bar to Asylum*, 31 HASTINGS INT'L & COMP. L. REV. 693, 703 (2008). ("[I]ndividuals suffering from PTSD habitually avoid 'people[,] places, thoughts, or activities that bring back memories of the trauma.'").

<sup>210</sup> Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 492 (1992).

<sup>211</sup> *Id.* at 493.

<sup>212</sup> *Id.*

<sup>213</sup> See Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 43 (2014) (summarizing empirical studies from 2009, 2011, and 2012 on removal proceedings).

<sup>214</sup> See, e.g., *Fiadjo v. Attorney General of the United States*, 411 F.3d 135, 155 (3d Cir. 2005) (describing the "bullying nature" of the immigration judge's questions).

<sup>215</sup> See NAT'L CENTER ON DOMESTIC VIOLENCE, TRAUMA, AND MENTAL HEALTH, *supra* note 207, at 3 (describing how "[n]oticing and validating someone's feelings" is a suggested course of action when someone is triggered).

<sup>216</sup> See *Fiadjo*, 411 F.3d at 154-55 (describing how "[p]oor interview techniques" negatively impacted the appellant's ability to respond to questioning, which "most certainly" led to a negative credibility finding).

## 3. Asylum law's recognition of the impact of trauma

Asylum law already recognizes that one year may be insufficient time for survivors of trauma to prepare their asylum applications. Under the INA, asylum seekers must file their asylum application within one year of arrival in the United States to be eligible.<sup>217</sup> However, if an applicant files outside of that one-year window, they can still be eligible for asylum if they show that they were subject to changed or extraordinary circumstances, and then filed within a reasonable amount of time.<sup>218</sup> Extraordinary circumstances “refer to events or factors directly related to the failure to meet the one-year deadline.”<sup>219</sup> One category of these extraordinary circumstances already contemplated by the regulations include “serious illness or mental or physical disability, including *any effects of persecution or violent harm suffered in the past.*”<sup>220</sup> PTSD has been recognized, and not challenged, in the First Circuit as a basis for extraordinary circumstances.<sup>221</sup> The circumstance must be carefully documented, however, because PTSD and trauma symptoms are so common among asylum seekers that, by some accounts, adjudicators have come to take a jaded view of this exception.<sup>222</sup>

For over two decades, federal immigration law has led the Department of Justice to recognize that the effects of persecution and harm may reasonably delay asylum seekers from completing their asylum applications. It then defies the purpose of these well-established regulations to require that asylum seekers not only apply for asylum, but also reach a conclusion in their case, all within one year.

## 4. Trauma and the FAMU Policy

When EOIR accelerates the case of a family who is traumatized by the violence they have witnessed or suffered in their home country, it takes a toll on the quality of the subsequent hearing. Attorneys need time to work with traumatized clients and earn their trust. Once that trust is earned, clients are more likely to open up about the details of what happened to them. Often, clients have experienced much more than they divulge at the first meeting, especially when such experiences include severe forms of persecution such as sexual assault or torture. They may not feel comfortable sharing these facts in a first meeting but will often share them after a second, third, fourth, or fifth meeting over the course of several months or even years. When an attorney only has one or two opportunities to meet with a client before an application for asylum is due, those facts will be omitted from the application, which will appear weaker or even contradictory to later statements. And when an Individual Hearing date is set so quickly, an attorney will have less time to build the rapport

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<sup>217</sup> 8 U.S.C. § 1158(a)(2)(B) (2020).

<sup>218</sup> 8 U.S.C. § 1158(a)(2)(D) (2020); 8 C.F.R. § 208.4(a)(4)(ii) (2020).

<sup>219</sup> 8 C.F.R. § 208.4(a)(5) (2020). This language has remained unchanged since the regulations were promulgated in 1997. See Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 97 Fed. Reg. 10339 (Mar. 6, 1997).

<sup>220</sup> 8 C.F.R. § 208.4(a)(5)(i) (2020) (emphasis added).

<sup>221</sup> *Mukamsoni v. Ashcroft*, 390 F.3d 110, 117 (1st Cir. 2004).

<sup>222</sup> See Victoria Neilson & Aaron Morris, *The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal*, 8 N.Y. CITY L. REV. 233, 270 n. 218 (2005); see also Musalo & Rice, *supra* note 209, at 704-06 (describing instances in which immigration judges and asylum officers denied asylum applications because they incorrectly understood the effects of trauma).

necessary to get their client's full story so that it can be presented to the judge.

Because of the pressure to complete FAMU cases quickly, attorneys are simply not afforded the time required to build relationships with their clients. Because of the high rates of PTSD among asylum seekers, this time pressure can inhibit an attorney's ability to work with an asylum-seeking client. In turn, the attorney may fail to achieve a full understanding of the asylum seeker's case and may inadequately prepare their clients for the stress that is inherent in an Individual Hearing. Additionally, without time to seek treatment, an asylum seeker may not be able to fully articulate what happened to them or what they experienced.

If an asylum seeker's mental health prevents them from telling their whole story, they do not get a *full* and fair hearing. This failure is different from focusing testimony, which necessarily happens in every case. Not everything that an asylum seeker has experienced will rise to the level of persecution or merit a grant of asylum. However, if an asylum seeker's mental health prevents them from speaking to their attorney about all the details of what they experienced, their case will not be fully presented to the judge.

Similarly, a rushed process may raise more inconsistencies, leading to an adverse credibility finding. This is not through the fault of the asylum seeker, as they are not intending to deceive. As discussed *supra*, inconsistencies may be the result of physical injuries or of PTSD. Inconsistencies may also arise out of a learned survival technique. Without time to seek mental health treatment or to build a relationship with their attorney, an asylum seeker with a factually meritorious application may be deemed not credible and denied protection.

The rush to trial ultimately prejudices immigrants. The specific manner by which traumatic experiences present challenges to receiving a fair hearing will depend on the facts of each asylum seeker's case. Still, when an asylum seeker is unable or unwilling to share certain traumatic facts because of mental health circumstances, the IJ cannot assess all the relevant harms the asylum seeker may have suffered. The evidence is overwhelming that immigrants are being removed from the United States under the FAMU Policy because they are not able to express everything they suffered in their home country. Put differently, there are people who are properly qualified to receive asylum, Withholding of Removal, or protection under the Convention Against Torture but are denied relief because the FAMU Policy prevents them from articulating their entire case.<sup>223</sup> Similarly, there are people whose removal from the United States relies on specious adverse credibility findings and who, absent the FAMU Policy, could have received counseling and proper treatment to help them explain their inconsistencies so to be found credible. In other words, the FAMU Policy fundamentally prejudices immigrants' cases.

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<sup>223</sup> See, e.g., Carol M. Suzuki, *Unpacking Pandora's Box: Innovative Techniques for Effectively Counseling Asylum Applicants Suffering from Post-Traumatic Stress Disorder*, 4 HASTINGS RACE & POVERTY L.J. 235, 239 (2007) ("There is an inescapable and cruel paradox evident when one considers the ramifications of PTSD on an asylum claim—those who suffer from PTSD because of their trauma experiences, and who are deserving of asylum in the United States, may be denied asylum as a direct result of the symptoms of their affliction").



C. *Potential Critiques and Questions*

The arguments advanced in this Article about the acceleration of families' asylum cases are necessarily generalized but nonetheless invite critique. One such critique would follow the Fourth Circuit's logic in *Rusu*: that asylum seekers, by having a hearing at all, have the *opportunity* to present their case.<sup>224</sup> That is, if an asylum seeker is unable to articulate their fears because of their trauma or cannot obtain the evidence, that is the burden of the asylum seeker and their attorney, and not the government. This critique ignores the very heart of due process. A fundamental concern of due process is whether someone had an "opportunity to be heard at a *meaningful* time in a *meaningful* manner."<sup>225</sup> This critique focuses on the opportunity but not the requirement that it be *meaningful*. As a matter of judicial interpretation, the Supreme Court in *Mathews* would not have included this language if it were superfluous. Asylum seekers may be given an opportunity to state their case in a hearing, but without the evidence to support their case or the ability to articulate their fears, the hearing is not at a meaningful time or in a meaningful way, as due process requires.

Another critique contends that as FAMU is not the only expedited proceeding, it is no different than others that courts have been reluctant to strike down. While FAMU may not be the only expedited proceeding, its faults go to the very heart of fairness in adjudications. FAMU is the only type of case where such tight restrictions are imposed on the discretion of IJs.<sup>226</sup> The FAMU Policy directly contravenes notions of fairness and process upon which courts are built. If the FAMU Policy were to continue and expand, or if a similar policy were put in place by a future Administration, thousands more asylum-seeking families would be deprived of their fair day in court to which they are entitled.

How the FAMU Policy and the June Proposed Asylum Rule will interact remains an open question as of this Article's publication. In June 2020, the Trump Administration published a Notice of Proposed Rulemaking that, among other sweeping changes, allows IJs to pretermit asylum claims based on the application and supporting evidence alone, without a hearing.<sup>227</sup> It is unclear how FAMU cases will be treated if this rule goes into effect, or at what stage an IJ might look to pretermit a case. The impact of the proposed rule, and its interaction with the FAMU Policy, will undoubtedly raise more due process questions for families seeking asylum, especially if it gives families even less time and fewer opportunities to present their cases.

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<sup>224</sup> *Rusu v. INS*, 296 F.3d 316, 324 (4th Cir. 2002).

<sup>225</sup> *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (emphasis added) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

<sup>226</sup> Complaint at 44, *Las Americas v. Trump*, 2020 WL 4431682 (D. Oregon 2020) (No. 3:19-cv-2051), [https://www.splcenter.org/sites/default/files/ecf\\_1\\_las\\_americas\\_v\\_trump\\_no\\_19-cv-02051-sb\\_d\\_or.pdf](https://www.splcenter.org/sites/default/files/ecf_1_las_americas_v_trump_no_19-cv-02051-sb_d_or.pdf) [<https://perma.cc/8TW4-93ZE>].

<sup>227</sup> Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36277 (proposed June 15, 2020).

## IV. HOW MUCH TIME IS ENOUGH?

This Article does not ultimately settle the question of how much time is enough time for an asylum-seeking family to prepare their asylum case. Because of the immigration court backlog, this is an increasingly complex question. As described in this Article, the federal government throws recently arrived families through the adjudicatory system as quickly as possible, without the opportunity to fully prepare for their hearings. Meanwhile, on the opposite end of the spectrum, many other asylum seekers' cases are languishing in the immigration court backlog.<sup>228</sup> This in turn affects the ability of their counsel to fully and fairly represent them as memories fade, witnesses die or can no longer be found, or country conditions change over many years. Under current case law, it is unclear how much time the due process clause would require and what the minimum—and maximum times—required by due process may be.

Despite that uncertainty, the experiences with FAMU suggest that the time required by the settlement agreement from *B.H. v. U.S. Citizenship and Immigration Services, et al.* (known as *A.B.T. v. USCIS* or the *ABT* settlement) may not be sufficient.<sup>229</sup> In *A.B.T. v. USCIS*, class members argued that Department of Homeland Security policies unlawfully prevented them from obtaining work authorization while their asylum applications were pending.<sup>230</sup> Under the settlement, the government agreed that the plaintiffs were entitled to a minimum of forty-five days between the last Master Calendar Hearing and the Individual Hearing.<sup>231</sup> As described *supra*, IJs in New York are giving approximately two to three months (sixty to ninety days) between the last Master Calendar Hearing and the Individual Hearing.<sup>232</sup> However, even this amount of time is not enough to fully prepare a case, which requires not only gathering all the necessary evidence but also ensuring that clients are psychologically prepared for Individual Hearings. While it has not established a *ceiling*, this Article shows that the *floor* for how soon hearings should be scheduled should be significantly higher than that agreed upon in the *ABT* settlement. The full contours of what that amount of time should be, especially in light of due process concerns arising on the other time extreme, will need to be the subject of its own article.

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<sup>228</sup> The backlog is only getting longer due to the COVID-19 pandemic. *See generally* *More Immigrants in Limbo as Government Shutdown Due to COVID-19 Leads to Widespread Immigration Court Hearing Cancellations*, TRAC (June 4, 2020), <https://trac.syr.edu/immigration/reports/612> [<https://perma.cc/R7BK-KSWD>].

<sup>229</sup> Revised Settlement Agreement, *B.H. v. U.S. Citizenship and Immigration Services*, No. CV11-02180 (W.D. Wash. Sept. 18, 2013), [https://www.americanimmigrationcouncil.org/sites/default/files/litigation\\_documents/klok-revised\\_settlement\\_agreement.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/klok-revised_settlement_agreement.pdf) [<https://perma.cc/H8WF-DFVY>]. The Revised Settlement Agreement has since expired. U.S. Citizenship and Immigration Services, *The ABT Settlement Agreement* (June 14, 2019), <https://www.uscis.gov/archive/the-abt-settlement-agreement> [<https://perma.cc/36KJ-65TN>].

<sup>230</sup> *See generally* Complaint, *A.B.T. v. U.S. Citizenship and Immigration Services*, No. 11-02108 (W.D. Wash. Dec. 15, 2011), [https://www.americanimmigrationcouncil.org/sites/default/files/litigation\\_documents/asylumclockcomplaint-filed-12-15-2011.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/asylumclockcomplaint-filed-12-15-2011.pdf) [<https://perma.cc/A7LH-QHYS>].

<sup>231</sup> Revised Settlement Agreement, *supra* note 229, at 12.

<sup>232</sup> *See* description *supra* Part III.A.2.

## *IN-AND-OUT JUSTICE*

### CONCLUSION

The immigration court system is under extreme pressure originating from structural flaws that have been exacerbated by the actions of the Trump Administration. There is tremendous need to fix this system so that everyone's cases are heard fairly and in a timely manner. However, this need does not outweigh the rights of families fleeing extreme violence in their home countries. Legal practitioners and policy leaders can and must advance solutions that give families fleeing violence the opportunity to be fully heard in their immigration court hearings, while also addressing the backlog of cases that plague the overworked system. Families' lives and futures are not, and should not be treated like, political footballs. Everyone deserves the opportunity to be heard, especially when their life may be at stake. The acceleration of families' cases fails to answer the larger, structural problems of the immigration court system and violates the rights of families to a full and fair hearing. The Trump Administration should rescind the FAMU Memo, and future administrations should never again use the tactic of acceleration as a bandage for the failure to address structural flaws.