

Access to Records in Immigration Court

A Critical Measure to Reduce the Backlog, Increase Efficiency, and Ensure Due Process in Removal Proceedings

**By Adina Appelbaum, Program Director, and Sam Hsieh, Deputy Program Director
Capital Area Immigrants' Rights (CAIR) Coalition Immigration Impact Lab**

OVERVIEW

An April 2023 GAO report and recent news articles have highlighted the severe inefficiencies in the immigration court system, with the number of pending cases topping a historical high of nearly two million.[1] This case backlog has wasted resources, impeded judicial efficiency, and left millions of noncitizens in legal limbo for several years, resulting in separated families, exploited or abused crime victims, and a lack of access to essential employees. These reports have called critical attention to the need for the Department of Justice (DOJ) Executive Office for Immigration Review (EOIR), congressional representatives, and policymakers to take meaningful action to address the inefficiencies in the immigration court system. In addition to implementing commonly discussed measures such as hiring more immigration judges and prioritizing certain types of cases, effectively addressing the backlog also requires updating deficient immigration court procedures that lead to unnecessary delay.

In its work providing legal services to thousands of immigrants facing detention and removal and supporting immigration practitioners nationwide on records access issues, the Capital Area Immigrants' Rights (CAIR) Coalition has seen the critical role that incrementally improved access to records in immigration court has had on reducing inefficiency in the heavily backlogged immigration court system and safeguarding noncitizens' due process rights.

This Policy Brief examines the beneficial impact of increased access to immigration court records in addressing inefficiencies and due process violations, including the backlog, in removal proceedings.

Barriers to Records Access Result in Inefficiencies and Due Process Violations

Noncitizens in removal proceedings face significant barriers to accessing their immigration court records, causing needless delays in immigration court cases and erroneous removal orders to be issued before records are accessed, exacerbating the backlog.

Immigration law and removal proceedings are highly complex. Records access is necessary for noncitizens to defend against their deportation and to ensure a fair removal proceeding, especially to allow access to counsel. If a noncitizen does not have access to the same information the government has on what previously occurred in their immigration court proceedings, including asylum-related fear interviews, court hearings, prior decisions, and allegations U.S. Immigration and Customs Enforcement (ICE) has made against them, it can be nearly impossible to have a fair hearing or to succeed on even the most substantial claim.

Unlike the criminal legal system, there is no right to government-appointed counsel in immigration court. The vast majority of noncitizens in removal proceedings, particularly those whom ICE detains, are therefore unrepresented by counsel (pro se).

Detained pro se noncitizens are the most harmed by these records access problems. Such harm is exacerbated in situations where the noncitizen is a child, faces mental health

challenges, has memory issues, or struggles to articulate what happened in their prior pro se immigration proceedings.

Improved access to records for pro se individuals is imperative to ensuring efficient proceedings and due process. Legal service providers need to see noncitizens' records so they can analyze their case, assess whether they are eligible for any relief from removal under complex and fast-changing immigration laws, and, if so, quickly attempt to place the case with pro bono counsel before the next hearing.[2] Records access is also critical for attorneys to adequately prepare for representation. For detained noncitizens, this process is even more urgent given the immigration courts' accelerated dockets, which often give individuals only a few weeks to seek records and secure counsel.

Noncitizens are entitled to timely and meaningful access to their immigration court records under the Fifth Amendment's due process clause and the Immigration and Nationality Act, which mandate disclosure to ensure a full and fair hearing. Without complete and accurate records of prior proceedings, noncitizens seeking relief and facing removal—especially those fighting their cases from detention—cannot effectively put forward their claims for relief. Lack of records access results in wrongful denials of relief and deportations as well as appeals to seek to remedy such harms, all of which contribute to the backlog but could be avoided.

[1] See, e.g., U.S. Government Accountability Office (April 26, 2023) Immigration Courts: Actions Needed to Address Workforce, Performance, and Data Management Challenges (GAO-23-105431), <https://www.gao.gov/products/gao-23-105431>; Caldwell, Alicia (March 1, 2023) Immigration Judges are Moving Fast, But Case Backlog Keeps Growing, Wall Street Journal, <https://www.wsj.com/articles/immigration-judges-are-moving-fast-but-case-backlog-keeps-growing-c8cc6922>; Bernal, Rafael (April 23, 2023) House Democrats Call to Double Immigration Backlog Processing Funds. The Hill, <https://thehill.com/latino/3931317-house-democrats-call-to-double-immigration-backlog-processing-funds/>; Eakin, Britain (January 18, 2023) U.S. Immigration Court Backlog Reaches All-Time High. Law360, <https://www.law360.com/articles/1566772/us-immigration-court-backlog-reaches-all-time-high>.

Current Procedures for Accessing Immigration Court Records

Advocacy led by CAIR Coalition and its partners resulted in EOIR creating a new national policy to improve records access in March 2022. But serious problems remain—the language of the policy leaves out pro se individuals in detention and is not implemented consistently.

Pro se individuals in detention face serious logistical challenges under the March 2022 records access policy, and the policy fails to inform them of their right to access records or the procedures for doing so. Individuals who are detained almost always lack internet access, making it impossible for them to request their records pro se. Across the country, many legal service providers face serious logistical challenges requesting records on behalf of these individuals to help them understand the circumstances of their case, even if they get written permission.

There are also serious delays in accessing records. Many requests have been pending for over three months—a time period that often lapses after a removal order has been issued on the accelerated detained docket—despite multiple efforts to follow up. Such delays highlight the need for increased administrative court staff and resources in the immigration courts to process records requests. Moreover, even though the current policy specifically states that submitting a FOIA request is not necessary to request records, some immigration court staff refuse to comply, instead telling noncitizens to file such a request. FOIA requests often take months to process—and lead to even longer delays in the system.



These barriers to records access, especially for pro se individuals who are detained, and delays in accessing records nationwide unnecessarily exacerbate the immigration court backlog.

How Access to Records Increases Immigration Court Efficiency

Timely access to immigration court records will reduce immigration court delays and the case backlog in ways that other measures, such as increasing the number of immigration judges or prioritizing certain types of cases, cannot.

Specifically, access to records is needed to address several underlying reasons for delay and inefficiency in the immigration court system, including (1) challenges with assessing relief eligibility and obtaining evidence to develop and corroborate claims, (2) barriers in access to counsel, and (3) avoidable continuances, appeals, and remands that prolong adjudications.

[2] The ability to seek more time in removal proceedings, for example to obtain necessary records or seek counsel, is limited. For example, while immigration judges must grant a noncitizen's first motion for a continuance to seek counsel, such motions are often granted only once and frequently denied thereafter.

1. Efficiently identifying frivolous and meritorious claims

Timely access to records means noncitizens and the legal service providers assisting them have access to the necessary information to determine whether there is a viable claim for relief. If no viable relief is identified, noncitizens can avoid unnecessary time and expense in removal proceedings and detention. Noncitizens with identified viable relief can efficiently access critical evidence to develop their claims, meaning they are more likely to put forward a meritorious claim, and case adjudication times, including appeals, can be reduced.

2. Increasing access to counsel

Timely records access means noncitizens who do have viable relief identified are more likely to be able to secure counsel. This is particularly true for individuals who are detained, given that the majority are pro se and legal service providers have limited access to the detained population, can only place limited numbers of cases with pro bono attorneys, and need to first confirm relief eligibility to begin the placement process with law firms, clinics, etc.

Increased numbers of counseled cases significantly improve immigration judges' efficiency because that means there are fewer pro se respondents to whom judges need to

spend additional time explaining complex law, guiding on how to put forward and substantiate a claim, and teaching court procedures. Most often, attorneys navigate procedures, articulate claims, and present evidence more efficiently than pro se individuals.

3. Reducing the number of continuances, appeals, and remands

Lack of access to records is a common basis for case delays. Timely records access enables noncitizens to confirm whether relief is viable and secure counsel, making noncitizens less likely to request extensions to seek records and counsel; more likely to put forward all claims for relief in the first instance; and less likely to face due process issues relating to lack of records access, thereby reducing the need for as many continuances, appeals, and remands.

Access to records is an essential solution to reducing inefficiency in the immigration court system so that noncitizens can more easily screen whether they have meritorious claims, access counsel, and have faster and fairer proceedings. Without incorporating improved record access measures, proposed backlog solutions will fail to move the needle in addressing root causes of the backlog.



“Having timely and meaningful access to immigration court records is a win-win for noncitizens and the Government. It is crucial to protect noncitizens’ due process rights, especially for those who are detained and pro se, and reduces inefficiency in the immigration court system.”

— Sam Hsieh, Esq., Deputy Program Director,
Capital Area Immigrants' Rights (CAIR) Coalition

RECOMMENDATIONS

For Increasing Access to Immigration Court Records

Improved, timely access to records is a critical component of reducing the heavy immigration court backlog and complying with due process requirements. Ensuring that all noncitizens have access to the records needed to participate in their cases must be part of concerted efforts to make immigration courts more efficient. CAIR Coalition recommends the following courses of action:

1. EOIR, congressional representatives, and policymakers should incorporate measures to increase records access as one of the core areas of focus for reducing the immigration court backlog.
2. EOIR should amend its March 2022 records access policy to clarify how people who are pro se and detained can access their records in a timely fashion and make efforts to inform individuals of how they can access records, including by requiring immigration judges to provide oral and written notice at the initial master calendar hearing and posting educational posters on records access procedures in detention facilities.
3. EOIR should more clearly articulate to Congress how it plans to allocate funding to address immigration court administrative staff workforce needs to better facilitate increased access to records.[3]
4. Congress should increase funding specifically for EOIR immigration court administrative staff to enable meaningful and timely access to immigration court records for all noncitizens, especially those who are pro se and detained.

[3] Despite increases in funding from Congress, EOIR officials have stated that recommendations regarding EOIR's workforce planning needs have not been implemented due, in part, to a lack of funding. Recently, the U.S. Government Accountability Office identified that EOIR has not clearly communicated its workforce funding needs to Congress and recommended that the Director of EOIR take steps to communicate clear information to Congress as part of its annual budget justification regarding workforce needs. See U.S. Government Accountability Office (April 26, 2023) Immigration Courts: Actions Needed to Address Workforce, Performance, and Data Management Challenges (GAO-232-105431), 14, 21-23, 46. Retrieved from <https://www.gao.gov/products/gao-23-105431>.



Adina Appelbaum, Esq.

Program Director, Immigration Impact Lab

Adina created and leads the Immigration Impact Lab, CAIR Coalition's first-ever federal courts and appellate impact litigation project. She has litigated individual and class action impact cases on behalf of immigrant adults and children involving asylum law, due process and detention, and the intersection of criminal and immigration law.



Sam Hsieh, Esq.

Deputy Program Director, Immigration Impact Lab

Sam Hsieh is the Deputy Program Director for CAIR Coalition's Immigration Impact Lab. She leads the Lab's litigation efforts and has litigated impact litigation actions on behalf of detained immigrant adults and children in immigration proceedings and federal courts.

ABOUT CAIR COALITION

The Capital Area Immigrants' Rights Coalition is the leading service provider for immigrant adults and children at risk of detention and deportation in the Capital region area and beyond. We do direct legal representation, know-your-rights presentations, impact litigation, advocacy, and the enlistment and training of attorneys to defend immigrants. Our programs include:

Detained Children

Provides legal services to children detained by the Office of Refugee Resettlement in Virginia and Maryland and those released locally to a sponsor in Virginia, Maryland, and D.C.

Detained Adults

We provide information, legal support, and representation to adults in detention. We use a trauma-sensitive and client-centered approach.

Social Services

We provide a holistic service model that addresses our client's basic needs—such as housing, food, and clothing, as well as referrals to medical, mental health, and educational support services.

Immigration Impact Lab

The Lab uses impact litigation to challenge barriers to asylum, minimize the consequences of criminal convictions, and protect due process rights for detained children and adults.



“

At first, I had no hope. But while we were working on my case my attorney explained my rights and how to fight. Then I felt more encouraged.

”

A CAIR Coalition client.



CONTACT US

For more information about our work. Contact us at info@caircoalition.org or www.caircoalition.org.