NEW YORK CITY IMMIGRATION COURT MONITORING REPORT

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**Although this report has been prepared by law students who are members of New York University's Chapter of IRAP, neither the court observation nor the report has been supervised by IRAP.

INTRODUCTION

This report is an analysis of quantitative and qualitative data on New York City immigration courts collected by volunteer court observers from October 2022 to January 2023. It is a part of the ongoing New York City immigration court observational study, a collaborative project started by several immigrant rights advocates in New York City. The project has grown and comprises individual attorneys, Immigrant ARC, and students from various law schools who serve as volunteers, including students from New York University (NYU) School of Law, New York Law School, Columbia Law School, and Fordham Law School, among others. The study is currently led by Professor Lenni B. Benson of New York Law School, a senior fellow at Immigrant ARC.

The immigration court administrators and public relations officers assisted this study by sharing the master calendar schedule and officially informing the immigration judges that students and attorneys would be observing. We thank the Executive Office for Immigration Review (EOIR) for cooperating with us by sharing this scheduling information. We also thank Professor Talia Inlender at UCLA School of Law who shared with us how her team of students observed the Dedicated Docket in Los Angeles and the process that went into writing and publishing a report.[1] This conversation informed the way that the NYU Chapter of the International Refugee Assistance Project (IRAP)'s immigration court monitoring team compiled this report.

From October 2022, volunteer court observers attended – mostly in person and some virtually – master calendar hearings and a handful of individual merits hearings in three Manhattan immigration courts: 290 Broadway, 26 Federal Plaza, and Varick Street Court. The vast majority of observations came from 290 Broadway due to its proximity to observers.[2]

1 Center for Immigration Law and Policy, UCLA School of Law, *The Biden Administration's Dedicated Docket: Inside Los Angeles' Accelerated Court Hearings For Families Seeking Asylum* (2022), https://law.ucla.edu/sites/default/files/PDFs/Center_for_Immigration_Law_and_Policy/Dedicated_Docket_in_LA_Report_FINAL_05.22.pdf. The UCLA School of Law observed and reported solely on the Dedicated Docket in Los Angeles. The Dedicated Docket refers to an expedited proceeding for family cases created under the Biden administration in certain cities that runs alongside the regular docket. This study of New York City immigration courts, on the other hand, contained only a small number of observations of the Dedicated Docket. Therefore, the authors of this report did not distinguish between the Dedicated Docket and the regular docket. *See* EOIR Policy Memorandum 21-23, at https://www.justice.gov/eoir/book/file/1399361/download.

This observational study was motivated by the immigrant advocacy community in New York learning about thousands of migrants being sent to New York immigration courts and to Immigration and Customs Enforcement (ICE) reporting appointments (called "Check-Ins"). The Customs and Border Protection (CBP) or ICE processing officers had inserted New York area addresses into the charging documents (known as the "Notice to Appear" Form) for many of these migrants.[3]

Nonprofit organizations throughout New York received hundreds of these notices in the mail for people they had never met. Many notices went to organizations or addresses that do not provide legal services for immigrants. Some of the migrants told advocates that the arresting officer asked where they wanted to go when they were detained and Googled a nonprofit organization in the New York area and inserted that address. Immigrant ARC set up a rapid response team and invited local and national advocacy organizations to meet and confer about solutions to the chaos of the rapid border processing.

The practice of inserting a false address or an address where the individual has no direct contacts is particularly problematic because § 240(b)(5)(A) of the Immigration and Nationality Act (INA) (or § 1229a(b)(5)(A) of the U.S. Code) requires the removal of persons who do not attend an immigration court proceeding after having received a written Notice to Appear. Under § 240(b)(5)(A), this applies if there is "clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2)). The written notice by the Attorney General shall be considered sufficient for the purposes of this subparagraph if provided at the most recent address provided under § 1229(a)(1)(F) of this title [the U.S. Code]." This implies that the addresses of unrelated nonprofit organizations filled in by arresting officers may be sufficient to satisfy the notice requirement, even if the noncitizen never received any notice of a hearing and therefore never showed up to court.

2 In 2021, the NYU Chapter of the International Refugee Assistance Project (IRAP), a non-governmental organization that advocates for refugees worldwide, released a report titled "New York Varick Immigration Court: One Year of Operations under COVID-19," which provided historical data on New York City's Varick Street Immigration Court and qualitatively analyzed how the court was affected by the COVID-19 pandemic. The current report builds on those findings by presenting more quantitative data. This report also expands on the previous team's work by including qualitative data from 290 Broadway and 26 Federal Plaza Courts, in addition to the Varick Court.

3 *See e.g.*, Claudia Torrens, *Border patrol agents sending migrants to false city addresses, sowing confusion*, PBS NewsHour (Oct. 24, 2022). https://www.pbs.org/newshour/nation/border-patrol-agents-sending-migrants-to-false-city-addresses-sowing-confusion.

This can lead to noncitizens being ordered removed in absentia for failing to appear at their master calendar hearing. Therefore, the first set of issues we observed and tracked was problems with noncitizens' Notices to Appear and rates of removal in absentia.

The next issue we observed and tracked was the rate of representation for people in initial appearances and continuances. This was done to determine the percentage of noncitizens appearing in court (called "respondents") without counsel. Respondents often fail to appear because they lack legal counsel to orient them through the process. We chose to focus on this issue as an advocacy tool to call for New York City and State governments to dedicate more funding to pro bono attorneys and other programs, such as the Friend of the Court.[4]

Together, from October 2022 to January 2023, students from various law schools and pro bono attorneys observed 750 immigration court proceedings across three immigration courts. This is only a subset of the immigration court observation data, and the observations are ongoing. We chose to pause adding new data in order to complete our analysis and prepare this report. The quantitative analysis, such as the rate of representation and backlog, only refers to the 750 court proceedings. However, the qualitative observations, such as the general immigration court atmosphere, include more recent data to add color to the actual events at the courthouses. Among the 750 proceedings, 604 proceedings took place at 290 Broadway (80.5%), 103 were from Varick Street Court (13.7%), and 39 were from 26 Federal Plaza (5.2%).[5] Court observers had a list of master calendar hearings and self-selected the date, time, and judge for the observation.

4 Federal law does not require the appointment of free counsel for noncitizens in immigration proceedings. While the EOIR offers some support through its "Help Desk," there is no federal system of appointed counsel except for a small cohort of juveniles in federal custody and for individuals who have mental conditions that may render them incompetent to represent themselves.

5 There were four additional observations where neither the courthouse nor the name of the immigration judge were recorded. The numbers (604+103+39+4) add up to 750 observations.

These proceedings were overseen by the following Immigration Judges:

NUMBER OF COURT OBSERVATIONS BY COURTHOUSE AND JUDGE

290 Broadway		Varick Street		26 Fed Plaza	
Judge Bartleson	27	Judge Burnham	36	Judge Harbeck	13
Judge Bratton	12	Judge Conroy	4	Judge Lurye	26
Judge Brennan	14	Judge Kolbe	26		
Judge Burns	13	Judge Mungoven	24		
Judge Cassin	163	Judge Norkin	13		
Judge Christensen	16				
Judge Chung	10				
Judge Dodd	19				
Judge Grogan	25				
Judge Gundlach	30				
Judge Koppenhofer	14				
Judge Krasinski	19				
Judge Lloyd	13				
Judge McKee	45				
Judge Navarro	81				
Judge Perl	1				

Judge Poctzer	74				
Judge Schoppert	27		103		39
Unspecified[6]	1				
Total [7]	604		39		103

COURT OBSERVATION METHODOLOGY

Observers attended an initial virtual training led by Lenni B. Benson and Claire R. Thomas from New York Law School and Funmi Akinnawonu from Immigrant ARC. Some students attended the session live on Zoom while others watched the recording. The participants were introduced to the general goals of the project and the basics of immigration courts and proceedings. Ms. Akinnawonu started the training by mentioning the recent increase in the number of Notice to Appear being sent to nonprofit organizations that people had no connections to, and the concern with the issuance of in absentia removal orders. Professor Benson also expressed the hope that by having volunteers attend and observe court proceedings, court personnel would be particularly mindful of meeting all court requirements and providing required advisals to unrepresented persons.

This introduction was followed by an overview of immigration court procedures and observers' responsibilities, including the importance of notice, the meaning of a Notice to Appear, and the types of information to track during the observation. The training emphasized the importance of staying until the end of the morning or afternoon proceedings because in absentia removals tend to be decided at the end. Unfortunately, in many cases, students could not remain in the courtroom until the close of the master calendar hearing due to academic obligations.

6 Some observers omitted the names of the immigration judges in their data entry but indicated the courthouse and the floor where the observation took place.

7 *See supra* note 5.

After having attended the training, the volunteers independently conducted their court observations across the three New York City courthouses mentioned above. This was the intended design of the project, an unfunded observational study that needed to be as self-executing as possible. Immigrant ARC prepared the schedules showing which immigration judge held proceedings on which dates and times and allowed observers to select the dates and times of their observations in addition to the courthouse and judges. Compared to a random assignment, this could have resulted in bias as observers ended up concentrating on 290 Broadway and certain judges. As of summer 2023, this potential selection bias has been addressed as court observers are now directed to a link that randomly assigns them to a courthouse and a judge based on the date they have selected.

During or after attending the hearing, volunteers recorded their observations on two separate Google Forms.[8] First, the General Immigration Court Observation Form allowed for comments on specific issues regarding the court's operation. This included any problems encountered while passing through security screening, the ease or difficulty of navigating the court schedule posted on the walls, the interaction with clerks and other court personnel, and the presence of materials to find legal assistance, among others. Second, observers also filled out the NTA Immigration Court Observation Form for each individual's case they witnessed. This form solicited information about the judge, the attorney for the government (also known as the Office of the Principal Legal Advisor, or OPLA), and the respondents, including the language spoken, the presence of interpreters, and whether they appeared in person or virtually (i.e. via Webex). The form also left space for observers to comment on questions such as whether the Change of Address form (also known as Form EOIR-33) was mentioned, whether the respondent was given time to find an attorney if they were pro se, and how the hearings concluded. In the spring and summer of 2023, the NYU IRAP's court monitoring team compiled the data from the two forms into an Excel spreadsheet for further organization and analysis.[9]

8 *See* Appendices 1 and 2 for copies of the immigration court observation forms that were used by court observers – one to record general observations of the immigration court and another to record individual proceedings.

9 The data is on file with the authors and available for review.

This methodology worked quite well, but some shortcomings are worth noting. First, many observers were law students with little prior knowledge of immigration courts, so they were learning specific terms (such as the distinction between a 'continuance' and a 'merits hearing') and the particularities of immigration court proceedings while conducting their observations. As a result, some early data might be lacking in detail or contain inadvertent mistakes. Second, observers faced practical constraints trying to either quickly fill out the form in real-time using their mobile hotspots or take notes elsewhere and fill out the forms later. For this and other reasons, the entries for some data fields are missing or contain typos.

Third, court observers generally chose not to capture the respondents' names or A-numbers in their forms to preserve the respondents' privacy and minimize the intrusiveness of the observation. Although this choice had its benefits, it made it difficult to track specific cases over time, such as identifying whether pro se respondents had found counsel for their continuances. Therefore, the data presented below is best understood as a snapshot of what occurred on a particular day, rather than a longitudinal study. Lastly, the authors of this report had to make certain inferences based on the data collected, which might not be universally true. For example, the form did not contain a direct question as to whether respondents had a lawyer, but rather asked: "Was the respondent physically present?" The team analyzed the responses to this question with the reasonable assumption that respondents physically present were appearing pro se while those on Webex had a lawyer.[10] For future studies, it would be helpful to include a question explicitly asking if the respondent had a lawyer.

[10] This assumption was informed by our reading of § 1003.25(a) of Title 8 of the Code of Federal Regulations. According to § 1003.25(a), the appearance of the respondents in court is not generally waived unless they are represented by counsel: "The Immigration Judge may, for good cause, and consistent with § 240(b) of the [Immigration and Nationality] Act, waive the presence of the alien at a hearing when the alien is represented or when the alien is a minor child at least one of whose parents or whose legal guardian is present. When it is impracticable by reason of an alien's mental incompetency for the alien to be present, the presence of the alien may be waived provided that the alien is represented at the hearing by an attorney or legal representative, a near relative, legal guardian, or friend." Although an unrepresented person could request a Webex or telephonic appearance, the authors of this report have not heard of most immigration judges granting these requests.

GENERAL COURT ATMOSPHERE

A person's experience in immigration court appears to depend largely on the time of day, the specific courthouse location, and the particular personalities of the staff on duty. There were 73 responses submitted on general observations of the three immigration courts, and the majority were observations of 290 Broadway.[11]

Entering the Courthouse

A Notice to Appear tells the individual to arrive on time and gives a start time for the master calendar hearings. An immigration judge may have approximately 30 or more individuals assigned on any master calendar day (some cases involving families who are grouped together if possible) and the court usually wants to complete the calendar by noon to 12:30 p.m.[12] Usually, the start time is 8:30 a.m. or 9:00 a.m.

While the line to enter the courthouses generally moved quickly, complications tended to arise at 26 Federal Plaza early in the morning – usually before 8 a.m. – when larger numbers of respondents arrived in advance of their hearings and were instructed to wait outside. Nevertheless, the security screening process across all three courthouses was typically smooth and efficient, with 63 out of 72 observers (87.5%) noting that the security check to enter the building took less than 15 minutes.

On some days, volunteers were requested to produce documentation of their court-observer status, but on other days, they were let in without question. Professor Benson had provided observers with a letter of introduction stating that the observer had received training and had been informed of the court rules.[13] The letter also included the contact information for John Martin, the EOIR Public Relations Officer who had provided the schedule of hearings that facilitated the observation. It is unclear, however, if all observers carried the letter of introduction to their visits and presented it when their presence was challenged.

11 Out of the 73 responses, only 52 indicated which courthouses they were observing. Out of the 52 responses, 42 responses were for 290 Broadway.

12 More recently, court observers have seen master calendar dockets with 50 to 120 respondents.

13 *See* Appendix 3 for a copy of the letter of introduction.

For instance, at 26 Federal Plaza, one observer noted during her November 3, 2022 visit:

> *"[w]hen I arrived at the court around 7:40 [a.m.], the line was so long and the guards did not allow me to get into the court without [an] invitation letter from the professor. Three of [the] guards confirmed the invitation letter [and] then I could go into the court finally."*

At 290 Broadway, multiple observers noted being asked to produce identification and explain their reason for being there. Also, at 290 Broadway, after a sudden reinstatement of the COVID-19 mask mandate, respondents who did not have a mask were required to get off the security line, go purchase a mask from a nearby store, and get back in line, which inevitably added additional waiting time during peak hours. Observers of the Varick Court generally did not report difficulties entering the courthouse.

Locating the Courtrooms

At all three locations, court observers and respondents often had difficulty locating their courtrooms, and as a result, they needed to ask support staff for assistance. Multiple observers noted that signage and staff communication were inadequate, and unannounced changes in scheduling and courtroom locations compounded an already stressful process. In addition, public-facing materials about how to obtain legal assistance were readily available in some courthouses (Varick) but not in others (290 Broadway).

Court observers also noted the absence of a centralized place for information and that security guards were not always forthcoming with assistance. For instance, at 290 Broadway, one observer noted:

> *"[S]ecurity did not know where to send people once they were on the 15th floor. No calendars had been posted for any of the judges in the hallways as they were on previous days. When people arrived, the window clerks sent them to various floors and most judges were out that day. Most people were told their hearings would be rescheduled but had to wait quite a while before they were informed."*

Another observer at 290 Broadway noted,

> *"I spoke with security and they informed me that respondents who arrive at the court for their initial hearing all have the 15th floor listed on their NTA, not the floor where the hearing is actually scheduled. Respondents who are here after their initial hearing will have the correct location of the courtroom as the court assistants who give them the new NTA will specify the floor and room number of the courtroom. This is confusing for both respondents and security as they have to examine each NTA to be able to assist individuals."*

On multiple occasions, observers and respondents arrived at the court only to be told that the judge would not be hearing cases that day. For instance, one observer noted during their November 29, 2022 observation at 290 Broadway:

> *"I went to the 15th floor to find a sign that Judge []*[14] *was on the 13th floor. I went down to the 13th floor and located the correct courtroom. It took me approx. 10 minutes to get from security to where I needed to be. There was no docket hanging outside. At 8AM the the security guard arrived as well as families appearing for court. We all sat in the waiting room. At 8:45AM I asked the guard when the courtroom would open, she told me "they always run late." At 9:15AM, a court employee informed me and the families that Judge [] called out and there would be no appearances today (over an hour waiting). In the meantime, families were unable to ask any questions due to the fact that there was no one in the area that spoke Spanish. There was a large window on the wall that contained lists of currently disciplined practitioners which many thought would be a guide on where they should be going. You could see the serious confusion when they were unable to locate their names."*

These types of lapses in communication resulted in wasted time, confusion, and frustration for both respondents and court observers.

14 The names of immigration judges have been redacted to prevent statements disclosed in this report from influencing their future proceedings.

For the respondents, the confusion was magnified by language barriers and the lack of interpreters to bridge the gap. Most respondents were Spanish-speaking, and therefore, there was a high demand for Spanish interpreters. One observer at 290 Broadway wrote:

> *"I spoke with a [security] guard who told me that because there aren't many court employees that speak Spanish, he often has to go floor to floor to help people translate."*

Even during hearings, interpreters were at times unavailable, causing delays and necessitating informal workarounds.

Several observers noted that at 290 Broadway, various court personnel challenged their presence in the courthouse and the courtrooms, which directly clashes with the EOIR's published guideline that "immigration court hearings are open to the public, with limited exceptions, as specified in law."[15] One observer described a particularly troubling interaction with a security officer during their November 29, 2022 visit, after they had successfully passed through the security check:

> *"When I began to read the names on the docket, a security officer [...] approached me and asked for ID and/or some form of proof that I was a court observer. I told him that I did not immediately have some ID that would sufficiently identify me as a student observer, but that immigration court proceedings were open to the public to my knowledge and understanding.*

15 U.S. Dep't of Just., *Observing Immigration Court Hearings* (2017), https://www.justice.gov/eoir/observing-immigration-court-hearings. Pursuant to an EOIR Fact Sheet, the limited exceptions when immigration proceedings are not open to the public are as follows: "The case involves information subject to a protective order; The case involves an abused spouse or child, and in the case of an abused spouse, a hearing may be opened to the public with the abused respondent's consent; The case involves a respondent who, based on provisions of the Violence Against Women Act (VAWA), is a beneficiary of an application for relief under specific sections of the Immigration and Nationality Act, among other federal statutes (VAWA is a law that seeks to protect human trafficking victims, abused spouses, abused children, and certain other victims of violence); The immigration judge grants an oral or written motion a party files to close a hearing; The immigration judge makes a determination to close a hearing to protect witnesses, parties to the case, or the public interest; The immigration judge makes a determination to close a hearing, or limit the number in attendance, based on consideration of the physical facilities and space available for the hearing; or The respondent in an asylum case, which by regulation provides for additional privacy protections, requests that the hearing be closed." *Id.*

[The guard] told me that they were "not really" open to the public but he would ask a court clerk if I could stay. [He] then told me of his time as a police officer in Guyana and that my lack of identification was a security concern. Our conversation was cordial but I did remain firm in asserting that the hearings were open to the public and politely showed him the EOIR publication titled "Observing Immigration Court Hearings" which he acknowledged and accepted."

Another observer was prevented from entering the courtroom without adequate explanation during their November 1, 2022 visit:

"I was supposed to observe in Judge []'s courtroom. I sat in the waiting room for a while and then a clerk asked who I was, checked with the judge, and told me to come back at 10 am (also verified that I had been vetted to observe). When I returned at 10, there was a different guard in the waiting room on floor 29 who told me []'s courtroom was closed and he didn't have anyone on the docket today. I told him about the clerk I spoke to earlier and he just kept telling me to go to the 15th floor. The guard there told me there [was] nothing [] happening upstairs. I saw one of the other judges from the excel sheet on the 15th floor dockets but he wasn't willing to let me into their courtroom at that point, so I left."

The Hearings

The immigration judges generally allowed observers to enter their courtrooms and stay for the full duration of the hearing, although in the example quoted above, at least one observer noted that a clerk did not let them into the judge's courtroom without an explanation. Dockets varied considerably in length, and at times pro se respondents would wait for up to five hours for their case to be called. While judges had different methods for determining the order in which they heard cases, generally, respondents with legal representation were called first (and appeared virtually via Webex), while pro se respondents appeared in person and would need to wait until the rest of the docket had been cleared.

Many judges tried to accommodate in-person respondents by encouraging them to seek counsel and extending deadlines if necessary. During pro se hearings, the judges took time to explain the procedural posture of the case and options for relief, often with the aid of a court-appointed interpreter. Therefore, hearing where respondents appeared pro se generally took more time than those where respondents were represented.

The volunteers also observed many unrepresented family units – many with school-aged children. When addressing these families, the judges commonly informed the parents that they do not have to bring their child(ren) to future proceedings, so that they would not miss school. For the families that were represented, however, their counsel asked the judge directly if the children could be excused from further proceedings.[16] In every case, the judge granted the request.

ADDRESS & IN ABSENTIA REMOVAL ISSUES

Background

When noncitizens without proper documentation for entry are processed at the border, a border patrol agent must enter an address for them to receive Notices to Appear. The noncitizen may provide an address, but if the person does not have an address in mind, border patrol agents may write down an address for shelters or nonprofits and send the person there.[17] If a person in removal proceedings misses his or her court date, under § 240(b)(5) of the Immigration and Nationality Act, he or she can be ordered removed in absentia.[18] The statute requires that the Department of Homeland Security (DHS) establish by "clear, unequivocal, and convincing evidence" that the notice was provided. The removal order may be rescinded if a respondent files a motion to reopen proceedings and demonstrates, among others, that the respondent did not receive proper notice of the hearing.

16 The OPLA usually agrees to the waiver of the appearance of children if they are young or attending school so long as the parents return in person.

17 *See* Torrens, *supra* note 3.

18 Section 240(b)(5) of the INA (§ 1229a(b)(5) of the U.S. Code) states that a noncitizen who has received a written notice of a hearing but does not attend it shall be ordered removed in absentia.

The impact of an incorrect address is far-reaching. Over the course of one month in the summer of 2022, Catholic Charities of New York received more than 300 NTAs addressed to individuals that they had no way of contacting, meaning that the individual has no way of knowing that they are required to appear for court proceedings.[19] Missing a hearing can have severe consequences for anyone in removal proceedings, particularly for those applying for asylum. The master calendar hearing is a critical step in the asylum application process and serves as an opportunity for the individual to establish their eligibility for asylum. If an asylum seeker misses their scheduled hearing, the immigration judge may issue a removal order against them in absentia. This means that they could be deported back to their country of origin, where they may face persecution or harm, without having had their day in court.

Address Changes

Out of the 750 immigration court proceedings we analyzed, we recorded 125 instances of change of address (16.7% of respondents) issue during the hearings. Change of address is completed on Form EOIR-33. Section 265 of the INA requires all foreign nationals, even lawful permanent residents, to file Form EOIR-33 within ten days from the date of change in address or contact information. The failure to provide an updated address can be grounds for removal.[20]

Even though having a correct address is essential to ensuring that respondents receive proper notice, we only observed immigration judges carefully examining respondents' addresses 15.7% (118) of the time. Sixty-five percent (489) of entries noted that the judges did not carefully examine the respondents' addresses, and it was unclear the extent to which the judges reviewed the addresses for the remaining 18.8% (141) of respondents.

In Absentia Hearings

In absentia hearings took place rapidly at the end of the docket. Many observers noted that the judges moved very quickly through these proceedings and that it was hard to keep up. In total, the court observers recorded 48 in absentia hearings and one of them had grouped seven respondents.[21] Generally, in absentia hearings are heard at the end of the morning or afternoon proceedings, or on busy days, postponed until after lunch. Many student observers could not stay for the full morning or afternoon period, and therefore, there were likely more in absentia hearings than the ones we captured.

19 Sara Dorn, *Border agents are flooding NYC nonprofits with improperly addressed court notices for asylum-seekers*, City & State New York (Aug. 16, 2022), https://www.cityandstateny.com/politics/2022/08/border-agents-are-flooding-nyc-nonprofits-improperly-addressed-court-notices-asylum-seekers/375930/.

20 INA § 237(a)(3)(A); 8 U.S.C. § 1227(a)(3)(A).

There were also three instances (0.4%) of a respondent or their counsel noting that the NTA went to an organization that was not affiliated with the individual. We had anticipated a higher percentage based on conversations with various nonprofit organizations about receiving NTAs for people they had never met. Since we observed hearings only a few months after we learned of the NTA practice, it could be that many of the cases were not yet scheduled, or that the EOIR administration queried the adequacy of the address and asked the OPLA for a better address before docketing.

For instance, some New York nonprofits reported that a significant number of individuals were handed an NTA when released but that their cases have not yet been lodged with the EOIR. Perhaps future observations will be able to clarify the erroneous address issue.

Removals

Twenty-six of the 48 in absentia hearings resulted in the individual being ordered removed in absentia. To enter a removal order in absentia, the immigration judge must find that "the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the [person] is removable."[22]

However, in many instances, the judges did not seem to give sufficient and individualized attention to the in absentia proceedings. One observer wrote:

> *"[T]he judge was handed paperwork for 7 individual respondents and simply stated that the government has met their burden of proving that these individuals are each removable in absentia to their country of origin, respectively. These cases were all grouped together, even though each respondent was an individual without any relation to any of the other respondents. There was no discussion between the judge and government attorney about whether or not the addresses were correct, what the country of removal was for respondents, etc. Judge stated that these respondents were sent NTA's and failed to appear, their applications are abandoned and they are ordered removed in absentia."*

21 This number was derived from counting the number of proceedings that were marked as "in absentia" from the 750 proceedings.

22 INA § 240(b)(5)(a); 8 U.S.C. § 1229a(b)(5)(a).

In other instances, the judge found sufficient notice because the NTA was mailed and not returned to the EOIR, creating a presumption of delivery of notice. Subsequently, the respondents were ordered removed. Another judge at 290 Broadway ordered the removal of two family members and an individual respondent even when no addresses of the respondents were read into the record and the NTAs sent to them had been returned to sender for insufficient address.

Reissuances and Continuances

There were 20 instances out of the 750 analyzed where the judge either reissued the Notice to Appear or issued a continuance to give the in absentia respondents another chance to appear. Of note, cases involving minors seem to elicit additional care. One judge set as a policy that she would not issue a removal order in absentia for any juvenile who did not appear at his or her first court proceeding. Another judge found improper service in a case involving an unaccompanied child (3 years old) because the deportation officer's signature was illegible; the judge postponed the hearing to determine if the NTA was properly mailed.

In the case of minors, regulations require that if the minor is under 14 years of age, "service shall be made upon the person with whom the . . . minor resides; whenever possible, service shall also be made on the near relative, guardian, committee, or friend." [23] Sometimes, the service is made upon the manager of a facility where a child is held.

RATE OF REPRESENTATION

Another issue we sought to explore during our observation was the rate of representation among respondents. The hearings we observed were usually divided into two groups. The immigration judge would first address respondents who were represented by counsel and ordinarily appeared on Webex. Only after all the respondents with lawyers were heard would the judge turn to respondents appearing pro se.

[23] 8 C.F.R. § 103.5a(c)(2)(ii).

One of the shortcomings of our questionnaire was that there was no question explicitly asking whether the respondent was represented. Therefore, we had to calculate the rate or representation inferentially: we determined the number of respondents without counsel based on the number of observations which ended with the judge granting the respondent a continuance to find counsel. Since there were instances when the immigration judge did not give pro se respondents more time to find counsel, the numbers we calculated are conservative estimates. The rate of representation is likely to be lower.

- **Rate of representation across all hearing types:**
  - Out of all observations (750), at least 263 (35.0%) respondents did not have counsel.
- **Rate of representation for "initial appearances":**
  - Out of all initial appearances where the respondent was present (253), at least 136 (53.7%) did not have counsel.
  - Note: We only considered observations for which the court observers were sure it was the respondent's first (i.e. initial) appearance. We did not consider observations for which the observers "thought" but were not sure that it was a first appearance.

Numerous studies confirm the importance of counsel in improving the outcome of the case and in enhancing the efficiency at every stage of the court proceeding.[24] A 2011 study on immigration representation found that people who were represented and not detained at the time of case completion were almost six times as likely to obtain a successful outcome (defined as obtaining either termination or relief from deportation) as those who were not detained but unrepresented (74% versus 13%, respectively).[25] Further, for immigrants who submit an application for relief, those who were represented are four times more likely to see a successful result by the end of their case compared to those who were unrepresented (84% versus 21%, respectively).[26]

24 Migration Policy Institute, *At the Breaking Point: Rethinking the U.S. Immigration Court System*, 29-30 (2023), https://www.migrationpolicy.org/sites/default/files/publications/mpi-courts-report-2023_final.pdf.

25 Study Group on Immigration Representation, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, 19 (2011), https://justicecorps.org/app/uploads/2020/06/New-York-Immigrant-Representation-Study-I-NYIRS-Steering-Committee-1.pdf.

26 *Id.* at 20.

In the vast majority of proceedings we observed that were considered “initial appearances,” the judge gave the respondent time and a printed list of legal resources to find a lawyer, or otherwise informed them how they might obtain counsel. Afterward, the judge scheduled a second appearance. Thus, for those respondents who appeared at their first hearing without a lawyer, the first appearance was essentially a rescheduling. While most judges would wait until the end of the session to announce this to all unrepresented respondents, in some cases, the judge would take the time to ensure that each unrepresented person received the printed list of pro bono and low bono attorneys.

As shown in the calculation above, from the 750 observations, we found that 53.7% of initial appearances were unrepresented. However, the rate of representation increased when measured across all hearing types, including continuances and merit hearings where 34.9% were unrepresented. This suggests that when given time to find counsel, some do succeed.

However, many respondents who were given continuances to find a lawyer returned to their next hearing without a lawyer. Court observers noted the frustrations expressed by several respondents at the challenges of finding a pro bono or low bono attorney:

“This is the 3rd adjournment to find a lawyer.”

“Respondent indicated that he could not find a pro bono attorney and can’t afford to hire an attorney. He will try to fill out [the] asylum form himself. Judge stated that free lawyers are overwhelmed with the recent entering of people in New York.”

"Sometimes we don’t even have cash for rent, how could we have cash for a lawyer?”

Some respondents shared that although they called the legal services organizations from the printed list, no one picked up the phone. The immigration judges responded that these organizations are overcapacity but that they should keep trying. Other judges instructed the respondents to visit the Catholic Charities Help Desk, which although cannot provide legal representation, can help answer legal questions.

Our observations revealed a simple but important reality in immigration court: lack of representation leads to slower proceedings, which in turn leads to less overall processing capacity. Judges uniformly spend less time processing respondents who have representation, usually because the counsel for the respondent can quickly address the essential factual elements of the case and notify the court if the respondent will be seeking relief. This suggests that the more unrepresented respondents an immigration judge receives, the fewer number of respondents that the judge can process per hearing. Additionally, the more time it takes for a respondent to find representation, the longer it can take for that person's case to be resolved. These and other factors contribute to a general backlog in immigration courts, an issue we analyze next.

BACKLOG

Background

Over the past decade, immigration courts have faced an enormous and rapidly growing backlog of pending cases. In Fiscal Year 2013, there were 344,230 pending cases before the immigration court nationally.[27] As of January 2023, there are 2,097,244 pending cases.[28] In New York alone, there are almost 200,000 pending immigration cases, up from about 50,000 in 2013.[29] This backlog has led to each immigration judge having approximately 2,700 individual cases on their docket at any given time.[30] The biggest jump nationally was from Fiscal Year 2021 to 2022 when immigration courts were largely closed due to the coronavirus pandemic. The national backlog grew by more than 500,000 cases in a single year.[31]

27 Transactional Records Access Clearinghouse, Syracuse University, *Historical Immigration Court Backlog Tool* (2023), https://trac.syr.edu/phptools/immigration/court_backlog/.

28 *Id.*

29 *Id.*

30 *Hearing Before the Subcomm. on Immigr. and Citizenship of the H. Comm. on the Judiciary*, 117th Cong. (2022) (Statement of the Honorable Mimi E. Tsankov), https://www.govinfo.gov/content/pkg/CHRG-117hhrg47087/html/CHRG-117hhrg47087.htm.

31 Transactional Records Access Clearinghouse, *supra* note 27.

Observations on Backlog in New York City Immigration Courts

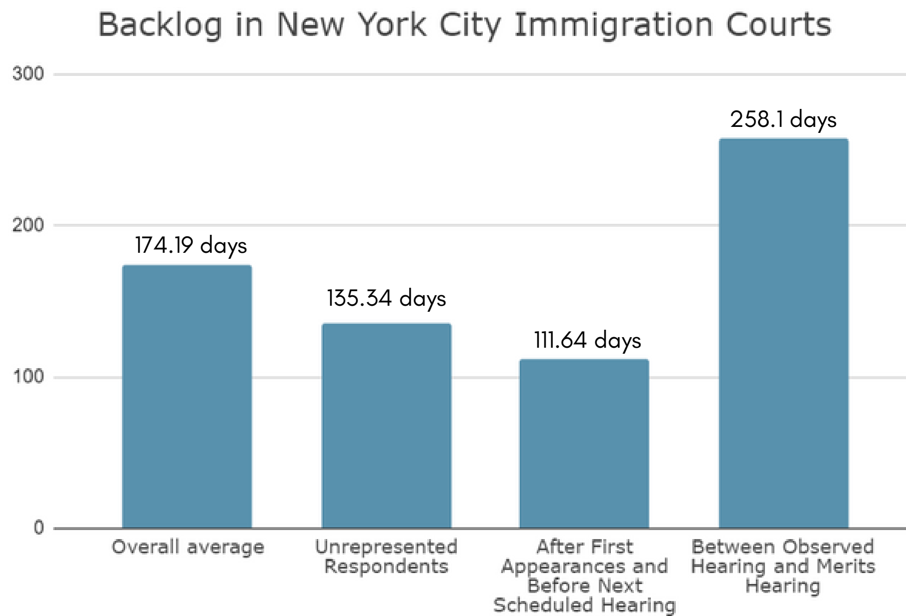
The Transactional Records Access Clearinghouse at Syracuse University (TRAC) has released data showing the average wait days since the issuance of the Notice to Appear (NTA) for all pending cases. In New York, the average number of days waited since the issuance of the NTA in Fiscal Year 2023 is 840.[32] This is down from 1,009 days in Fiscal Year 2021.[33] At the 290 Broadway immigration court, the average number of days waited so far is 701.[34] At the Varick Street immigration court, it is 454 days.[35]

While we were unable to fully track cases throughout their lifespan due to the limited time frame of our project, our observers noted the amount of time between the hearings they observed and the next scheduled hearings. In aggregating the data, we calculated the average time between the observed hearings and the next scheduled hearing. We then further categorized the data based on the type of respondent (e.g., unrepresented respondents) and the types of hearings (e.g., after the first appearance). These are averages across the three courts. The numbers we calculated are:

- **Overall average** of at least 174.19 days between the observed hearing and the next scheduled hearing (24.9 weeks; 6.2 months). This is the average time between hearings for every type of respondent and every type of hearing. This number includes represented and underrepresented respondents and also includes merits hearings, continuances, and any other type of next hearing.
- **Unrepresented respondents** had at least 135.34 days between the observed hearing and the next scheduled hearing (19.3 weeks; 4.8 months). This is the average time between hearings for respondents who did not have counsel. We defined as unrepresented respondents those to whom the judge gave a continuance to find counsel.
- **After the first appearance**, there were 111.64 days between the observed hearing and the next scheduled hearing (15.9 weeks; 3.9 months). This is the average time between hearings for respondents after their first appearance. In other words, these were respondents who we observed at their first appearance, and to whom the judge gave a continuance for any reason.

[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*

- **For merits hearings**, there were 258.1 days between the observed hearing and the merits hearing (36.9 weeks; 9.2 months). This is the average time between any type of hearing and the respondent's merits hearing.



It is clear from the numbers above that cases are often rescheduled to months later, causing an overall delay in the adjudication of the case. The amount of time between the observed hearing and the next hearing is indicative of the lengthy delays faced in adjudicating cases due to the large number of cases on any given immigration judge's docket.

It is also important to note that while the backlog can cause severe issues for those in immigration proceedings, the delays caused by continuances and rescheduling do not necessarily hurt the case. Continuances are often issued to allow unrepresented respondents to secure counsel. Continuances and rescheduling of hearings may also give respondents more time to gather important evidence or apply for relief.

TAKEAWAYS & SUGGESTIONS FOR FUTURE STUDY

Takeaways

- Future studies should randomize the variables in the observations as much as possible, including the immigration court, immigration judge, and the types of hearings observed. This change has already been reflected as of summer 2023.
- Future studies should also ensure that observers stay until the end of the proceedings where most in absentia removals take place. Many student observers in our study were not able to stay until the end of the proceedings, which likely explains the low rate of in absentia removals we calculated.
- Future observations should take into account, and plan for, accessibility issues. Many of our observers reported not knowing where to go, and court personnel offered limited proactive help. Several observers also noted that the court personnel and/or clerks challenged their right to be present at the hearings, despite immigration proceedings being open to the public unless under limited circumstances, which was not the case for the proceedings that we observed.

Suggestions

The New York City immigration court observation is ongoing as of December 2023. In addition to having student and attorney volunteers, Professor Benson is working with several economists to analyze the effect of the presence of court observers on the ways that immigration judges conduct their hearings. Several changes have been made to the court observation questionnaire and the assignment of dockets. First, to prevent bias in court observers' selection of the courthouse and judge, the court observers now use a link to input a date of observation, which then randomly assigns a courthouse and an immigration judge for them to observe.

Second, both the General and NTA Immigration Court Observation forms have been edited and expanded to better capture some of the issues noted by observers.[36] For instance, the General Immigration Court Observation form now includes questions asking whether the observer witnessed or heard anyone being denied entry, whether they had difficulty locating the courtrooms, and general emotions upon entering the courthouse and observing the proceedings, among others.

[36] Inquiries can be made to Lenni Benson at lenni.benson@nyls.edu to access these forms or review the new process.

The NTA Immigration Court Observation form now includes more detailed questions such as the type of proceeding observed (i.e., juvenile, regular, dedicated docket, or asylum rule), whether the observer stayed for the entire docket, the race and gender of the immigration judge, the respondent's counsel (if present), and the OPLA, and the language and estimated age of the respondent. The form also asks observers to evaluate (if possible) whether the interpretation is adequate if the respondent has been provided one and to describe the general demeanor or body language of the respondent, counsel, and immigration judge. These questions are intended to capture more qualitative information to determine if racial and ethnic characteristics make a difference in how judges interact with respondents or to the rates of representation, in absentia removals, and backlog.

New Development in New York City Immigration Court

Starting in March 2023, the Executive Office for Immigration Review implemented a new process it created in December 2022 at 290 Broadway (and also potentially at Varick). This process involves creating a specialized docket called the E-33 Docket to serve individuals who have no known address but have a city as their destination. If a migrant at the border has a city in mind but no specific address, the Department of Homeland Security ("DHS") will put the city on the NTA and schedule a master calendar hearing on the E-33 Docket for 120 days in the future. The person must attend this hearing to discuss their actual address since the NTA will have no residential address listed. However, the process and guidance on this docket are not transparent and there are no formal regulations that cover its operation.

For future court observations, it would be important to monitor the success of this initiative. It will also be important to document whether an immigration judge would now move a case to this E-33 Docket for respondents who fail to appear instead of ordering them removed in absentia. Professor Benson observed an E-33 docket in which the immigration judge and the OPLA counsel very carefully examined the information they had in the record. A staff member from Immigrant ARC and Professor Benson also served as Friends of the Court and offered suggestions on how to verify the address. They identified from the basic facts of the NTA that several of the individuals were prima facie eligible for relief such as Temporary Protected Status (TPS), Special Immigrant Juvenile Status (SIJS), or asylum, and offered to try to contact the respondents.

But further observations are essential to understand this new specialized docket and determine whether it results in fewer in absentia orders or perhaps in voluntary terminations by the OPLA.

CONCLUSION

One of the goals of this immigration court observational study was to enhance the transparency around what is happening at immigration court hearings (particularly master calendar hearings) in New York City. Before the introduction of Webex in immigration proceedings, both the OPLA and counsel for respondents would be physically present at the immigration court and serve as first-hand observers of potential issues. These may include issues with entry to the courthouses and confusion about filing procedures or locating information at the court information windows. But now, for most master calendars, only the immigration judge and court personnel are present as both the OPLA and counsel appearing for respondents appear on Webex. This study, therefore, allowed us to share our observations with Immigrant ARC and its nonprofit collaborators, information that will bolster their advocacy. Professor Benson has also provided generalized observations based on collected data to the Assistant Chief Immigration Judges (ACIJs) for the three New York City immigration courts.

In recent months, since the completion of this early study, both New York City and State governments have mobilized more resources to expand pro se representation and referrals to immigration legal assistance. Immigrant ARC has also launched a few small-scale “Friend of the Court” projects but has insufficient resources to cover more than five individual master calendar hearings a month. With the large number of people filing for asylum, withholding, or protection under the Convention Against Torture without counsel, it is unclear how the immigration courts will handle requests for continuances to find counsel. It is also unclear whether the courts will be prepared for substantial supplementation of the pro se filings, because pro se respondents tend to file only the I-589 form without further written testimony or supporting evidence.

Even with new funding and pro bono efforts, the caseload in New York immigration courts continues to increase rapidly. Therefore, the observational study is continuing with the goal of providing longer-term assessments. Identifying problems and making larger-scale observations could help all participants in the immigration adjudication system anticipate and preempt problems. It could also help avoid unnecessary delays or in absentia orders issued in error.

As we have noted, the sheer number of people appearing in immigration courts pro se and the lack of clear communication from the court are worrisome. Although immigration courts are not alone in the U.S. court system in dealing with unrepresented populations, the high stakes of these hearings and language barriers heighten the need for greater transparency and clearer communication. Immigrant ARC's Friend of the Court program and Catholic Charities Help Desk are useful but too small and under-resourced to meet all the needs of unrepresented noncitizens in removal proceedings. Implementing small changes to enhance communication is complicated by the relationship between the EOIR and the General Services Administration (GSA) that controls the physical buildings where immigration courts are located.

This means that the security teams that manage the crowds entering the immigration court buildings are not under the direct control of the court. It also means that signage, information counters, kiosks, and postings take time to negotiate and implement. However, as our study recorded numerous episodes of confusion and delay experienced by both respondents and court observers due to the unavailability of such information, making the information available should be considered a priority.

Clear and centralized posting of the daily dockets with the exact locations of the courtrooms in would be extremely helpful. In some New York City courts, this information is difficult to find and observers reported long lines of people trying to read the posted material. In other courts, we did not see any centralized posting. For instance, 26 Federal Plaza has a wall of self-help materials on the 12th floor, where people first arrive to locate their courtrooms, but none of these materials are available on the 14th floor, where many courtrooms are located. There is also no signage on the 14th floor referring people to those materials. Moreover, although the EOIR posted several videos on its YouTube channel last year explaining to the public what they can expect at a master calendar hearing, it is unclear if and how the public is directed to these videos.[37]

Overall, we believe that in addition to aiding advocacy by shedding light on various aspects of immigration court proceedings, this observational study benefitted the participants. Students and attorneys who volunteered their time reported developing a deeper understanding of the nature of immigration court hearings. We hope that the observers will continue to engage in the field of immigration law and strive to improve the fairness, accuracy, and efficiency of immigration court proceedings for the benefit of all stakeholders.

37 EOIR, *Introduction to Immigration Court*, YouTube (Apr. 12, 2022), https://youtu.be/ea1HR_QkJZM?si=dHo8fegpZ6M-Htw1.