

At What Rate Do Noncitizens Appear for Their Removal Hearings? Measuring In Absentia Removal Order Rates

Noncitizens who are charged by the Department of Homeland Security (DHS) with immigration violations may have their cases adjudicated during immigration court removal proceedings. Immigration courts operate within the Department of Justice’s Executive Office for Immigration Review (EOIR). During proceedings, immigration judges (IJs) determine whether noncitizens (i.e., *respondents*) are removable (deportable), and if so, whether they are eligible for protection or relief from removal, such as asylum. Removal proceedings may involve multiple hearings. Respondents who fail to appear for any of their hearings may be ordered removed *in absentia* (i.e., in the respondent’s absence) by an IJ.

The rate at which respondents fail to appear for their hearings has been a key measure that some have cited to support policy positions and legal decisions related to mandatory detention, border security, and asylum. Yet the method for measuring the in absentia rate has been debated, and there is wide variation in the rates cited by elected officials and reported in the media. This In Focus explains the legal requirements for in absentia removal orders, how EOIR calculates in absentia rates, how to interpret those rates, and an alternative method for calculating in absentia rates that some argue measures the rate more comprehensively by accounting for a large and growing number of pending cases. It also presents data on in absentia removal orders for asylum seekers.

In Absentia Removal Orders in the Law

Section 240(b)(5) of the Immigration and Nationality Act requires that any respondent who has received written notice of a hearing and does not attend it must be ordered removed in absentia. DHS must present “clear, unequivocal, and convincing evidence” that the notice was provided, and that the respondent is removable. The removal order may be rescinded if a respondent files a *motion to reopen* proceedings and demonstrates that their failure to appear occurred because

- the respondent faced “exceptional circumstances” (e.g., serious illness or death of an immediate family member),
- the respondent did not receive proper notice of the hearing, or
- the respondent was in federal or state custody and unable to appear through no fault of their own.

In Absentia Rate: Initial Case Completions Only Method

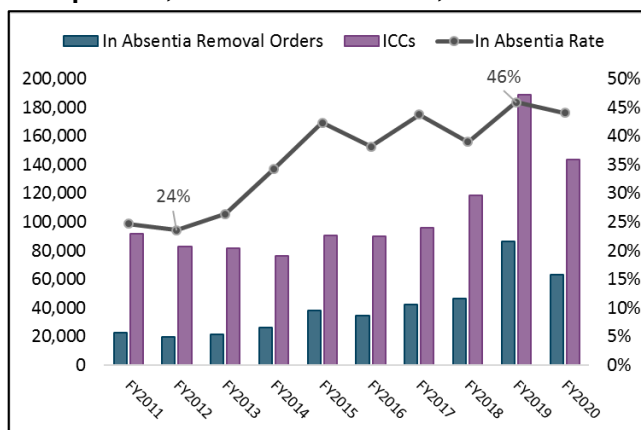
EOIR publishes in absentia rates in its annual Statistics Yearbooks and on its Workload and Adjudication Statistics website. EOIR calculates the in absentia rate by dividing the number of in absentia removal orders issued in a fiscal

year by the total number of initial case completions (ICCs) in that same year. An ICC is “the first dispositive decision rendered by an immigration judge” and includes orders of removal, grants of relief (e.g., asylum), voluntary departure (respondents voluntarily leaving the United States at their own expense), and proceeding terminations.

$$\text{Rate} = \frac{\text{In absentia removal orders}}{\text{ICCs}} \times 100$$

From FY2011 to FY2020, about 38% (401,042) of all ICC decisions (1.06 million) were in absentia removal orders (averaging about 36% annually), indicating 62% of respondents appeared for their hearings during this period. Using EOIR’s ICC method, the annual in absentia rate generally increased during this period, ranging from a low of 24% in FY2012 to a high of 46% in FY2019 (Figure 1).

Figure 1. In Absentia Removal Orders, Initial Case Completions, and In Absentia Rates, FY2011-FY2020



Source: CRS analysis of data for removal, deportation, and exclusion (I-862) cases provided by EOIR on July 13, 2021.

Note: Excludes detained cases. In absentia removal orders are uncommon for individuals in detention—DHS is responsible for ensuring that respondents in its custody appear at all hearings.

Note that this rate does not account for

- respondents who have appeared for hearings but whose cases have not yet been completed, including those that are pending in the growing backlog of immigration cases (1.3 million cases as of March 31, 2021);
- those whose cases have been *administratively closed*, or moved to an inactive pending docket (305,698 cases as of March 31, 2021), while the respondent pursues an application with another agency, such as U.S. Citizenship and Immigration Services, or so that the IJ may clear low-priority cases from their docket to adjudicate higher-priority cases (e.g., respondents

convicted on crimes or who pose a national security risk); or

- outcomes from subsequent case completions for respondents ordered removed in absentia who were granted motions to reopen.

In Absentia Rate: All Matters Method

Some observers claim that the ICC method overstates the in absentia rate. An alternative method, *all matters* (AM), was proposed in a 2020 *University of Pennsylvania Law Review* article (“Measuring *in Absentia* Removal in Immigration Court,” by Ingrid Eagly and Steven Shafer, vol. 168 no. 4). The authors contend that EOIR’s ICC method fails to account for the substantial number of respondents whose cases are in the pending case backlog or are administratively closed. For example, an individual whose case is pending and who appears for all pre-decision hearings would not be accounted for by the ICC method.

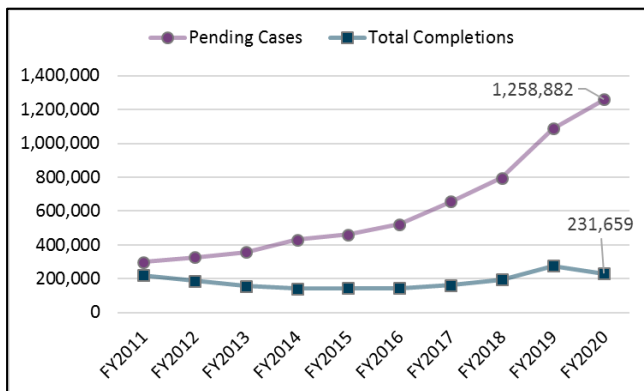
The AM method calculates the in absentia rate as a proportion of all pending and completed cases, including “other” completions (e.g., administrative closures):

$$\text{Rate} = \frac{\text{In absentia removal orders}}{\text{ICCs} + \text{Other completions} + \text{Pending cases}} \times 100$$

Using data from FY2008 to FY2018, the authors found that the AM method yielded a lower average annual in absentia rate among non-detained respondents (5%) than the ICC method (34%). The total in absentia rate over the 11-year period using the AM method was 17%, compared with 34% using the ICC method. The ICC method indicates that 66% of respondents with initial case completions attended their hearings over that period. In contrast, the AM approach indicates that 83% of respondents with initial case completions, pending cases, and administratively closed cases attended their hearings. The study also found that 15% of in absentia orders issued over that period were later rescinded after the cases were reopened.

The AM method has been supported by some advocates, who state that because far more cases are pending than completed in recent years (Figure 2), the ICC method distorts the true in absentia rate and fails to account for court appearances by individuals with pending cases.

Figure 2. Cases Pending and Completed, FY2011 - FY2020



Source: EOIR, Workload and Adjudication Statistics, “Pending Cases, New Cases, and Total Completions.”

Notes: Total completions include ICCs and subsequent case completions: “any dispositive decisions by an immigration judge after an ICC.” Includes removal, deportation, and exclusion (I-862) and asylum- and withholding-only (I-863) detained and non-detained cases. Removal cases are by far the most common case type.

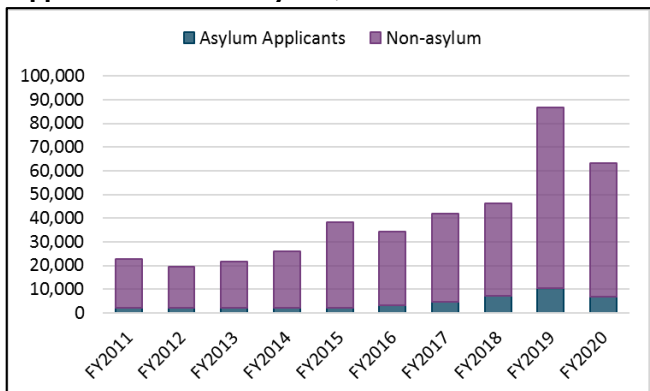
Figure 2 illustrates the widening gap between the number of case completions and the number of pending cases over the past decade. In FY2011, case completions and pending cases were almost equivalent. By contrast, at the end of FY2020 there were 231,659 case completions compared with more than 1.2 million pending cases.

Some observers argue that the ICC method is more reliable than the AM method because the latter cannot account for the rate at which respondents whose cases are currently pending may fail to appear for future hearings. In addition, because individuals whose cases are administratively closed are not expected to appear in court, they contend that including those cases artificially lowers the in absentia rate.

Asylum Applicants

Some policymakers are interested in in absentia removals among just asylum seekers. From FY2011 to FY2020, among all 401,042 in absentia orders issued, 43,215, or 11%, were issued to asylum applicants (Figure 3)

Figure 3. In Absentia Removal Orders: Asylum Applicants and Non-asylum, FY2011 - FY2020



Source: EOIR, Workload and Adjudication Statistics, “Asylum Applicant *In Absentia* Removal Orders,” and unpublished data provided to CRS on July 13, 2021.

Notes: Figure includes data for removal, deportation, and exclusion (I-862) cases; excludes detained cases. EOIR’s data for the total universe of asylum decisions includes both I-862 and I-863 (asylum- and withholding-only) case types; therefore, CRS has not produced an in absentia rate for asylum seekers because the numerator (I-862 only cases) and denominator (I-862 and I-863 cases) for the rate would be incongruent.

For more information about immigration courts and removal proceedings, see the following:

- CRS In Focus IF11690, *Pending Cases in U.S. Immigration Courts, FY2008-FY2020*
- CRS In Focus IF11536, *Formal Removal Proceedings: An Introduction*
- CRS Infographic IG10022, *Immigration Court Proceedings: Process and Data*

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