

## TIME, DUE PROCESS, AND REPRESENTATION: AN EMPIRICAL AND LEGAL ANALYSIS OF CONTINUANCES IN IMMIGRATION COURT

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*Since 2014, U.S. immigration courts have expedited the cases of many children and families fleeing persecution in Mexico and Central America. This Article conducts an empirical and legal analysis of this policy, revealing that reasonable time between immigration court hearings is necessary to protect the statutory and constitutional rights to legal representation. A large majority of immigrants facing deportation—including those part of the recent surge of children and families from Central America and Mexico—appear at their first deportation hearing without a lawyer, often because they cannot afford one.*

*When an immigrant appears without a lawyer and does not expressly waive his or her right to counsel, the immigration judge (IJ) must grant a continuance that allows a reasonable period of time for an immigrant to search for and retain counsel. Yet existing law does not specify what period of time is reasonable, and the courts of appeals disagree over how closely to scrutinize an IJ's decision to deny a continuance.*

*In this Article, we use schedule data from the Executive Office for Immigration Review to show that the length of a continuance has a large effect on immigrants' likelihood of finding counsel, of appearing at subsequent hearings, and of eventually avoiding removal. Our analysis demonstrates that shorter continuances for unrepresented children and families prevented many from finding counsel and avoiding deportation. In light of these findings, we examine the due process and statutory consequences of an IJ's decision to deny a continuance or to grant an overly short continuance. We conclude by recommending that initial continuances of fewer than ninety days should be presumptively invalid.*

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### INTRODUCTION

On July 9, 2014, at the height of the recent surge of Central American children's border crossings, 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>1</sup> In the announcement, Osuna stated that EOIR had added a newly prioritized docket in immigration courts across the country.<sup>2</sup> Under the directive, immigration judges (IJ) were instructed to give expedited consideration to priority docket cases.<sup>3</sup> Osuna's announcement meant that the over 57,000 cases<sup>4</sup> involving unaccompanied children and families with children<sup>5</sup> would be placed at the head of the line in immigration court.

Under this directive, priority cases were to be heard even more quickly than those of immigrants detained during the pendency of removal proceedings. Usually, immigration courts prioritize detained cases to prevent unnecessary time spent in detention. Before the new priority dockets, detained cases were the ones with the highest priority and were resolved quickly—typically in well under a year.<sup>6</sup> The slowest-moving

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1. See *Challenges at the Border: Examining the Causes, Consequences, and Responses to the Rise in Apprehensions at the Southern Border: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 113th Cong. 3 (July 9, 2014) (statement of Juan P. Osuna, Dir. of the U.S. Dep't of Justice Exec. Office for Immigration Review) [hereinafter *Osuna Directive*], <http://www.justice.gov/sites/default/files/testimonies/witnesses/attachments/2015/02/05/07-09-14-eoir-osuna-testimony-re-challenges-at-the-border-examining-the-.pdf> [perma.cc/QQA8-ZF4Y]. For more information on the Central American refugee crisis, see *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection*, U.N. HIGH COMM. FOR REFUGEES, <http://unhcrwashington.org/children> (last visited Mar. 27, 2016) [perma.cc/SNP8-VEJ7].

2. See *Osuna Directive*, *supra* note 1.

3. See *id.*

4. See *infra* Table 1.

5. In the immigration context, these include all respondents up to the age of twenty-one. The Immigration and Nationality Act of 1965 (INA) defines a child as an unmarried person under twenty-one. INA § 101(b)(1), 8 U.S.C. § 1101(b)(1) (2012).

6. See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 63–64 (2015) (noting mean case durations of 146 and twenty-three days for represented and unrepresented detained cases, respectively).

cases in immigration courts, by contrast, are those of individuals who are not detained and not on a priority docket. Those cases regularly last several years—years longer than newly prioritized but otherwise similar children’s and families’ cases.<sup>7</sup>

In this Article, we show that the priority dockets announced by Osuna had an important side effect: they prevented many immigrants from finding lawyers. Because immigration proceedings are classified as civil, rather than criminal, the federal government has long insisted that immigrants have no right to a government-provided lawyer, regardless of whether they are adults or children.<sup>8</sup> Many immigrants facing deportation lack the savings to hire a private lawyer immediately after proceedings begin. Instead, they are only able to save for and engage a lawyer (or find someone to represent them for free) if they have months before a final hearing in court. Osuna’s directive, expediting Central American migrants’ cases, forced thousands of immigrants to move forward with their proceedings before they were able to retain a lawyer.<sup>9</sup>

Part I shows that different immigration courts and judges within each court varied in how strictly they implemented Osuna’s directive. We take advantage of that variation to estimate just how much difference a longer continuance makes to an immigrant’s ability to retain an attorney. Using data obtained by a Freedom of Information Act (FOIA) request from EOIR, we find that increasing the time between the first and second hearing from one to two months *doubled* children’s and families’ chances of finding a lawyer.

This empirical finding suggests that the current doctrine is inadequate and leads directly to doctrinal recommendations. Part II summarizes the state of the law: because immigrants who lack lawyers and are swiftly deported rarely appeal, the case law on continuance length is not well developed. In Part III, reasoning from our findings and from the statutory and constitutional rights to counsel, we propose that, for immigrants without lawyers, an initial continuance of at least ninety days should be presumptively required. This recommendation reflects our result that the chance of finding a lawyer increases most steeply during this first ninety-day period. Finally, we also suggest that EOIR, which provided the database that we analyze, could perform this analysis for each immigration court annually, providing a more narrowly tailored presumption that reflects

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7. *See id.* (noting a mean case duration of over 600 days for represented nondetained respondents).

8. *See, e.g.*, Defendant’s Reply Brief in Support of Their Motion to Dismiss at 5–8, *J.E.F.M. v. Holder*, 107 F. Supp. 3d 1119 (W.D. Wash. 2015) (No. 2:14-cv-01026).

9. At the same time that Osuna announced the expedited docket, he also announced funding for lawyers to represent unaccompanied children. *See Osuna Directive, supra* note 1, at 3. These approximately 100 attorneys have played an important role, but they have been limited to the representation of unaccompanied children under sixteen, leaving families and older children with the need to seek representation. *See Justice AmeriCorps Legal Services for Unaccompanied Children*, CORP. FOR NAT’L & CMTY. SERV., <http://www.nationalservice.gov/build-your-capacity/grants/funding-opportunities/2014/justice-ameri-corps-legal-services#FAQs> (last visited Mar. 27, 2016) [perma.cc/75LD-YA2H].

local conditions (and that might result in longer continuances in certain immigration courts).

These findings and recommendations fit within a growing literature and advocacy on immigrants' access to counsel. For example, a pathbreaking program in New York City recently secured funding for publicly funded representation for all detained immigrants facing deportation in New York City's immigration court,<sup>10</sup> and other states and cities have considered providing similar funding.<sup>11</sup> Further, a recent class action lawsuit secured access to representation for some mentally disabled immigrants in detention,<sup>12</sup> and a currently pending suit seeks government-provided representation for children facing deportation.<sup>13</sup> We call attention to an understudied piece of this puzzle: the time needed to secure representation.

#### I. EMPIRICAL ANALYSIS: HOW CONTINUANCES MATTER IN PRACTICE

For children and families who are not detained during their removal proceedings, more time before a final hearing means more time in the country, more time to find a lawyer, and a better chance of winning the right to stay in the United States. Of the over 57,000 children and their family members whose cases the Obama Administration prioritized, 14 percent began their immigration proceedings with a lawyer and 44 percent found a lawyer by the time of their second hearing.<sup>14</sup> Most families and children who found lawyers found them after their first court appearance.<sup>15</sup>

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10. See *New York Immigrant Family Unity Project*, VERA INST. JUST., <http://www.vera.org/project/new-york-immigrant-family-unity-project> (last visited Mar. 27, 2016) (describing the project, a public defender program for detained immigrants facing deportation in New York City's immigration court) [perma.cc/XLT6-V2R3]; see also STEERING COMM. OF THE N.Y. IMMIGRANT REPRESENTATION STUDY REPORT, ACCESSING JUSTICE: THE AVAILABILITY AND ADEQUACY OF COUNSEL IN IMMIGRATION PROCEEDINGS (2011), <https://www.ils.ny.gov/files/Accessing%20Justice.pdf> (report providing basis for funding for representation in New York) [perma.cc/7LSR-E8EP].

11. See, e.g., *San Francisco Allocates \$2.1M to Legal Aid for Unaccompanied Minors, Families Facing Deportation*, CBS SF BAY AREA (Sept. 16, 2014), <http://sanfrancisco.cbslocal.com/2014/09/16/san-francisco-allocates-2-1m-to-legal-aid-for-unaccompanied-minors-families-facing-deportation-david-campos-central-america-el-salvador-guatemala-honduras-mexico-undocumented> [perma.cc/MH4Q-ALQ2].

12. See *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, at \*16, \*20 (C.D. Cal. Apr. 23, 2013) (entering permanent injunction).

13. See Motion for Preliminary Injunction, *J.E.F.M.*, 107 F. Supp. 3d 1119 (No. 2:14-cv-01026-TSZ) [hereinafter *J.E.F.M.* Motion for Preliminary Injunction].

14. See *infra* Table 1. All data reflect the state of the immigration courts' database on April 30, 2015, when the data for our most recent FOIA request was extracted. For these summary statistics, we consider all children and families whose cases were expedited but who were not detained—those marked "UC" (unaccompanied child) or "AWC/ATD" (adults with children/alternatives to detention) in the immigration court's database. A small number of these cases—under 10 percent—are marked as initially detained, so the vast majority are never detained. For the analysis below, which considers the effect of time before the group of 100 Justice America lawyers began its work, see *supra* note 9, we consider only cases that had their first hearing between August 1, 2014, and January 1, 2015.

15. See *infra* Table 1.

The more time they had between hearings, the more likely they were to find a lawyer.<sup>16</sup>

Immigration proceedings start with a scheduling hearing called a master calendar hearing. Immigrants sit on benches in the back of the courtroom, and the judge calls them one by one for a short colloquy. When immigrants come to their first hearing without a lawyer (as most do), the IJ tells them that they have a right to lawyer at their own expense.<sup>17</sup> Then the IJ offers a continuance to give each immigrant time to look for a lawyer.<sup>18</sup> A long wait means more time in the country and, therefore, more time to save up for a paid lawyer or to find a nonprofit or pro bono attorney.

Why does more time make a difference? First, immigrants often do not have enough money saved to pay an attorney immediately. Full representation in immigration court can cost several thousand dollars. Gathering the money may require saving over months, together with support from friends and family and other forms of loans.<sup>19</sup> Second, finding a lawyer may not be easy even with some money saved up. For example, an attorney who frequently volunteers on the priority docket in San Francisco's immigration court points out that even reaching immigration attorneys may be difficult, simply because many lawyers are busy: "I explain that you should space out the calls and always leave a message, including your phone number. I explain that lawyers often don't call back, but you need to fight for yourself and you need to do these things."<sup>20</sup> These combined obstacles—lack of resources and lack of information about removal proceedings—make time important for finding counsel.

IJs give some immigrants more time than they give others. Some of these differences in wait times reflect random scheduling decisions—an IJ often assigns immigrants in first master calendar hearings to one of several dates, some of which are later than others and some of which may be more convenient for assuring the presence of an interpreter. But the court database also shows that immigration courts vary in how strict they are with extensions. Some IJs, and some courts, tend to give several continuances with six months or more between hearings; others give only one or two continuances with only a month or two between hearings.<sup>21</sup>

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16. See *infra* Figure 2.

17. See 8 C.F.R. § 1240.10(a)(1)–(3) (2015).

18. See IMMIGRATION COURT PRACTICE MANUAL § 4.15(g) (2009), [http://www.justice.gov/eoir/pages/attachments/2015/02/02/practice\\_manual\\_review.pdf](http://www.justice.gov/eoir/pages/attachments/2015/02/02/practice_manual_review.pdf) [perma.cc/4BJP-YELA].

19. The literature on how poor households finance large medical expenses documents such coping strategies. When households are able to gather the money to pay for such large expenses, they often fall further into poverty. See, e.g., Gabriela Flores et al., *Coping with Health-Care Costs: Implications for the Measurement of Catastrophic Expenditures and Poverty*, 17 HEALTH ECON. 1393, 1393–95 (2008) (summarizing literature on coping with health expenses).

20. Telephone Interview with Att'y Courtney McDermed (June 15, 2015).

21. See *infra* Figure 1.

When Osuna announced the expedited children's docket in July 2014, IJs reacted: the median first continuance dropped from ninety-four to seventy-eight days.<sup>22</sup> This change mattered. The policy of expediting hearings shortened many continuances enough to prevent children and families from finding lawyers.

Even after the nationwide decision to expedite, the length of continuances varied from court to court, from IJ to IJ, and from immigrant to immigrant, allowing us to estimate the importance of continuance length. Figure 1 shows average continuance lengths for children and families who came to their first hearing without lawyers at the immigration courts that heard at least 1000 expedited cases between August 1, 2014, and January 1, 2015.<sup>23</sup> Different courts adopted widely different policies: the average first continuance in Chicago (over 150 days) was three times longer than in Atlanta (under fifty days).<sup>24</sup> In our regression analysis below, we control for differences across courts (and IJs) to measure the effect of less time on case outcomes, but initially, we present these cross-court differences to illustrate the degree of variation in continuance length.

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22. More precisely, the median first continuance length for nondetained and released juvenile cases with a first hearing in 2013 was ninety-four days; the median first continuance for unaccompanied children and families with children between August 1, 2014, and January 1, 2015, (the period in which cases were most expedited) was seventy-eight days.

23. These averages exclude continuances of longer than 200 days, which make up fewer than 20 percent of all continuances. These longer continuances often reflect a different dynamic at work; for example, a judge may adjourn a case in order to give a child time to file an application for asylum with U.S. Customs and Immigration Services. Although we did not drop them, very short continuances may also occasionally reflect a different dynamic; for example, if an immigrant or lawyer is unable to appear on short notice and informs the court, sometimes a hearing may be rescheduled quickly.

24. See *infra* Figure 1.

*Figure 1: Average Continuance Length by Court for Priority Docket Cases*

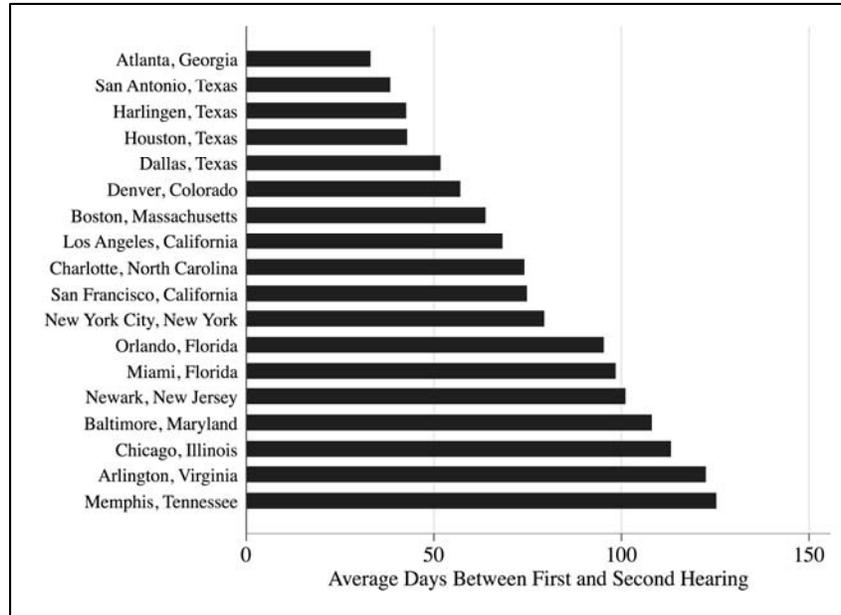


Table 1 illustrates the time dynamic in priority docket cases; with each hearing, more and more immigrants are represented, but there are fewer and fewer respondents. This attrition reflects both the fact that many immigrants are ordered deported at their first and second hearings and that many immigrants have not yet appeared for their second or third hearing, because these cases began recently.<sup>25</sup>

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25. In order to identify when a respondent first had a lawyer, we used the earliest of three dates: (1) the EOIR-28 date, which is not always recorded when a lawyer is present but reflects the date when the lawyer first formally entered an appearance, (2) the first date on which an Alien Attorney Code is recorded in the schedule table, and (3) the first date on which an EOIR Attorney ID is recorded in the EOIR schedule table. Sometimes the EOIR-28 date is updated when attorneys enter subsequent appearances; that should not affect our results, because we use the first of these three measures.

*Table 1: Representation Over Time  
for Children and Families on Priority Dockets*

	<b>First Hearing</b>	<b>Second Hearing</b>	<b>Third Hearing</b>
<b>Percentage with Lawyer</b>	14%	44%	64%
<b>Number with Lawyer</b>	8,154	14,705	10,132
<b>Total</b>	57,410	33,420	15,948

Source: EOIR CASE Database, *Never Detained Priority Children's and Family Cases*.

These differences do not just speed cases up or slow them down. They also change IJs' decisions: more time means a better chance of finding a lawyer. In order to estimate this effect reliably, we rely on a key fact about the first master calendar hearing: IJs grant a first continuance as a matter of course.<sup>26</sup> In other words, at the first hearing, children without lawyers are always granted a continuance, and judges do not address the merits before granting that continuance. We therefore need not worry that the merits of the cases explain the effects that we find.

Those effects are large. Figure 2 considers children and families who arrived in immigration court without a lawyer and shows that the more days that elapse before a second hearing, the more likely that the child or family will have a lawyer at that second hearing.<sup>27</sup> This figure includes all cases marked by EOIR as unaccompanied children or adults with children on alternatives to detention; less than 10 percent of these cases began with detention. Moving from a one-month to a two-month continuance nearly doubles the chance of finding a lawyer, from just over 20 percent to nearly 40 percent.<sup>28</sup> The effect levels off over time: after 100 days, longer continuances make a smaller difference, though still a significant one.<sup>29</sup>

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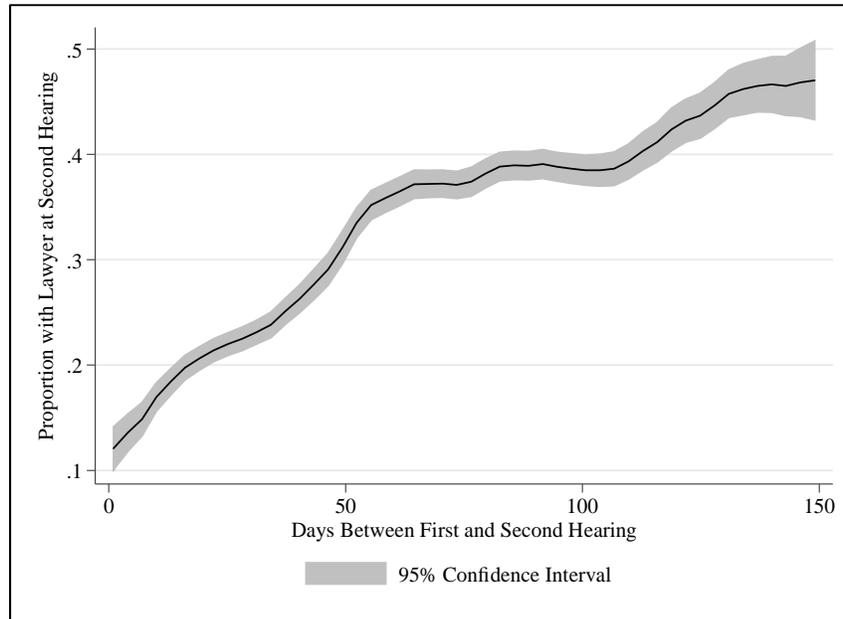
26. *See infra* note 36 (describing regulations and the practice manual governing immigration judges' grants of continuances to seek representation).

27. Note that the database marks cases as "adults with children" and does not distinguish between the adults and the children in these groups.

28. *See infra* Figure 2.

29. *See infra* Figure 2.

Figure 2: Continuanance Length and Representation for Priority Docket Cases



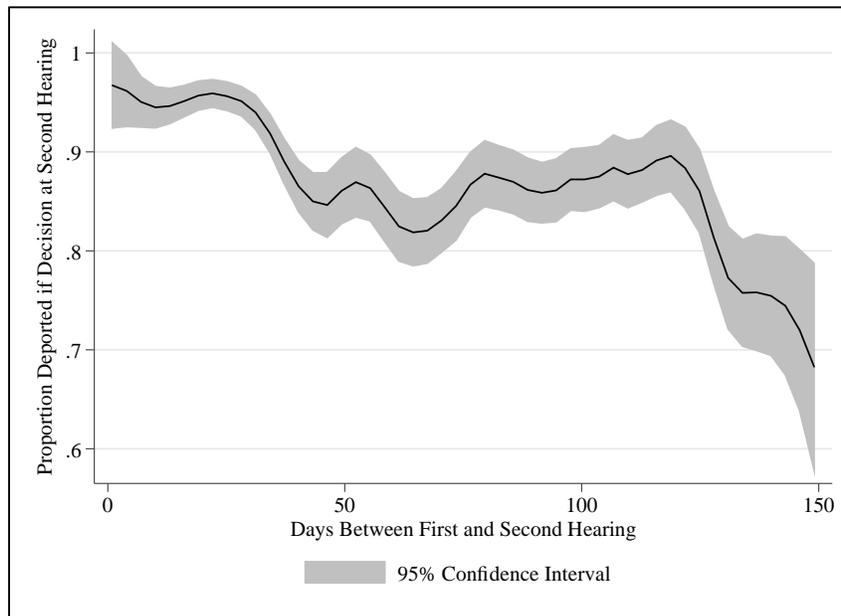
Given the importance of time for finding a lawyer, it should come as no surprise that longer continuances also give children and families a better chance of winning the right to remain in the United States. Figure 3 shows the effect of more time on the chance of deportation at the second hearing.<sup>30</sup> These estimates are necessarily incomplete: most immigration proceedings do not end at the second hearing.<sup>31</sup> Still, there is a distinct pattern that resembles the effect of time on finding a lawyer: more time helps, especially at the beginning.<sup>32</sup>

30. For simplicity, we count voluntary departure as deportation. Even though it carries different legal consequences, it requires the immigrant to leave the United States.

31. A few proceedings also end at the first hearing.

32. See *infra* Figure 3.

*Figure 3: Continuance Length and Deportation for Priority Docket Cases 2*



So far, we have shown that the amount of time that IJs grant between the first and second hearings—a routine determination that does not reflect the merits of cases, but does vary across judges and courts—is highly correlated with legal representation and outcomes at the second hearing. One may wonder, however, whether these results simply reflect differing caseloads across immigration courts and judges: perhaps some IJs both grant more time and help immigrants find lawyers in other ways. To account for that possibility, we verify the results in Figures 2 and 3 with regressions that employ fixed effects at the IJ level. These fixed effects control for variation caused by both IJs and courts; because IJs generally work in one court, there is little need for court fixed effects in addition. The results, shown in Tables 2 and 3 below, are very similar to those in the figures: holding caseload and judge constant, more time leads to a better chance of finding a lawyer and avoiding deportation. In other words, even looking at one judge at a time, immigrants granted longer continuances are significantly more likely to find representation and avoid deportation. As in these figures, the effect of more time is strongest in comparisons between relatively short continuances.

*Table 2: Effect of Continuance Length on Representation at Second Hearing*

	(1) 200 Days or Fewer	(2) 100 Days or Fewer	(3) 50 Days or Fewer
Continuance Length	0.00187*** (0.000268)	0.00282*** (0.000281)	0.00371*** (0.000628)
Central American	0.0613 (0.0418)	0.0556 (0.0413)	0.00963 (0.0335)
Intercept	0.145** (0.0440)	0.104* (0.0406)	0.113** (0.0385)
<i>N</i>	26,772	20,085	9,016

Standard errors in parentheses. All models include IJ fixed effects. Standard errors clustered at the IJ level. Note that the sample only includes cases with first hearings between August 1, 2014, and January 1, 2015.

\*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$ .

*Table 3: Effect of Continuance Length on Deportation Orders at Second Hearing*

	(1) 200 Days or Fewer	(2) 100 Days or Fewer	(3) 50 Days or Fewer
Continuance Length	-0.000651** (0.000199)	-0.000554 (0.000368)	-0.00120 (0.00138)
Central American	-0.103* (0.0465)	-0.0938 (0.0497)	-0.0129 (0.0433)
Intercept	1.015*** (0.0466)	1.008*** (0.0510)	0.973*** (0.0609)
<i>N</i>	4,163	3,145	1,782

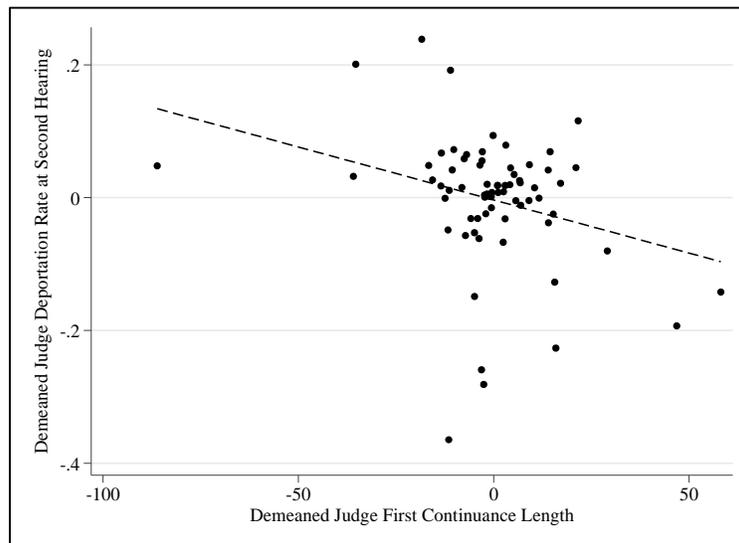
Standard errors in parentheses. All models include IJ fixed effects. Standard errors clustered at the IJ level. Note that the sample only includes cases with first hearings between August 1, 2014, and January 1, 2015.

\*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$ .

Although the IJ-fixed effects allow us to be confident that time matters independent of IJs' preferences, IJs do also use time to influence outcomes. Many IJs understand that longer continuances can help immigrants find a lawyer and successfully apply for relief. The same IJs who are more likely to order immigrants deported also grant shorter and fewer continuances.<sup>33</sup> This pattern holds for children and families: IJs who allow longer continuances are less likely to have ordered children and families deported at their second hearing.<sup>34</sup>

Figure 4, below, shows the results: the longer the average continuance, the lower the chance of deportation. There are relatively few IJs who have heard families' and children's cases on the priority docket, and those cases may not have been randomly assigned. Nonetheless, there is good reason to believe that this relationship is real: it matches similar results from the adult docket.<sup>35</sup>

*Figure 4: Judges' Deportation Rates and Continuance Lengths for Priority Docket*



33. David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. (forthcoming) (manuscript at 19–24), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2568960](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2568960) [<https://perma.cc/XVM6-WLPV>].

34. To test whether more generous IJs also granted children and families longer continuances, we look at cases that had a first hearing between August 1, 2014, and January 1, 2015, and that received a continuance of fewer than 150 days. Note that in the previous regressions, unlike in the figures, we include continuances of up to 200 days; the shorter length for the figures makes these easier to display, but there is little substantive difference. We included only IJs who heard at least 200 cases on the priority docket. Next, we demeaned the average first continuance time by court and also demeaned each IJ's deportation rate (at a child or family's second hearing) by court.

35. *See id.*

Finally, the skeptical reader may still wonder whether IJs allow more time for cases to which they are more sympathetic; perhaps the results reflect this correlation between sympathy and continuances, rather than the effect of extra time. That hypothesis, however, does not fit the nature of the initial hearing before an IJ. When the immigrant appears without a lawyer, the IJ grants a continuance as a matter of course and usually without a detailed inquiry into the case.<sup>36</sup> This short interaction with the IJ does not allow time for the IJ to develop a view about the likely merits of the case and to grant a longer continuance to an immigrant with a more meritorious case.

In sum, these data offer convincing evidence that continuance length influences both access to counsel and eventual outcomes in immigration court. Longer continuances mean fewer deportations.

## II. A REASONABLE OPPORTUNITY TO FIND COUNSEL

The U.S. Constitution, the Immigration and Nationality Act of 1965 (INA), and immigration regulations all protect the right to counsel, but case law has not fully addressed the implications of that right for IJs' decisions about continuances. In this part, we describe the origins and contours of the right to a reasonable time to seek counsel. First, we describe the growing civil *Gideon* movement and its accompanying scholarly work. That movement has focused on the extension of a right to representation to particularly vulnerable populations—in the immigration context, unaccompanied children and mentally disabled respondents. We survey this literature in order to situate our contribution. We describe a complementary right that cuts across populations of respondents: the right to a reasonable opportunity, in the form of a reasonable continuance, to obtain counsel at no expense to the government. This right is not a new one, but in the absence of data on the effects of longer and shorter continuances, courts' focus has been on the grant or denial of a continuance rather than its length. There is a consensus that the Constitution and INA protect the right, at least under some circumstances, to a continuance to seek counsel. The circuits differ, however, on how much deference they grant an IJ's denial of a continuance. Moreover, the circuits are split on whether to require respondents to demonstrate that they were prejudiced by the denial of a continuance. Finally, and most important for the purposes of our analysis, neither the courts of appeals nor the Board of Immigration Appeals (BIA) offer guidance on the length of a reasonable continuance. Perhaps this lack of guidance helps explain the dramatic variation across IJs and courts in the average length of a continuance.

Because the courts and the BIA offer little guidance on the scope of the due process right to a reasonable continuance, we set out a framework for evaluating the reasonableness of a continuance. That framework explicitly

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36. See 8 C.F.R. § 1240.10(a)(1) (2015) (requiring immigration judge to inform respondent of right to counsel at no expense to the government); see also IMMIGRATION COURT PRACTICE MANUAL, *supra* note 18, § 4.15(e).

acknowledges the need for empirical evidence, a need that is implicit in the current due process doctrine. The leading doctrinal standards for evaluating the necessity of additional procedures under the Constitution—the *Mathews v. Eldridge*<sup>37</sup> test and the related fundamental fairness standard in immigration law—both require judges (and the Executive) to make empirical, predictive judgments. We take the additional step of urging that these decision makers consider systematic empirical evidence when it is available.

#### A. Representation for Vulnerable Populations

As advocates and scholars have argued that immigrants facing deportation should have counsel appointed and paid for by the government, they have often focused on identifying feasible next steps toward that goal. Such steps have typically identified some group of immigrants facing deportation as especially vulnerable.

Perhaps most prominently, two important class actions have sought government-provided representation for two particularly vulnerable populations of immigrants facing removal: (1) mentally ill immigrants who are also detained pending their removal, and (2) children. In *Franco-Gonzalez v. Holder*,<sup>38</sup> the plaintiffs secured a permanent injunction requiring the provision of representation, at government expense, for mentally ill immigration detainees.<sup>39</sup> The plaintiffs prevailed partly on Rehabilitation Act grounds; the court held that government-provided counsel was a reasonable accommodation for their mental disability.<sup>40</sup> In other words, the rationale was that mentally ill respondents are especially unable to represent themselves. The same concern underlies *J.E.F.M. v. Holder*,<sup>41</sup> in which the plaintiffs sought counsel for children facing removal proceedings, arguing that children are less able than adults to represent themselves competently. These concerns also motivated San Francisco's funding for representation for unaccompanied children and families facing deportation.<sup>42</sup> Furthermore, scholars have argued persuasively that children facing a complex legal system are particularly entitled to representation.<sup>43</sup>

Detention raises similar issues: without free access to communication and legal resources, immigrants in detention are less able to represent themselves.<sup>44</sup> The New York Family Unity Project recently began providing representation to all immigrants in New York City who are detained pending their deportation.<sup>45</sup> The project uses a public defender

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37. 424 U.S. 319 (1976).

38. No. CV 10-02211 DMG (DTBx), 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013).

39. *Id.* at \*20.

40. *Id.* at \*5.

41. 107 F. Supp. 3d 1119 (W.D. Wash. 2015).

42. *See supra* note 11.

43. *See, e.g.,* Ashley Ham Pong, *Humanitarian Protections and the Need for Appointed Counsel for Unaccompanied Immigrant Children Facing Deportation*, 21 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 68 (2014).

44. Of course, detention without counsel raises liberty concerns as well.

45. *See New York Immigrant Family Unity Project, supra* note 10.

model, with some attorneys working directly in criminal public defenders' offices and others based at nonprofits.<sup>46</sup>

We contribute to this growing literature and growing movement with a complementary approach that stresses access to nonappointed counsel, acknowledging that few immigrants currently have access to appointed counsel. Although we concentrate on the immigration courts' recent prioritization of children's and families' cases, which reduced access to counsel for a particularly vulnerable population, our argument holds equally for adult respondents, who may be competent to represent themselves under the current doctrine, but nonetheless possess a right to reasonable access to counsel—and therefore to a reasonable continuance.

Our work fits within a broader literature on access to counsel in civil cases. Scholars have examined these issues across many contexts, including housing court, family court, and benefits adjudications.<sup>47</sup> We add to this literature with a focus on one of the most important reasons that immigrants face their hearings without a lawyer: lack of time to save up for and find one.

### B. *The Statutory Right to Counsel*

The INA provides immigrants the right to counsel at no expense to the government.<sup>48</sup> That right is also guaranteed by regulations issued pursuant to the statute.<sup>49</sup>

The regulations also include provisions to allow respondents time to seek counsel. When a respondent moves for a continuance, the IJ may grant the motion for good cause shown.<sup>50</sup> Absent a formal motion for a continuance, the IJ may also adjourn the hearing to a later date “either at his or her own instance or, for good cause shown, upon application by the respondent or the [Immigration and Naturalization Service].”<sup>51</sup>

In *In re C-B*,<sup>52</sup> the BIA held that when the respondent does not expressly waive his or her right to counsel, these statutory and regulatory authorities require the IJ to “grant a reasonable and realistic period of time to provide a fair opportunity for a respondent to seek, speak with, and retain counsel.”<sup>53</sup> In other words, the BIA has recognized that the statute and regulations give rise to an obligation not only to grant an adjournment or continuance upon good cause shown, but also to set a date that provides the respondent with a fair opportunity to retain counsel.

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46. *See id.*

47. For a review of the literature, see Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 *FORDHAM URB. L.J.* 37, 40–44 (2010).

48. INA §§ 240(b)(4)(A), 292, 8 U.S.C. §§ 1229a(b)(4)(A), 1362 (2012).

49. 8 C.F.R. §§ 1003.16(b), 1240.3, 1240.11(c)(1)(iii) (2015).

50. *Id.* § 1003.29.

51. *Id.* § 1240.6.

52. 25 I. & N. Dec. 888 (B.I.A. 2012).

53. *Id.* at 889.

*In re C-B*'s holding has not yet been cited by any court of appeals. That neglect partly reflects the fact that very few unrepresented respondents petition for review; the respondent in *In re C-B* proceeded pro se.<sup>54</sup> By contrast, many of the circuit court cases on continuances have arisen after an IJ denied a *represented* respondent's right to a continuance. Even where the circuit courts have expressly considered the denial of a continuance to seek counsel, most of the cases concern a respondent's right to a continuance after their lawyers withdraw. In other words, the appellate case law has arisen in the context of a privileged and unrepresentative subset of all respondents who are denied continuances. The analysis we provide, and the framework we suggest, is necessary because the courts of appeals rarely (if ever) have the opportunity to consider this issue despite its importance for most indigent immigrants in removal proceedings.

As a threshold matter, the general review of a denial of a continuance should not be confused with the more specific review of a continuance to seek counsel. For example, *Peng v. Holder*<sup>55</sup> appeared to set out a standard governing the review of the denial of a continuance. In *Peng*, the Ninth Circuit held that the IJ "should consider factors including '(1) the nature of the evidence excluded as a result of the denial of the continuance, (2) the reasonableness of the immigrant's conduct, (3) the inconvenience to the court, and (4) the number of continuances previously granted.'"<sup>56</sup>

Yet the court applied this standard where a *represented* respondent was denied a continuance—the plaintiff in *Peng* needed time to apply for a section 212(c) waiver.<sup>57</sup> Moreover, the cases on which the *Peng* court relied all concerned *represented* respondents who requested continuances for one reason or another.<sup>58</sup>

By contrast, courts correctly employ a different standard to decide whether the denial of a continuance specifically violated a respondent's right to counsel. The courts of appeals simultaneously consider whether the denial of the continuance violated the respondent's statutory right to counsel and whether the denial constituted a due process violation.<sup>59</sup> In deciding whether a particular denial violated the right to counsel, courts exercise substantial discretion. When courts affirm the denial, they often emphasize the IJ's discretionary control of his or her docket;<sup>60</sup> when they

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54. *Id.* at 888.

55. 673 F.3d 1248 (9th Cir. 2012).

56. *Id.* at 1253 (quoting *Ahmed v. Holder*, 569 F.3d 1009, 1012 (9th Cir. 2009)).

57. *Id.* at 1253–57.

58. *Id.* at 1253; see *Ahmed*, 569 F.3d at 1011–12 (reviewing a denial of a continuance requested by counsel while the appeal of the visa petition was pending); *Baires v. INS*, 856 F.2d 89, 91 (9th Cir. 1988) (reversing a denial of a continuance to gather more written evidence); see also *Karapetyan v. Mukasey*, 543 F.3d 1118, 1129 (9th Cir. 2008) (reversing a denial of a continuance to submit fingerprints).

59. See *Ponce-Leiva v. Ashcroft*, 331 F.3d 369, 374 (3d Cir. 2003) ("[T]he two claims are one and the same.").

60. See *Al Khouri v. Ashcroft*, 362 F.3d 461, 464 (8th Cir. 2004) (noting that an IJ's discretion to manage his or her docket is "wide," and affirming a denial of a continuance where the respondent's lawyer withdrew and the respondent waived his right to counsel).

reverse, they emphasize the right to counsel.<sup>61</sup> One may search in vain for a clear test governing when the denial of a continuance becomes unreasonable enough to require reversal.

Perhaps more important than the test (or lack of one), however, are the standard of review and the requirement that respondents show that they were prejudiced by the denial of the continuance. The circuits are split on both of these questions. In the Ninth Circuit, the denial of a continuance to seek counsel presents a question of law that the court reviews *de novo*.<sup>62</sup> In the Third Circuit, by contrast, the court reviews a noncitizen's challenge of an IJ's denial of a continuance to seek counsel for abuse of discretion.<sup>63</sup>

Moreover, the circuits are split on whether a respondent must show prejudice to challenge a violation of his or her right to counsel. The petitioner must show prejudice in the Fourth, Fifth, and Tenth Circuits, but not in the Second, Third, Seventh, Ninth, and D.C. Circuits.<sup>64</sup> This split reflects a broader split on the question of when courts may reverse agency action in the absence of a showing of prejudice. In *Leslie v. Attorney General of the United States*,<sup>65</sup> for example, the Third Circuit held that when a regulation protects a fundamental statutory or constitutional right, a court may reverse agency failure to comply with the regulation even if there is no showing of prejudice.<sup>66</sup> *Leslie* concerned an IJ's failure to comply with the regulation requiring IJs to advise respondents that free legal services may be available and to provide a list of such services.<sup>67</sup> The court granted the petition for review.<sup>68</sup> The Ninth Circuit recently applied this reasoning in reversing an IJ's denial of a continuance for a respondent whose attorney failed to appear: in *Montes-Lopez v. Holder*,<sup>69</sup> the court concluded both that the denial of the continuance violated the respondent's right to counsel and that no showing of prejudice was necessary for reversal.<sup>70</sup>

This conclusion was also consistent with a line of older cases in which the Ninth Circuit held that an IJ's denial of a continuance violated the statutory right to representation. In *Castro-Nuno v. INS*,<sup>71</sup> the respondent's lawyer had appeared at two initial master calendar hearings, but the case was continued to a third hearing because INS officers failed to appear.<sup>72</sup> At that third hearing, the respondent's lawyer failed to appear.<sup>73</sup> The

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61. See *Hernandez-Gil v. Gonzales*, 476 F.3d 803, 807 (9th Cir. 2007) (declining to “allow a myopic insistence upon expeditiousness to render the right to counsel an empty formality” (quoting *Biwot v. Gonzales*, 403 F.3d 1094, 1099 (9th Cir. 2005))).

62. *Montes-Lopez v. Holder*, 694 F.3d 1085, 1088 (9th Cir. 2012).

63. *Ponce-Leiva*, 331 F.3d at 377.

64. See *Montes-Lopez*, 694 F.3d at 1090 (discussing the circuit split).

65. 611 F.3d 171 (3d Cir. 2010).

66. *Id.* at 180.

67. *Id.* at 173 (citing 8 C.F.R. § 1240.10(a)(2)–(3) (2015)).

68. *Id.* at 183.

69. 694 F.3d 1085 (9th Cir. 2012).

70. *Id.* at 1088–94.

71. 577 F.2d 577 (9th Cir. 1978).

72. *Id.* at 578.

73. *Id.*

respondent repeatedly asked to speak with his lawyer, but the IJ ignored these requests, conducted the hearing, and eventually allowed the respondent to depart voluntarily from the United States.<sup>74</sup> The Ninth Circuit, relying on the statutory right to counsel in immigration proceedings and the fact that the respondent did not waive that right, held that the IJ should have granted a continuance sua sponte.<sup>75</sup> Similarly, in *Rios-Berrios v. INS*,<sup>76</sup> the court relied partly on case law from the criminal context to conclude that two continuances of one working day each deprived the respondent of his statutory right to counsel.<sup>77</sup> The court held that the brevity of the continuances, particularly after the INS's decision to transfer the respondent from California to Florida, constituted an abuse of discretion and violated both the respondent's statutory right to counsel and the underlying due process right that the statutory right codifies.<sup>78</sup>

In sum, the circuits are split on two questions: (1) whether to review the denial of a continuance to seek counsel de novo or for abuse of discretion, and (2) whether a petitioner must demonstrate prejudice to obtain reversal of that denial. Notably absent from the case law is any treatment of the length of continuances, rather than their denial. This varying and incomplete treatment of continuance length demonstrates the need for a rational framework that explicitly acknowledges the practical importance of time between hearings.

### C. A Due Process Framework for Continuance Length

The standard due process framework should make the consideration of empirical evidence a natural part of determining whether procedures are constitutionally sufficient. The Executive and the courts should consider the effect of continuance length on access to counsel in weighing how much time is constitutionally adequate. Although our direct reliance on quantitative evidence may appear novel, it does not break new doctrinal ground: empirical judgments are crucial to both the *Mathews v. Eldridge* due process standard and the fundamental fairness due process standard, which developed in the immigration context.

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74. *Id.*

75. *Id.* at 579. An IJ's duty to grant reasonable requests for continuances could also spring from his or her statutory and ethical obligation to develop the record and guide the respondent through his or her proceedings. In *Al Khouri v. Ashcroft*, 362 F.3d 461 (8th Cir. 2004), the court affirmed the IJ's denial of a continuance after the respondent's lawyer withdrew, but found that the IJ failed to give the respondent a full opportunity to develop the record and therefore violated his due process rights—partly because the respondent lacked time to prepare after his request for a continuance was denied. *Id.* at 464–66. An IJ's affirmative duty to develop the record stems partly from the INA. See 8 U.S.C. § 1229a(b)(1) (2012) (“The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses.”).

76. 776 F.2d 859 (9th Cir. 1985).

77. See *id.* at 862–63.

78. *Id.*

In *Mathews*, the Court set out a standard for determining whether procedures are sufficient to pass constitutional due process muster. That standard requires weighing

[f]irst, 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>79</sup>

Our evidence, which demonstrates that longer continuances increase the chance that respondents will find counsel, speaks directly to the second factor: the value that a longer continuance (the procedural safeguard) provides is the higher chance of finding a lawyer.

Of course, quantifying this value, as we have done, does not eliminate the need to weigh the private interest in additional procedure against the government's interest in faster proceedings. Yet the private interest in representation in immigration court is a particularly strong one, and the government interest in shorter continuances is not. Although backlog and delay in immigration court are real problems, the most important factor in delay is the difficulty of scheduling an individual merits hearing: in some courts, such hearings are now being scheduled already for 2019.<sup>80</sup>

The fundamental fairness test, historically applicable in the immigration context, draws on principles similar to those that underpin the *Mathews* test. To reverse on fundamental fairness grounds, a court of appeals must find a fundamental procedural error, as well as prejudice resulting from that error.<sup>81</sup> Although we argue below that a finding of prejudice should not be necessary for the reversal of a denial of a continuance, the prejudice requirement reflects concerns similar to those underlying the *Mathews* test: courts attempt to estimate the importance of the procedures at hand.

To evaluate whether short continuances violate due process, courts should look to the aggregate evidence of harm rather than to prejudice in any individual case. The reason is simple: the prejudice determination requires a court to assemble a hypothetical counterfactual. The court is forced to guess what would have happened in the case had the IJ granted a longer continuance. In any individual case, that is nearly impossible—even setting aside the fact that immigrants granted short continuances are unlikely to appeal, and therefore such cases are necessarily rare. Imagine (plausibly) a child who has no connections in the United States and was the victim of abuse in Central America that he or she is afraid to discuss in court. Imagine further that he or she receives a very short continuance, and without a lawyer to gain the child's trust and elicit his or her story, that abuse remains absent from the record. In the unlikely event that the child were to appeal, the BIA would have little choice but to conclude that the

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79. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

80. We noted this timing in December 2015.

81. See *Al Khouri v. Ashcroft*, 362 F.3d 461, 465–66 (8th Cir. 2004).

short continuance caused little prejudice; the record would contain no facts suggesting that the child was entitled to asylum.

This type of counterfactual determination asks the impossible of appellate adjudicators, but it is precisely what quantitative causal inference can accomplish in the aggregate.<sup>82</sup> We therefore propose a regulation that draws on these empirical results, but in the absence of such a rule, we urge courts of appeals to consider our results when weighing the importance of continuance length.

### III. MORE SEARCHING REVIEW AND A PRESUMPTIVE RIGHT TO A NINETY-DAY CONTINUANCE

More time means a better chance of finding a lawyer and remaining in the United States. Drawing on these empirical results, which we believe fit naturally into due process doctrine, we conclude with recommendations for both the courts of appeals and EOIR, which supervises the country's immigration courts.

We argue, first, that the denial of a continuance to seek representation should be reviewed *de novo*, as the denial itself makes review so much less likely—by diminishing the respondent's chance of finding a lawyer and eventually appealing. When an IJ denies a continuance, that IJ not only makes the immigrant less likely to find a lawyer and to avoid deportation, but also makes the immigrant less likely to appeal a deportation order.<sup>83</sup> Indeed, our case search did not yield a single example of an immigrant who was denied a continuance and petitioned for review of that denial *pro se*. Because the denial of a continuance is so unlikely to be reviewed, we think it unfair to further insulate the denial from review by deferring to the judgment of the IJ.

Similarly, the prejudice requirement is unfair in light of the empirical evidence that shorter continuances systematically prevent *pro se* respondents from finding counsel. An individual showing of prejudice imposes a perverse burden upon a *pro se* litigant: it requires him or her to marshal, on appeal, the evidence that his or her lawyer would have obtained had the continuance been granted.<sup>84</sup> The requirement places the respondent in a catch-22: without a lawyer, the respondent cannot show what evidence the lawyer would have marshaled.

Finally, perhaps the most notable shortcoming of the existing case law is its failure to address the length of continuances. Our empirical findings show that continuance length has a dramatic impact on the right to counsel.<sup>85</sup> Relying on our finding that the impact of a longer continuance is large for continuances of under ninety days, we propose a presumption: continuances of under ninety days for nondetained immigrants should be

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82. Of course, our study is not a randomized controlled trial. Yet our attempt does take advantage of the arbitrary nature of first continuance lengths, together with judge-fixed effects, to draw plausible causal inferences.

83. See Hausman, *supra* note 33, at 24–25.

84. See *supra* Part II.C.

85. See *supra* Figure 3.

presumptively invalid. The burden should be on the government to justify a shorter continuance.

Of course, our findings cover only one population—families and children—in one recent time period. We readily acknowledge that access to counsel varies across courts and over time. We therefore suggest that EOIR perform an analysis similar to the one we have performed, but for each immigration court on an annual basis. This is feasible: EOIR already publishes a statistical yearbook with descriptive statistics broken down by court.<sup>86</sup> A court-by-court analysis of continuance length and access to counsel would allow a regionally sensitive presumption. EOIR may implement a rule requiring such review—and a ninety-day presumption—either through instruction to the country’s immigration courts or by a formal rulemaking process.

These proposals, which would require minimal resources, would significantly increase immigrants’ chances of finding a lawyer, helping to make the right to counsel a reality.

#### CONCLUSION

Our findings and recommendations are simple. Time matters to immigrants facing deportation, who are learning to navigate the immigration courts and scraping together money for a lawyer. Setting a presumptive minimum continuance length can begin to remedy the due process violation that short continuances impose.

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86. *See, e.g.*, U.S. DEP’T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2013 STATISTICAL YEARBOOK, at A5 (2014), <http://www.justice.gov/sites/default/files/eoir/legacy/2014/04/16/fy13syb.pdf> [perma.cc/98GX-WZ95].