

NOTES

STUCK ON THE BACKBURNER: AN ANALYSIS OF USCIS'S BACKLOG OF IMMIGRATION APPLICATIONS AND POTENTIAL REFORMS

RYAN J. FENNELL*

ABSTRACT

In recent years, the backlog of pending applications at U.S. Citizenship and Immigration Services (USCIS) has surged. The backlog creates significant processing delays, keeps immigrants in administrative limbo, and obstructs the American dream. This Note examines USCIS's origins and duties, causes of the backlog, and potential reforms for backlog reduction. USCIS leadership's statements on the issue and bipartisan legislative proposals indicate recent support to revamp the U.S. immigration system. Ideal reforms, this Note argues, should include both internal measures within USCIS and external measures from Congress and courts.

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INTRODUCTION

The federal government is facing an administrative crisis: an onslaught of immigration applications is piling up. Perhaps more importantly, this backlog creates hardship for Americans, prospective U.S. citizens, and potential residents whose pending applications (and livelihoods) remain stuck on the administrative backburner. The U.S. Citizenship and Immigration Services' (USCIS's) backlog is deeply rooted and has grown over each of the three previous presidential administrations. Pending immigration cases increased during the Bush administration, accelerated under President Obama, and exploded during the Trump administration. USCIS's backlog continues to climb in 2022.

As President Biden begins his second year in office, attention is turning to USCIS—the agency within the Department of Homeland Security (DHS) that grants applications for work permits, green cards, and naturalization—for answers. Over 8 million cases were pending at the end of 2021, more than triple the 2.5 million cases outstanding two years prior.¹ Projections anticipate

1. See Muzaffar Chishti & Julia Gelatt, *Mounting Backlogs Undermine U.S. Immigration System and Impede Biden Policy Changes*, MIGRATION POL'Y INST. (Feb. 23, 2022), <https://perma.cc/6UX9-E8DE>.

that the net backlog will skyrocket through 2022 and beyond unless new policies are implemented to address the problem.

COVID-19 is partially responsible for the backlog's recent surge. But the pandemic did not cause the preexisting inefficiencies inherited by USCIS. These structural issues have snowballed since USCIS was established and have entrenched inefficiencies which overwhelm the U.S. immigration system. The puzzling reality that hundreds of thousands of valid immigration openings have recently "expired" supports this claim. In 2021 alone, 230,000 green cards, 150,000 visas for family-based immigrants, and nearly 80,000 visas for employment-based immigrants went unused.² Such mismanagement is concerning for individuals seeking lawful entry to the United States and for advocates of effective public administration.

This Note examines USCIS's administrative responsibilities, root causes of the current backlog of pending immigration applications, and potential reforms to address the issue. Part I outlines how and why USCIS was established at the beginning of the 21st century. Consideration of USCIS's institutional design, vested duties, and statutory directives frames how USCIS can better achieve its legislative objectives. Part I also summarizes the types of immigration services handled by USCIS and describes how a typical immigration case proceeds, from receipt of the initial application through the decision-making process. It also explicates how public conception of the "backlog" is stilted because USCIS retains substantial deference over how to define the term "backlog." Part I then frames the prior USCIS logjam of cases—which developed during the Bush administration in the wake of 9/11—to contextualize the current issue in 2022.

Part II identifies underlying causes of the current backlog. These contributing factors—listed in order of causal importance by my estimation—include: structural causes (i.e. internal misadministration within USCIS), the COVID-19 pandemic, and shifts in substantive policies. The data behind substantive policy causes is sparser than conclusive evidence indicating the influence of structural causes and COVID-19. Nevertheless, political decisions create immigration policy, and thus are key to this study of USCIS. Next, Part II assesses problematic features of the backlog. To put it simply, why should we care? This Note proposes four main reasons: administrative waste, humanitarian costs, economic concerns, and loss of public trust.

Part III evaluates the prospects of reforms, namely recommendations to improve USCIS's processing times and thereby reduce case backlog. These recommendations gauge both internal measures, actions that USCIS can proactively take to more effectively handle the issue, and external measures, decisions beyond USCIS's control and within the discretion of two of the political branches of the U.S. government: Congress and the courts. This Note

2. *See Over 200,000 Green Cards Wasted in 2021 as Backlog Explodes*, BOUNDLESS IMMIGR. (Jan. 1, 2022), <https://perma.cc/FH8T-DLWY>.

charts the extent to which these political branches have pursued certain reforms under the American federalist system, and the benefits (and limits) of these measures. Part III posits that internal reforms within USCIS, coupled with external oversight from Congress and the courts, provide a comprehensive and suitable backlog reduction strategy. Finally, this Note concludes that internal reforms of USCIS reinforced by external oversight of the agency from Congress and the courts provide the most prudent strategy to reduce the U.S. immigration system's backlog.

I. USCIS AND ITS ADMINISTRATIVE ROLE

A. *Background on USCIS*

USCIS has recent origins. It was established on March 3, 2003 alongside its parent executive department: DHS. The birth of USCIS, vis-à-vis the creation of DHS, marked “the largest government reorganization since 1947, when Congress approved [President] Harry Truman’s Defense Department.”³ Like the Defense Department, developed months after World War II ended, DHS was formed after another major threat to U.S. national security: the September 11, 2001 attacks on New York City and Washington, D.C.⁴ After 9/11, President Bush created the Office of Homeland Security, via executive order, to pursue a “comprehensive national strategy to secure the United States from terrorist threats or attacks.”⁵

The creation of the Office of Homeland Security was just the first step in a broader push to overhaul post-9/11 American immigration policy. Political urgency galvanized efforts to implement wholesale administrative changes to achieve that objective.⁶ Following a presidentially-directed study by Homeland Security Advisor Tom Ridge, the White House proposed the creation of a Department of Homeland Security on June 6, 2002.⁷ Despite concerns from some Democrats that consolidation threatened federal union workers, Congress became largely receptive to implement immigration reforms that balanced heightened antiterrorism and national security concerns with efficient implementation of lawful immigration services.⁸ These

3. As President Truman guided the United States through the end of World War II, he lobbied Congress to unify the War and Navy Departments into one agency to increase the allocation of military resources and to eliminate waste due to lack of coordination. See Paul C. Light, *A Hollow Tribute: The creation of the Homeland Security Department, government's largest reorganization since the Truman days, likely will be the most difficult to manage*, BROOKINGS INST. (Aug. 1, 2002), <https://perma.cc/EBX5-YVMJ>.

4. See Sarah A. Binder & Molly E. Reynolds, *20 Years Later: The Lasting Impact of 9/11 on Congress*, BROOKINGS INST. (Aug. 27, 2021), perma.cc/J8GW-L3Z9.

5. Exec. Order No. 13,228, 66 Fed. Reg. 51,812 (Oct. 8, 2001), perma.cc/DFJ2-KMP6.

6. USCIS, OVERVIEW OF AGENCY HISTORY: POST-9/11 (last updated Dec. 4, 2021), perma.cc/8HSX-WFMS [hereinafter OVERVIEW OF AGENCY HISTORY].

7. See David Stout, *Bush Proposes Restructuring of Homeland Security*, N.Y. TIMES (June 6, 2002), perma.cc/8T4N-KMHJ.

8. See Richard W. Stevenson, *Threats and Responses: The President; Signing Homeland Security Bill, Bush Appoints Ridge as Secretary*, N.Y. TIMES (Nov. 26, 2002), perma.cc/6MFP-Q58F.

efforts culminated in the Homeland Security Act (HSA) of 2002, signed into law in November 2002 by President Bush.⁹ HSA received widespread support from a broad coalition of bipartisan members in the House of Representatives, and it was passed by a vote of 90-9 in the Senate.¹⁰

Under the HSA, Congress overhauled the federal agencies tasked with immigration services. The HSA dissolved the Immigration and Naturalization Service (INS) and transferred its functions to three separate agencies under the newly formed DHS—USCIS, Immigration and Customs Enforcement (ICE), and Customs and Border Patrol (CBP).¹¹ Moreover, under the statute, DHS integrated twenty-two federal agencies to pursue the President’s goal to “protect the American homeland.”¹² The HSA also created The Office of the Citizenship and Immigration Services Ombudsman (CIS Ombudsman), an independent office within DHS.¹³ It currently assists individuals and employers in resolving problems with USCIS, provides recommendations to fix problems with agency services, and submits an annual report on USCIS to Congress.¹⁴

Prior to the HSA, the INS had served an eighty-year run as the federal government’s chief actor for establishing immigration and naturalization policy.¹⁵ The INS was established under the Department of Labor in 1933 through the merger of the Bureau of Immigration and Bureau of Naturalization by President Franklin D. Roosevelt.¹⁶ In 1940, Roosevelt transferred the INS to the Department of Justice.¹⁷ Though Roosevelt assured Congress that he had no intent to deprive immigrants of “their civil liberties or otherwise impair their legal status,” he justified the decision based on the perceived need to “deal quickly with those aliens who conduct themselves in a manner that conflicts with the public interest.”¹⁸ The INS, housed in various agencies over the course of its lifespan, administered U.S. immigration policy for the better half of a century until Congress put USCIS at the helm of that mantle in 2003.¹⁹

9. *See id.*

10. U.S. SENATE, ROLL CALL VOTE 107TH CONGRESS – 2ND SESSION: ON PASSAGE OF THE BILL (H. R. 5005, AS AMENDED) (2002), <https://perma.cc/7BXA-7G7P>.

11. CBP and ICE both provide immigration enforcement and border security functions, yet they retain distinct administrative duties. CBP prevents drugs, weapons, terrorists, and other inadmissible persons from entering the U.S. ICE enforces criminal and civil laws governing border control, customs, trade, and immigration. *See* OVERVIEW OF AGENCY HISTORY, *supra* note 6.

12. PRESIDENT GEORGE W. BUSH, THE DEPARTMENT OF HOMELAND SECURITY 8 (2002), <https://perma.cc/DB5C-JNJ6>.

13. *See* 6 U.S.C. § 452 (providing legal authority for the CIS Ombudsman).

14. *See id.*

15. *See* Jessica Bolter, *Immigration Has Been a Defining, Often Contentious, Element Throughout U.S. History*, MIGRATION POL’Y INST. (Jan. 6, 2022), <https://perma.cc/6TZ7-XQEG>.

16. *See* Exec. Order No. 6166 § 14 (June 10, 1933), <https://perma.cc/MMK3-4Z7Y>.

17. *See* U.S. CITIZENSHIP AND IMMIGR. SERVS., OVERVIEW OF INS HISTORY: USCIS HISTORY OFFICE AND LIBRARY, 8 (2012), <https://perma.cc/T8Y3-72VM> [hereinafter OVERVIEW OF INS].

18. Reorganization Plan No. 5 of 1940, 54 Stat. 1238 (June 15, 1940), <https://perma.cc/X36Z-VXHQ>.

19. *See* OVERVIEW OF INS, *supra* note 17, at 11.

Unfortunately, USCIS inherited INS's share of inefficiencies, some of which have resulted in mismanagement that persists through present day.²⁰

Today, USCIS is responsible for three main activities.²¹ First, it handles adjudication of immigration petitions.²² These petitions include about fifty types of immigration requests, ranging from an Application for Employment Authorization to more discrete services such as an Application to Replace a Permanent Resident Card or a Genealogy Records Request.²³ Second, USCIS facilitates the naturalization process, through which eligible applicants become U.S. citizens.²⁴ Third, USCIS administers refugee and asylum claims, along with related humanitarian and international concerns on an as-needed basis.²⁵ USCIS's humanitarian efforts are provided via select directives to assist individuals displaced by war, famine, and political unrest.²⁶ For example, in March 2022 DHS announced that Sudanese and South Sudanese nationals were being offered Temporary Protected Status (TPS) for eighteen months, given the armed conflict and food crises in the region.²⁷ An additional, though less prevalent function of USCIS is the administration of other immigration-related services such as employment authorizations and nonimmigrant change-of-status petitions.²⁸ USCIS's core duties are handled by approximately 19,000 federal employees and contractors working at more than 200 offices around the world.²⁹

B. *Defining the Issue: What is Backlog?*

Part of the problem with USCIS's backlog is that the term itself is ill-defined. Lack of clarity regarding how to define the term backlog creates confusion for the agency, political branches of government, and individual applicants. In his written testimony to Congress in July 2019, Donald Neufeld, the Associate Director of USCIS's Service Center Operations Directorate, captured this ambiguity by defining "backlog" as "the number of pending cases

20. INS received a "D" rating from Government Executive's 2002 Federal Performance Report, which provided the following criticism: "Mediocre to poor performance in every management area persists except on services side, where fees support improvements." Light, *supra* note 3.

21. WILLIAM A. KANDEL, CONG. RSCH. SERV., RL44038, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS) FUNCTIONS AND FUNDING (2015), <https://perma.cc/5DP4-EXLR>.

22. *See id.* at 1.

23. Kandel, *supra* note 21, at 19-20.

24. Non-citizens may apply for naturalization by submitting a Form N-400; a \$640 filing fee, plus an additional \$85 biometric for certain applicants, is required for this application. *See* USCIS, OUR FEES, (last updated July 31, 2020), <https://perma.cc/7G6M-996S>.

25. Individuals seeking to come to the United States due to persecution may be eligible to apply for asylum by filing a Form I-589 application. There is no fee to apply. *See id.*

26. USCIS, AN OVERVIEW OF U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Mar. 2021), <https://perma.cc/C2LT-MNWX> [hereinafter OVERVIEW OF USCIS].

27. Press Release, Alejandro N. Mayorkas, Sec'y, Dep't. Homeland Sec., Secretary Mayorkas Designates Sudan and Extends and Redesignates South Sudan for Temporary Protected Status (Mar. 3, 2022), <https://perma.cc/Q8GE-AG9V>.

28. OVERVIEW OF USCIS, *supra* note 26.

29. USCIS, MISSION AND CORE VALUES (last updated Feb. 9, 2022), <https://perma.cc/V3F8-3S9L> [hereinafter MISSION AND CORE VALUES].

that have been in process longer than the processing goals set by USCIS.”³⁰ The dilemma here is striking; USCIS’s self-imposed processing goal informs its net backlog. Lengthening processing times would decrease the number of applications stuck in limbo. Shorter benchmarks would increase backlogged applications. Either move produces artificial results. Tinkering with processing times might reduce the number of backlogged applications on paper, and shield USCIS from public criticism and political scrutiny. But this would only lead to the mere appearance of progress rather than actual administrative achievement. In reality, the millions of individuals with backlogged applications would not receive faster processing times from USCIS.

Though USCIS’s operational definition of backlog is imprecise, Congress has previously provided a more cabined definition. In October 2000, Congress passed the Immigration Services and Infrastructure Improvements Act to provide USCIS’s predecessor (the INS) with mechanisms to eliminate its own backlog of immigration applications.³¹ Under that statute, Congress defined backlog in precise terms: “the period of time in excess of 180 days” that an immigration benefit application has been pending before the INS.³² However, USCIS does not follow this definition because the statute was never revised to apply to USCIS.³³ Instead, changes by USCIS to the definition of backlog have obscured the actual number of backlogged applications.³⁴ For this reason, the CIS Ombudsman warned in 2006 such “definitional changes hide the true problem and need for change” to achieve backlog elimination.³⁵ This concern remains a legitimate criticism of how USCIS manages its backlog.

C. *Historical Background: Prior USCIS Backlog*

U.S. immigration backlogs “are not a new phenomenon.”³⁶ As previously mentioned, USCIS inherited inefficiencies within the immigration system from the INS. In October 2000, the Immigration Services and Infrastructure Improvements Act mandated that the INS develop its own backlog elimination plan.³⁷ To achieve that objective, Congress provided appropriations in

30. *Joint Written Testimony of USCIS Officials: Policy Changes and Processing Delays at USCIS, Before the House Subcomm. on Immigration and Citizenship*, 116th Cong. 2, 3 (2019) (statement of Don Neufeld, Associate Director, Service Center Operations Directorate, USCIS) <https://perma.cc/86KM-MHCB>.

31. *See* Immigration Services and Infrastructure Improvements Act of 2000, 8 U.S.C. § 1572.

32. *See id.*

33. *See* U.S. GOV’T ACCOUNTABILITY OFF., GAO-06-20, IMMIGRATION BENEFITS: IMPROVEMENTS NEEDED TO ADDRESS BACKLOGS AND ENSURE QUALITY OF ADJUDICATIONS (2005), <https://perma.cc/8SFG-LL5K> [hereinafter IMMIGRATION BENEFITS].

34. *See id.*

35. USCIS OMBUDSMAN, ANNUAL REPORT TO CONGRESS: BACKLOGS AND PROLONGED PROCESSING TIMES (June 2006), <https://perma.cc/GZ83-7D3G>.

36. Neufeld, *supra* note 30, at 4.

37. *See* 8 U.S.C. § 1574.

fiscal year (FY) 2002 to fund a five-year, \$500 million program to achieve a universal six-month processing standard for all immigration benefit applications and petitions.³⁸ By late 2003, the year that USCIS was established under DHS, 6 million immigrant applications were awaiting adjudication, of which, 3.7 million applications were officially designated as backlogged.³⁹ USCIS attributed this particular pileup of applications, at least partially, to new security measures and background checks implemented after 9/11.⁴⁰ Regardless, USCIS has undeniably faced a fractured immigration system with burgeoning backlogs since its founding.

After its inception the newly formed USCIS strived to meet demands imposed by two institutional challenges: addressing prior backlog from its predecessor, while carving out its newfound role to improve security measures for post-9/11 U.S. immigration. On June 26, 2004, Director of USCIS Eduardo Aguirre submitted a revised plan to Congress to meet the HSA requirement that USCIS inform Congress of its plans to reduce its load of non-immigrant, immigrant, naturalization, and asylum/refugee applications and petitions.⁴¹ That plan outlined “goals and strategies that would be employed to eliminate [the] backlog.”⁴² Moreover, on September 30, 2004, USCIS renewed its commitment to meeting its statutory mandate “to eliminate the backlog and adjudicate all applications within six months.”⁴³ Despite subsequent reports tracking USCIS’s progress and gauging certain strategies to implement reforms, current backlog data indicates that this goal remains an elusive objective.

D. *The Current Backlog*

As of March 2022, USCIS faces a backlog of about 9.5 million cases, a surge from the 5.7 million applications that were outstanding at the end 2019.⁴⁴ According to research published by the Migration Policy Institute in February 2022, shown in [Figure 1](#) below, the backlog has steadily increased over the past decade.⁴⁵

38. See IMMIGRATION BENEFITS, *supra* note 33, at 3.

39. See *id.*

40. Since 2003, USCIS has required that every applicant undergo a national security and background check. See

USCIS, POLICY MANUAL: CHAPTER 6 – REQUIRED BACKGROUND CHECKS (last updated May 6, 2022), <https://perma.cc/9GUU-KSYD>.

41. See USCIS, BACKLOG ELIMINATION PLAN: FY 2006, 1ST QUARTER UPDATE, at iii. (Aug. 7, 2006), <https://perma.cc/CV6C-6BUE> [hereinafter BACKLOG ELIMINATION PLAN: FY 2006].

42. *Id.*

43. IMMIGRATION BENEFITS, *supra* note 33.

44. Chishti & Gelatt, *supra* note 1.

45. See *id.*

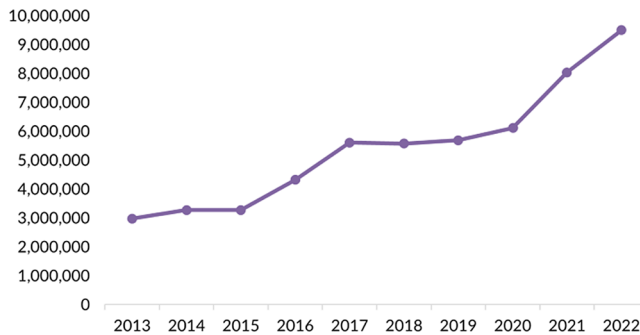


Figure 1. – Chart from Analysis by the Migration Policy Institute of USCIS Data⁴⁶

Backlogged applications often leave individuals, their families, and their employers awaiting decisions for an extremely unpredictable amount of time.⁴⁷ For example, the current wait for green card applications filed by an individual seeking asylum in the United States ranges anywhere from 25 to 52 months.⁴⁸ These administrative delays pose a myriad of downstream problems, including individualized harms to specific applicants and their families, as well as broader injury to national interests like economic growth, particularly when coupled with unemployment issues. Part II of this Note provides more thorough discussion of these problems.

II. CAUSES AND PROBLEMATIC FEATURES OF THE BACKLOG

A. *How Did We Get Here?*

The causes of USCIS’s backlog are multidimensional. Three contributing factors are structural deficiencies, COVID-19, and substantive policy shifts. These factors have led to the waste of USCIS’s resources, restricted its ability to respond to crises, and increased administrative obligations that practically divert USCIS’s ability to remedy the issue. Although these underlying causes of USCIS’s backlog are categorically distinct, they have produced interrelated administrative challenges. In tandem, these factors have roadblocked efficient processing of immigration applications.

1. *Structural Causes*

Structural deficiencies within USCIS are the first-order cause of the backlog. USCIS’s reliance on outdated information technology (IT) has been the most pernicious problem. To oversimplify the issue, paper-based processes,

46. See *id.* at fig.1 (“Figures for fiscal year (FY) 2013 through FY 2021 show the number of pending applications of all types at [USCIS] . . . as of the end of the fiscal year. FY 2022 data reflect the number of pending applications as of February 2022.”).

47. See Suzanne Monyak, *Immigrants with Asylum Put Lives on Hold over Green Card Waits*, ROLL CALL (Mar. 16, 2022), <https://perma.cc/AX43-VPKK>.

48. See *id.*

non-integrated IT systems, and depleted IT infrastructure supported by outdated hardware are just three ways that USCIS's technology has lagged over the years.⁴⁹ Paper-based processing has particularly delayed the adjudication of pending naturalization cases.⁵⁰ USCIS stores nearly 52 million hard-copy Alien files (A-files)—which contain immigration records for any non-naturalized individual—at three Federal record Centers (FRCs) in Kansas City, Missouri.⁵¹ This paper-based processing costs USCIS millions of dollars per year in shipping and storage fees.⁵² Ineffective uses of human and digital resources have resulted in reduced productivity and duplicative work for USCIS.⁵³ In turn, navigating USCIS's non-integrated information systems creates difficulties for the public.⁵⁴ USCIS's slow transition to digital services proved particularly problematic during the pandemic.⁵⁵

Insufficient staffing and non-existent performance measures are two other structural factors that contributed to increased processing times. According to a 2021 report from the Government Accountability Office (GAO), insufficient agency staffing has resulted from USCIS's failure to anticipate risk factors, like hiring delays or attrition, and lack of long-term strategies for acquiring, developing, and retaining staff.⁵⁶ These inefficiencies have limited USCIS's ability to implement backlog reduction plans. Similarly, the agency has not adopted performance measures or internal mechanisms to assess how its policies affect process times. A disconnect has developed between backlog reduction and USCIS's on-the-ground administration.

2. COVID-19

COVID-19 undeniably worsened USCIS's backlog through two unforeseeable challenges: reduced operational capacity and severe fiscal insecurity. On March 18, 2020, less than two months after the pandemic hit the United States, USCIS suspended its in-person services “to help slow the spread of coronavirus.”⁵⁷ These services remained closed until June 4, 2020 to ensure

49. DHS OFFICE OF INSPECTOR GENERAL, USCIS FACES CHALLENGES IN MODERNIZING INFORMATION TECHNOLOGY at 2 (Sept. 2005), <https://perma.cc/ZQ2G-9VML> [hereinafter USCIS FACES CHALLENGES].

50. See *id.* at 3.

51. Letter from Sens. Edward J. Markey and Elizabeth Warren, to Hon. David S. Ferriero, Archivist of the U.S., NAT'L ARCHIVES AND RECS. ADMIN. (Feb. 11, 2022), <https://perma.cc/5MX4-EFQH> (“The diminished FRC operational capacity continues to slow down the processing of N-400s, with serious consequences for individuals and families nationwide.”).

52. See USCIS FACES CHALLENGES, *supra* note 49, at 4.

53. See *id.* at 5–6.

54. See, e.g., Paul Stern & Sharvari Dalal-Dheini, *Walled Off: How USCIS Has Closed Its Doors on Customers and Strayed from Its Statutory Customer Service Mission*, AILA (Feb. 12, 2022), <https://perma.cc/2QRQ-AQA4>.

55. See Andrew Kreighbaum, *Archaic System Slowed Immigration Benefits Amid Pandemic: Report*, BLOOMBERG L. (Jan. 3, 2022), <https://perma.cc/J3Z3-CYCC>.

56. See *U.S. Citizenship And Immigration Services: Actions Needed to Address Pending Caseload*, GAO 38 (Aug. 18, 2021), <https://perma.cc/4U94-M7WB>.

57. *USCIS Preparing to Resume Public Services on June 4*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (May 27, 2020), <https://perma.cc/98DP-LYW4> (noting USCIS's “reliance on paper files limited its ability to process benefits even after reopening offices during the Covid-19 pandemic.”).

employee and customer safety.⁵⁸ Shutdown of operations resulted in immediate cancellations of about 280,000 interview appointments.⁵⁹ Even after USCIS rescheduled these appointments, it did so with reduced capacity.⁶⁰ USCIS did institute several novel responses to combat a complete agency shutdown. But the drive-through oath ceremonies and remote interviews instituted to maintain baseline efficiency were never designed to reverse the general backlog trend.⁶¹ These measures merely aimed to lessen new strains on USCIS's backlog.

Field office closures severely reduced USCIS's operational capacity. According to the Office of Ombudsman's 2021 Annual Report, even when USCIS field offices began to gradually open in June, they still suffered from reduced services and limited staff.⁶² Though all field offices opened in October 2020, they were only permitted to provide services at roughly 50% capacity.⁶³ Processing times of existing immigration applications consequently mounted while a host of new applications added to the already-growing backlog. Further, given the reduced staff, the Application Support Centers were forced to operate at 65% to 70% capacity.⁶⁴ Since USCIS's storage facilities in Kansas City were closed through much of the pandemic, backups of more than 350,000 requests for immigration histories have accumulated as of January 2022.⁶⁵ Whereas mobilization to work-from-home proved largely effective for the private sector, reliance on paper files and limited digital capacity constrained USCIS's response to the pandemic.⁶⁶

The pandemic also exacerbated USCIS's fiscal insecurity. Field office closures and suspension of in-person services after the pandemic began to shut off USCIS's primary source of funding: fee revenue.⁶⁷ USCIS receives approximately 97% of its annual funding from fees paid by applicants requesting immigration benefits.⁶⁸ Lack of fee revenue, reduced to 32% during the months of office closure as compared with the same time period in 2019, quashed a substantial portion of the agency's annual budget.⁶⁹ As a

58. *Id.*

59. See Letter from Rep. Elaine G. Luria to Tracy Renaud, Acting Dir., USCIS (May 4, 2021), <https://perma.cc/G6XY-MN7T>.

60. See Letter from Tracy Renaud, Acting Dir., USCIS, to Rep. Elaine G. Luria (May 18, 2021), <https://perma.cc/62SE-EEJ9>.

61. USCIS, FIELD OPERATIONS DIRECTORATE CITIZENSHIP BRANCH, OVERVIEW NATURALIZATION PROCESS AND CITIZENSHIP ACQUISITION (Mar. 25, 2021), <https://perma.cc/52GP-5BAU>.

62. USCIS OMBUDSMAN, ANNUAL REPORT TO CONGRESS (June 30, 2021), <https://perma.cc/Y6K2-RWJG> [hereinafter ANNUAL REPORT: 2021].

63. See *id.* at 8.

64. See *id.* at 10.

65. See Michelle Hackman, *With Paper Locked Underground, Thousands of U.S. Citizenship Applicants Wait and Wait*, WALL ST. J. (Jan. 24, 2022), <https://perma.cc/9EWK-F6Z5>.

66. See Susan Lund & Anu Madgavkar, *What's Next For Remote Work: An Analysis of 2,000 Tasks, 800 Jobs, and Nine Countries*, MCKINSEY, (Nov. 23, 2022), <https://perma.cc/M9UJ-3TXV>.

67. DEP'T OF HOMELAND SEC., CONTINUED RELIANCE ON MANUAL PROCESSING SLOWED USCIS' BENEFITS DELIVERY DURING THE COVID-19 PANDEMIC (Dec. 28, 2021), <https://perma.cc/3AXX-ZMPQ> [hereinafter CONTINUED RELIANCE ON MANUAL PROCESSING].

68. See *id.* at 13.

69. See *id.* at 14.

result, just two months after the pandemic, “Deputy Director for Policy Joseph Edlow, the acting head of USCIS, notified Congress of a projected pandemic-related budget shortfall and requested emergency funding of \$1.2 billion.”⁷⁰ Director Edlow testified before Congress on August 30, 2020, that due to the deficit, USCIS had issued furlough notices to “nearly 70 percent of [employees] and informed them that without funding from Congress, we will have no choice but to proceed with large-scale furloughs.”⁷¹

USCIS ultimately avoided a furlough “as a result of unprecedented spending cuts and a steady increase in daily incoming revenue and receipts.”⁷² However, since Congress declined to appropriate emergency funding as USCIS had requested, the agency chose to “implement severe cost cutting efforts” which harmed agency operations and resulted “in the descoping of contracts and a reduction in the number of contractors who assist our federal workforce.”⁷³ At the time, Director Edlow anticipated that averting the furlough would produce “costs that will increase backlogs and wait times across the board.”⁷⁴ Edlow’s remarks proved prescient. These cuts continue to adversely impact USCIS’s operations and administrative functions.

3. *Substantive Policies*

A final explanation for USCIS’s surging backlog is shifting substantive policies. This factor characterizes political decisions that inform how administrative agencies like USCIS are directed or positioned to achieve certain goals pursued by a given presidential administration. Indeed, politicians on both sides of the aisle have blamed their opponents’ policies for spurring USCIS’s growing backlog.⁷⁵ The divergence between these political perspectives was evident on July 22, 2019, when USCIS staff and several experts testified before the House Judiciary Committee.⁷⁶ Democrats like Rep. Victoria Escobar from Texas blamed Trump administration policies for draining USCIS’s resources. Escobar cited the “Public Charge Rule,” proposed in October 2018 to heighten the eligibility standard for determining if an individual may receive public benefits, as a misguided regulation worsening the problem.⁷⁷ Marketa Lindt, President of American Immigration Lawyers Association (AILA), identified three other Trump

70. ANNUAL REPORT: 2021, *supra* note 62, at 9.

71. *Id.* at 3.

72. U.S. CITIZENSHIP AND IMMIGR. SERVS., USCIS AVERTS FURLOUGH OF NEARLY 70% OF WORKFORCE, (Aug. 25, 2020), <https://perma.cc/C2YM-NQHN> [hereinafter USCIS AVERTS FURLOUGH].

73. ANNUAL REPORT: 2021, *supra* note 62, at 9.

74. See USCIS AVERTS FURLOUGH, *supra* note 72.

75. See Michael Volpe, *What is Causing the Multi-Million Applicant Backlog at USCIS?*, AL DÍA (July 22, 2019), <https://perma.cc/5FWK-N72W>.

76. See *id.*

77. *Id.*; On February 23, 2022, the Supreme Court heard oral argument for a challenge to the “Public Charge” rule. *Arizona v. City and Cty. of San Francisco*, 142 S. Ct. 1926 (2022). See Adam Liptak, *Supreme Court Weighs Whether States May Defend a Trump Immigration Policy*, N.Y. TIMES (Feb. 23, 2022), <https://perma.cc/PDA2-E6XX>.

policies as increasing strains on USCIS.⁷⁸ But Republicans like Rep. Ken Buck from Colorado pointed fingers at Obama-era policies like the Deferred Action for Childhood Arrivals (DACA) for causing “long adjudication wait times for immediate relative green applications, among other immigration benefits.”⁷⁹ Center for Immigration Studies (CIS) Policy Director Jessica Vaughan agreed with Buck’s contention. Vaughan blamed DACA as the policy change “most responsible for the backlog” and increasing it to more than 2.4 million applications.⁸⁰ Despite partisan division on the topic, substantive policies from both sides of the aisle have contributed to USCIS’s backlog. These policies have increased obligations on USCIS without providing sufficient time, funding, or guidance for how to effectively balance new agency priorities.

USCIS has identified DACA, implemented during the Obama administration, as a substantive policy shift that increased its processing delays.⁸¹ After legislation to streamline a process for immigrants to apply for conditional, and eventually permanent, residency stalled in Congress, President Obama instituted DACA via executive order on June 15, 2012.⁸² The policy sought to protect nearly 800,000 young individuals— (“DREAMers”)—who immigrated to the United States as children from deportation.⁸³ Setting aside separate policy debates raised by DACA, USCIS has confirmed that enforcing the policy accelerated the backlog by forcing the “diversion of USCIS resources to adjudicating DACA requests.”⁸⁴ Since USCIS had only two months to implement the program, DACA-related bureaucracy overwhelmed immigration service centers tasked with handling both green card applications and the deferral program, resulting in increased wait times for Americans with green card applications.⁸⁵ Within DACA’s first year of existence the wait period for an American to “obtain a green card for a spouse, child, or parent” swelled from five months to fifteen months, and more than 500,000 applications became stuck in the pipeline.⁸⁶

At the same time, politically-charged efforts to limit legal immigration services during the Trump administration aggravated pressures on USCIS. Trump administration policies expressly aimed to undermine USCIS’s

78. See Volpe, *supra* note 75.

79. See *id.*

80. *Id.*

81. See Neufeld, *supra* note 30, at 5.

82. Exec. Order No. 14,012, 86 Fed. Reg. 8277 (June 15, 2012), <https://perma.cc/B9YT-WYSP>.

83. See Tom Jawetz & Nicole Prchal Svajlenka, *Thousands of DACA Recipients Are Already Losing Their Protection From Deportation*, AM. PROGRESS (Mar. 5, 2018), <https://perma.cc/8YDY-P937>.

84. Neufeld, *supra* note 30, at 5.

85. See Julia Preston, *Program Benefiting Some Immigrants Extends Visa Wait for Others*, N.Y. TIMES (Feb. 8, 2014), <https://perma.cc/DE8P-7PBF>.

86. *Id.*; According to USCIS information shared with the Senate Judiciary Committee in 2015, it “made initial risk-based resource allocation decisions so that all USCIS customers are given the attention and service they deserve” after incurring an increased workload due to DACA. Letter from USCIS, to Sens. Chuck Grassley, Ron Johnson, Jeff Sessions, at 7 (Jan. 22, 2015), <https://perma.cc/DE8P-7PBF>.

efficiency. These measures typify what law professors Jody Freeman and Sharon Jacobs call “structural deregulation,” the use of presidential authority to systematically thwart “an agency’s ability to execute its statutory mandate.”⁸⁷ The numbers support that claim. Analysis of USCIS data by the American Immigration Lawyers Association (AILA) indicates that the average case processing time for all application types increased by 46% from FY 2016 (the last year of the Obama administration) to 2018.⁸⁸ Restrictive immigration policies, advocated by President Trump and promoted under his administration, increased bureaucratization for USCIS to intentionally stall processing times. For example, the Trump administration lengthened application forms, required more green-card applicants to attend in-person interviews, and subjected renewal applications to increased scrutiny.⁸⁹ These changes forced USCIS to spend more resources and time on applications.⁹⁰

USCIS’s unsteady mission statement exemplifies how substantive policies have stalled backlog reduction. In 2018, the Trump administration issued a revised USCIS mission statement, emphasizing that USCIS “administers the nation’s lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honoring our values.”⁹¹ That change eliminated a passage describing the United States as “a nation of immigrants” and reference to applicants as “customers.”⁹² According to USCIS Director Francis Cissna, the latter change aimed to shift USCIS away from an institutional culture that emphasizes the “ultimate satisfaction of applicants and petitioners, rather than the correct adjudication of such applications and petitions according to the law. Use of the term leads to the erroneous belief that applicants and petitioners, rather than the American people, are whom we ultimately serve.”⁹³ Though it is difficult to pinpoint the mission statement change as one specific to the backlog, the change exemplifies how the Trump administration steered USCIS away from a service-based culture, a corollary of efficient application processing, to one that prioritized reducing legal immigration.

B. *Why Does it Matter? Problematic Features of the Backlog*

Backlog in the U.S. immigration system poses four problematic features: administrative waste, humanitarian costs, economic concerns, and loss of

87. Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 587 (2021) (defining structural deregulation), <https://perma.cc/7XEX-673D>.

88. Walter Ewing, *USCIS Processing Times Get Even Slower Under Trump*, IMMIGRATION IMPACT (Feb. 4, 2019), <https://perma.cc/5ERQ-4YEV>.

89. Chishti & Gelatt, *supra* note 1.

90. *Id.*

91. USCIS, DIRECTOR L. FRANCIS CISSNA ON NEW AGENCY MISSION STATEMENT (Feb. 22, 2018), <https://perma.cc/9MKK-XV6B> [hereinafter DIRECTOR CISSNA ON NEW MISSION STATEMENT].

92. *See id.*

93. *Id.*

public trust. These consequences, though not exhaustive, touch on a range of issues that undermine USCIS's core functions, abandon immigrant populations in need, subvert national interests, and undercut public trust in U.S. immigration services. They collectively demonstrate why USCIS's backlog is concerning.

1. *Administrative Waste*

From an administrative perspective, USCIS's backlog is problematic chiefly because it is wasteful. When Congress created USCIS, it aimed to make national immigration services more efficient.⁹⁴ USCIS's failure to issue hundreds of thousands of valid green cards is the most recent example of how that goal has been neglected.⁹⁵ As the number of pending immigration cases increases without meaningful reform, federal funds—in addition to less calculable government resources like time—are being squandered. Political decisions, national security precautions, and policy concerns likely influence processing delays depending on current events and the priorities of the incumbent presidential administration. But the historic level of administrative waste at USCIS is beyond the pale and exceeds such norms. The discussion of USCIS's backlog in Part I, Section D of this Note indicates how USCIS has been unable to restrain its administrative waste.

Administrative waste creates existential risks to USCIS's role in public administration. Specifically, USCIS's backlog undercuts its administrative capacity and competence.⁹⁶ Whereas agency capacity is met when government resources are directed to achieve specific regulatory interests (such as efficient immigration services), administrative competence depends on an agency's ability to spend those resources in an effective manner.⁹⁷ Since providing efficient implementation of immigration services was a cornerstone of Congress's rationale for establishing USCIS in the first place, the agency's capacity is circumscribed by that legislative aim.⁹⁸ For reasons highlighted throughout this Note, USCIS's backlog hinders its ability to achieve that statutory objective. Conversely, USCIS's backlog saddles its administrative competence because without the backlog, the agency could more effectively allocate its resources, funding, and attention to pursue its broader administrative agenda, namely ensuring national security and antiterrorism – goals

94. See Homeland Security Act of 2002, H.R. 5005, 107th Cong. § 451 (5).

95. BOUNDLESS IMMIGR., *supra* note 2.

96. See ELIZABETH FISHER & SIDNEY A. SHAPIRO, ADMINISTRATIVE COMPETENCE: REIMAGINING ADMINISTRATIVE LAW 4–5 (2020).

97. See *id.*

98. See Stevenson, *supra* note 8.

which Congress determined were paramount in the wake of 9/11.⁹⁹ By undermining USCIS's capacity and its competence, the backlog constrains USCIS's ability to deliver its legislative mandates and corrodes its legal authority to do so. In this way, USCIS is stuck in a vegetative-like state.

2. Humanitarian Costs

USCIS's backlog also poses considerable humanitarian costs. Delays in immigration services particularly reinforce barriers for immigrants seeking refuge in the United States.¹⁰⁰ For instance, consider the Afghan refugee crisis. The sudden withdrawal of U.S. troops from Afghanistan in August 2021 led to the evacuation of thousands of Afghan nationals.¹⁰¹ Since then, more than 40,000 Afghan refugees have sought humanitarian parole or application for temporary lawful status in the United States.¹⁰² However, due to USCIS's backlog, few of these individuals have received a final application decision.¹⁰³ After the Taliban took control of the Afghan government, Afghan nationals who were unable to lawfully relocate elsewhere have faced human rights violations, food insecurity, and dismal economic opportunities.¹⁰⁴ USCIS's logjam of humanitarian parole applications is not the primary cause of these humanitarian issues, but it magnifies their duration by creating additional uncertainty for refugees stuck in administrative limbo.¹⁰⁵ Since these crises are unpredictable, backlog hamstringing USCIS's capacity to respond to forthcoming emergencies, whether from warfare or natural disaster, with the utmost urgency.¹⁰⁶ This also undermines U.S. diplomatic objectives that

99. *See id.*

100. In addition, USCIS backlog presents humanitarian concerns in non-crisis situations. Increased processing delays for visa applications often leaves immigrants stuck in administrative limbo. One of the more troubling realities of this situation is that immigrant families are often forced to live apart for long periods of time. *See Immigration Backlogs are Separating American Families*, NAT'L IMMIGR. F. (July 26, 2012), <https://perma.cc/86R6-UWEJ>.

101. *See, e.g.*, Dan Lamothe, *Documents Reveal U.S. Military's Frustration with White House, Diplomats Over Afghanistan Evacuation*, WASH. POST (Feb. 8, 2022), <https://perma.cc/2EZ5-ZZCR>.

102. *See* Raul Pinto, *Why Are Afghans Facing Significant Delays in Humanitarian Parole and Refugee Processing?*, IMMIGR. IMPACT (Mar. 17, 2022), <https://perma.cc/F4B3-R3U4>.

103. As of February 11, 2022, USCIS has processed less than 5% (fewer than 2,000) of these applications. Out of that group of applications, 1,500 have been denied; 170 have been approved. *See* Miriam Jordan, *Afghans Who Bet on Fast Path to the U.S. Are Facing a Closed Door*, N.Y. TIMES (Feb. 16, 2022), <https://perma.cc/T5E7-69XQ>; *see also* David J. Bier, *CBP Should Grant Parole to Fleeing Ukrainians Using ESTA*, CATO INST. (Mar. 2, 2022), <https://perma.cc/H8XX-QWE7> (noting, "it may take several decades to merely process all the applications through USCIS's paper-based parole process.").

104. *See* Lindsay Maizland, *The Taliban in Afghanistan*, COUNCIL ON FOREIGN REL. (Aug. 17, 2022), <https://perma.cc/T8SJ-H2AD>; In a letter addressed to the Biden administration on December 14, 2021, dozens of organizations—including legal services providers, resettlement agencies, law firms, and law school clinics—"expressed [their] extreme concern regarding the exclusionary approach" taken by USCIS towards the Afghans "who have applied for Humanitarian Parole to the United States." *Joint Letter to Biden Administration Expressive Concern Regarding Humanitarian Parole Denials for Afghans*, HUM. RTS. WATCH (Dec. 14, 2021), <https://perma.cc/7JAG-BDEW>.

105. *See* Samantha Howland Zelaya, *Explainer: Humanitarian Parole*, NAT'L IMMIGR. F. (Mar. 24, 2022), <https://perma.cc/8DYC-58ZS>.

106. For example, Russia's invasion of Ukraine in February 2022, has produced a recent humanitarian crisis. On March 3, 2022 the Biden administration issued TPS to Ukrainians already in the United

often accompany responses to humanitarian crises.¹⁰⁷

In addition to delaying application decisions for refugees, USCIS's backlog contributes to humanitarian costs for other immigrants whose applications are awaiting determination. For non-refugee applicants experiencing processing delays with their respective immigration benefits—whether a green card, work authorization, or citizenship—the backlog is not an abstract example of government inefficiency for academic study; it is a personal impediment. For instance, Naina Arora, who came to the United States in November 2018 to work in the operations department of a major health-insurance company in California, has experienced the first-hand burdens of grappling with USCIS's misadministration.¹⁰⁸ Arora's work permit expired in October 2021; since then, she has been placed on unpaid leave by her employer and left in bureaucratic limbo by USCIS without a clear timeline.¹⁰⁹ Still, unpaid leave is perhaps the best outcome that someone in Arora's situation can hope for. Other applicants, who like Arora have had work permits expire but have been fired by their employer, often resort to under-the-table employment to make ends meet for themselves and their families.¹¹⁰ Otherwise, immigrants waiting for permits rely on savings (if they have them) to cover living expenses, health care costs, and immigration fees.¹¹¹ USCIS delays create financial strains and emotional hardship particularly deleterious for immigrants.¹¹²

3. *Economic Concerns*

USCIS's backlog hinders economic development because it limits legal entry to individuals who are seeking to immediately join the U.S. workforce. At the end of FY 2021 nearly 1.5 million noncitizens were awaiting work permits from the federal government.¹¹³ This occurred amidst the United States'

States. Given lagging wait time for TPS applications submitted by Afghan refugees, Ukrainians will likely face further bureaucratic obstacles. ("With the TPS application backlog now being approximately 315,000 and recent announcement of TPS for Afghans, the wait time for Ukrainians to receive TPS will only increase, leading to more insecurity.") See Joshua Rodriguez, *Providing Temporary Protection to Ukraine: What the U.S. Can Learn From the EU*, NISKANEN CENT. (Apr. 20, 2022), <https://perma.cc/VT5F-LUK6>.

107. See, e.g., EMILY M. MORGENSTERN & NICK M. BROWN, CONG. RSCH. SERV., RL40213, *FOREIGN ASSISTANCE: AN INTRODUCTION TO U.S. PROGRAMS AND POLICY* (2022) (noting that "[t]he predominant theme of U.S. assistance programs has been national security," particularly after the terrorist attacks of September 11, 2001), <https://perma.cc/K7GV-ZXK8>.

108. See Dara Lind, *U.S. Work-Permit Backlog is Costing Immigrants Their Jobs*, BLOOMBERG (Mar. 15, 2022), <https://perma.cc/P2DS-PAC3>.

109. *Id.*

110. *Id.*

111. See Allison McNeely, *How USCIS Visa Processing Time Delays Are Hurting Immigrant Workers and Jobs*, BLOOMBERG (Mar. 4, 2022), <https://perma.cc/U9HE-5F9F>.

112. See Aishvarya Kavi, *They Grew Up Legally in the U.S., but Can't Stay After They Turn 21*, N. Y. TIMES (Apr. 30, 2022), <https://perma.cc/P8ZV-PSFJ>.

113. DHS OFFICE OF INSPECTOR GENERAL, NUMBER OF SERVICE-WIDE FORMS BY QUARTER, FORM STATUS AND PROCESSING TIME, FY 2021, QUARTER 4 (Nov. 2021), <https://perma.cc/PT8D-69AV>. This marks a considerable surge from 676,000 pending employment authorization applications in March 2020. See, e.g., Arturo Castellanos-Canales, *America's Labor Shortage: How Immigration Levels Accentuated*

largest labor shortage since World War II.¹¹⁴ According to the Labor Department, there were 11.3 million job openings in January 2022.¹¹⁵ Lower labor force participation contributes to at least three undesirable economic conditions: high inflation, reduced output and opportunity costs, and strains on supply chains.¹¹⁶ USCIS delays in approving work-permit renewals magnifies these economic issues.¹¹⁷ This harms businesses and stifles economic growth. Since major industries such as agriculture, technology, healthcare, transportation, and hospitality rely on immigrant workers for a substantial percentage of their workforce, USCIS's backlog prevents immigrants from filling workforce gaps during severe labor shortages, historic inflation rates, and unprecedented supply chain disruptions.¹¹⁸

Like labor shortages, economic trends are spurred by several factors.¹¹⁹ With that in mind, elimination of USCIS's backlogged work permit applications cannot guarantee economic progress.¹²⁰ However, the complex reality affecting the country's macroeconomic conditions should not obscure recognition that USCIS's backlog hampers economic opportunities. According to Giovanni Peri and Reem Zaiour, economists at the University of California Davis, "[the] dramatic drop in foreign labor supply growth is likely a contributor to the current worker shortages," and possibly responsible for impeding "economic recovery and growth."¹²¹ These economic issues produce downstream consequences that harm American business owners and consumers, many of whom are not personally seeking immigration services from USCIS. For example, supply chain disruption, caused by shortages of truckers and warehouse workers, precipitate volatile prices and delivery delays.¹²² To leave USCIS's backlog of work permit applications unaddressed perpetuates the labor shortage. It, therefore, stalls the U.S. economy.

the Problem and How Immigration Can Fix It, NAT'L IMMIGR. F. (June 6, 2002), <https://perma.cc/9AR4-MT5Q/>.

114. See Allison McNeely, *The US is in the Middle of the Biggest Labor Shortage Since WW2*, *Goldman Sachs Says*, BUS. INSIDER (Feb. 24, 2022), <https://perma.cc/3YF8-PLFQ>.

115. USDL NEWS RELEASE, USDL-02200785 (Mar. 3, 2022), <https://perma.cc/P5LT-HDWB>.

116. See Bill Conerly, *The Labor Shortage Is Why Supply Chains Are Disrupted*, FORBES (July 7, 2021), <https://perma.cc/RJ3T-7VJN>.

117. At the end of 2021 approximately 278,700 work permit renewals were backlogged. Lind, *supra* note 108.

118. Castellanos-Canales, *supra* note 113; see also Nicole Narea, *Immigrants Could Help the US Labor Shortage – If the Government Would let Them*, VOX (Feb. 16, 2022), <https://perma.cc/85QU-2HN4>.

119. See Loretta J. Mester, *Long-Run Economic Growth*, NYU STERN CTR. FOR GLOB. ECON. AND BUS. (Oct. 15, 2015), <https://perma.cc/89DG-Z8ME>.

120. See Castellanos-Canales, *supra* note 113 (explaining that several factors, including the pandemic, America's aging population, increased rates of retirement, and poor childcare options, have contributed to labor shortage and economic recession).

121. See Giovanni Peri & Reem Zaiour, *Labor Shortages and the Immigration Shortfall*, THE ECONOFAC NETWORK (Jan. 11, 2022), <https://perma.cc/Q4PP-ZKM5>.

122. See Peter S. Goodman, *How the Supply Chain Broke, and Why It Won't Be Fixed Anytime Soon*, N.Y. TIMES (Oct. 31, 2021) <https://perma.cc/96AY-NHZN>.

4. *Loss of Public Trust*

Finally, USCIS's backlog harms public trust in the federal government. Fewer than one-quarter of Americans report that they trust the U.S. government to do the right thing most of the time.¹²³ Though dispositive research linking USCIS's gridlock and low public trust is lacking, Congress has identified the issue, suggesting that this concern is not merely hypothetical. In a June 2018 letter to USCIS, fifty members of Congress stressed that expansion "of the naturalization backlog undermines public trust."¹²⁴ Likewise, given that part of President Biden's February 2021 executive order directed the Secretary of Homeland Security, along with the Secretary of State and the Attorney General, to support efforts to restore "Trust in our Legal Immigration System," public skepticism of the U.S. immigration system is at least discernible.¹²⁵

USCIS can only administer immigration services in a transparent and efficient manner if the broader public remains willing to engage with the agency. In other words, public trust—although difficult to quantify unlike processing delays, wasted green card numbers, and naturalization approvals—is key to healthy administration of USCIS. If American citizens and U.S. immigrants view USCIS as a bureaucratic nightmare, then Congress will become less willing to allocate proper funding and people will be less inclined to work with the agency.¹²⁶ Such concern exists both for immigrants directly experiencing backlog inefficiencies and observers who learn about it from the news. In turn, prospective citizens, employees, and residents will suffer additional consequences, like ballooning wait times for immigration benefits or closed doors to citizenship. These conditions aggravate the three previously identified problems posed by backlog—administrative waste, humanitarian costs, and economic concerns.

III. REFORMS FOR BACKLOG REDUCTION

Given the longstanding causes of USCIS's backlog and the pernicious problems it perpetuates, there are compelling reasons to prioritize backlog reduction. This Part considers internal measures and external measures to achieve that goal. Ultimately, this Part concludes that the most effective backlog reduction strategy requires internal reforms (within USCIS) and external oversight (from Congress and courts), though much should be accomplished internally.

123. *Public Trust in Government: 1958-2022*, PEW RSCH. CTR. (June 6, 2022) <https://perma.cc/26S3-FUYU>.

124. Letter from Rep. Zoe Lofgren to Hon. L. Francis Cissna, Dir., U.S. Citizenship and Immigr. Servs. (June 29, 2018) <https://perma.cc/F7VM-HK68> (stating that "[T]he agency clearly needs to invest further resources and increase staff to expand capacity and return processing times to the agency's stated goal of six months of less.>").

125. See Exec. Order No. 14,012, 86 Fed. Reg. 8,277 (Feb. 2, 2021).

126. See Billy Morgan, *Why Public Distrust Could Prove 'corrosive' to U.S. Democracy*, UCHICAGO NEWS (Mar. 26, 2019), <https://perma.cc/6QQU-MHRE> (interviewing William Howell).

A. *Internal Measures*

Internal measures, developed by USCIS, should target the main backlog cause: structural deficiencies. To recap, USCIS's structural deficiencies are outdated IT, insufficient staffing, and lack of performance measures.¹²⁷ USCIS recently took more initiative to address these deficiencies on March 29, 2022, when it announced three new measures to reduce its backlog.¹²⁸ These plans specifically aim to reduce wait times, expand premium processing, and streamline process for Employment Authorization Documents (EAD).¹²⁹ First, USCIS aims to establish new internal cycle time goals by September 2023.¹³⁰ It has also pledged to expand staffing and modernize its internal processes via technological upgrades.¹³¹ Second, USCIS will offer premium processing—allowing some individuals to expedite their applications by paying between \$1,500 to \$2,500—to more application categories.¹³² For now, premium processing is only available to individuals who file a Petition for a Nonimmigrant Worker, some employment-based immigrant visa petitions, or an Immigrant Petition for Alien Workers.¹³³ Third, USCIS is increasing the automatic extension time period for certain EAD renewal applicants.¹³⁴

USCIS's new initiatives provide a solid footing to fix its structural deficiencies. Internal cycle time goals, increased staffing, technology upgrades, and automatic EAD extensions address the structural causes afflicting USCIS: lack of performance measures, its depleted workforce, and outdated IT. However, USCIS should prioritize the following commitments to ensure that these measures are not abandoned like prior reduction plans.¹³⁵

First, short-term internal cycle time goals are only effective if coupled up with a long-term strategy. USCIS's immediate interest in applying internal metrics as a short-term goal (through Fiscal Year 2023) is sensible, but within the next year USCIS should outline revised time goals for the long-term. Second, new personnel and improved technology should be tailored to revamp USCIS's paper-based processing and depleted IT.¹³⁶ Prior efforts to modernize USCIS's technology in 2006 were “unfocused, conducted in an ad

127. See USCIS FACES CHALLENGES, *supra* note 49, at 5; see also, GAO, *supra* note 56, at 20, 23–30.

128. See Camilo Montoya-Galvez, *U.S. Immigration Agency Moves to Cut 9.5 Million-Case Backlog and Speed Up Processing*, CBS NEWS (June 6, 2002), <https://perma.cc/FY4N-75AU>.

129. See *USCIS Announces New Measures to Reduce Immigration Backlog*, NAT'L. REV. (Mar. 30, 2022), <https://perma.cc/Q9WH-VSBB>.

130. See *id.*

131. See *id.*

132. See *id.*

133. New categories include: Form I-140, Immigrant Petition for Alien Workers, EB-1 Multinational Executive or Manager, EB-2 Member of Professions Holding an Advanced Degree or Exceptional Ability seeking a National Interest Waiver (NIW), I-539, Application to Extend/Change Nonimmigrant Status, I-765, Application for Employment Authorization. See *id.*

134. See *id.*

135. See BACKLOG ELIMINATION PLAN: FY 2006, *supra* note 41.

136. See USCIS FACES CHALLENGES, *supra* note 49, at 4.

hoc and decentralized manner, and [were] in certain instances, duplicative.”¹³⁷ New staffing and technology should prioritize transitioning from paper-based to electronic processing, like USCIS provides for the annual H-1B lottery registration cycle.¹³⁸ Third, USCIS should ease applicants’ ability to request an automatic extension for certain EAD renewals. Fourth, USCIS could permit EAD renewal applicants to proceed with the prior two-page form rather than the current seven-page version.¹³⁹

B. *External Measures*

1. *Congress*

Given that the backlog has wedged a two-decade-old thorn in USCIS’s side, the agency would benefit from Congress’s help. Whereas USCIS can address its own structural deficiencies, Congress is better equipped to bolster USCIS’s operational capacity and fiscal security, both of which were recently exacerbated by COVID-19.¹⁴⁰ Congress should consider three specific legislative proposals: (1) amendment of the Immigration Services and Infrastructure Improvements Act of 2000 to require that USCIS adopt Congress’s backlog definition, (2) passage of the Jumpstart Our Legal Immigration System Act (“Jumpstart Act”) to reactivate wasted green cards, and (3) passage of the Equal Access to Green Cards for Legal Employment (“Eagle Act”) to lift per-country caps on employment-based visas.¹⁴¹ A fourth legislative measure, granting annual appropriations to USCIS, might alleviate fiscal insecurity and provide reinforcement for the agency to withstand major policy shifts.¹⁴² Although Congress could adopt the key provisions highlighted in these bills in unison, they remain distinct proposals for now.

First, Congress should amend the Immigration Services and Infrastructure Improvements Act of 2000 to rectify the foundational issue surrounding USCIS’s backlog: its opaque definition. An amendment should require USCIS to replace its imprecise definition (i.e. the number of cases pending beyond USCIS’s processing goals), with Congress’s prior backlog definition,

137. U.S. GOV’T ACCOUNTABILITY OFF., GAO-07-1013R, USCIS TRANSFORMATION: IMPROVEMENTS TO PERFORMANCE, HUMAN CAPITAL, COMMUNICATIONS, AND INFORMATION TECHNOLOGY MANAGEMENT AS MODERNIZATION PROCEEDS 2 (2007).

138. See Matthew P. Gunn, *USCIS Releases H-1B Lottery Information: Registration Process Begins March 1*, NAT’L L. REV. (Feb. 4, 2022), <https://perma.cc/E543-XVVZ>.

139. Paul Stern & Sharvari Dalal-Dheini, *Righting the Ship: The Current Status of USCIS Processing Delays and How the Agency Can Get Back on Course*, AM. IMMIGR. L. ASS’N 7 (Mar. 1, 2022), <https://perma.cc/44UK-S5DH>.

140. See ANNUAL REPORT: 2021, *supra* note 62, at vi.

141. See Immigration Services and Infrastructure Improvements Act of 2000, 8 U.S.C. §1572 (2000); Jumpstart Act, H.R. 7374, 117th Cong. (2022); EAGLE Act of 2022, H.R. 3648, 117th Cong. (2022).

142. See Suzanna Monyak, *USCIS Director: Federal Immigration Funds ‘critical’ to Agency*, ROLL CALL (Feb. 2, 2022), <https://perma.cc/7H6A-LDNA> (Director Ur Jaddou emphasized, “I cannot stress this enough: Appropriations are critical to the long-term success of this agency. . . USCIS must continue to receive appropriations to meet the increasing demand for many of our humanitarian benefits.”).

“the period of time in excess of 180 days.”¹⁴³ Congress can also keep a closer watch over USCIS’s progress by mandating regular reporting requirements using the modified definition.

One advantage of this recommendation is that it has precedent: The Case Backlog and Transparency Act of 2020, introduced by Representatives Tony Cardenas, a Democrat from California, and Steve Stivers, a Republican from Ohio.¹⁴⁴ That bill proposed to amend the Immigration Services and Infrastructure Improvements Act of 2000 to revise how USCIS defines its backlog; however, the legislation stalled shortly after the House Judiciary Committee referred it to the Subcommittee on Immigration and Citizenship.¹⁴⁵ The bill also outlined a reporting system to improve USCIS’s “transparency and accountability. . .and [to] help determine the root causes of the processing delays.”¹⁴⁶ The reporting system featured two proposals.¹⁴⁷ First, the system would require DHS to provide quarterly backlog reports to identify the number of pending applications. These reports would indicate pending cases per category and list average processing times for each respective benefit application form.¹⁴⁸ Second, the proposal suggested that GAO provide biennial reports with backlog-focused assessments, including analysis of factors contributing to the backlog, evaluation of USCIS’s procedures to measure how its policies affect processing, and recommendations to improve processing speed.¹⁴⁹ These are not the only effective reporting requirements available to Congress, but an update to USCIS’s backlog definition is advisable because it can provide a more accurate measure of the problem.

Second, Congress can strengthen USCIS’s operational deficiencies through additional statutory measures: reactivating wasted green cards and lifting per-country caps on employment-based visas. These measures were incorporated in two recently proposed bills: The Jumpstart and Eagle Acts.¹⁵⁰ The Jumpstart Act, introduced by Representative Zoe Lofgren, a Democrat from California, on April 4, 2022, proposes to recapture around 222,000 unused family-sponsored visas, 157,000 unused employment-based visas, and

143. 8 U.S.C. §1572, *supra* note 31.

144. H.R. 5971, 116th Cong. (2020).

145. Though the bill failed to gain traction, it received some support. For example, the American Immigration Lawyers Association (AILA) praised the bill as a “vital measure” for addressing USCIS’ processing delays. *See Overview: The Case Backlog and Transparency Act of 2020 (H.R. 5971)*, AM. IMMGR. LAW. ASS’N (Feb. 26, 2020), <https://perma.cc/3H25-KVEK> (“[T]he Act would promote timelier adjudications that align with USCIS’s mandate, meet the needs of families and companies throughout the country, service the public interest and ensure that the standards of good governance are being met regardless of Administration.”).

146. Press Release, Reps. Tony Cárđinas and Steve Stivers, Cárđinas, Stivers Introduce Bipartisan Case Backlog and Transparency Act of 2020 (Feb. 26, 2020).

147. *Id.*

148. *Id.*

149. *Id.*

150. *See* Jumpstart Act, H.R. 7374, 117th Cong. (2022); *see also* EAGLE Act, H.R. 3648, 117th Cong. (2022).

40,000 unused diversity visas.¹⁵¹ The bill also amends the Immigration and Nationality Act (INA) to prevent the future loss of unused employment-based visas by ensuring that they roll over to family-based categories.¹⁵² The Eagle Act proposes to eliminate per-country caps on green card for employment-based immigrant visas and to increase the per-country cap for family-based immigrant visas from 7% to 15%.¹⁵³ It was approved by the House Judiciary Committee on April 6, 2022.¹⁵⁴ The primary benefit of these measures is that they can lessen the cyclical backlog strains incurred each year when wasted applications are not properly allotted to the individuals awaiting their use. Reactivating green cards and lifting country caps could also ease labor shortages and lessen the economic concerns stated in Part II of this Note by releasing USCIS's jammed work permit applications.¹⁵⁵

Lastly, annual appropriations can quell USCIS's documented fiscal insecurity and buttress its ability to sustain shifting substantive policies. These backlog causes have exposed overarching problems with USCIS's reliance on fee-based revenue.¹⁵⁶ Without steady revenue, USCIS is ill-prepared to handle demands posed by international crises (e.g., COVID-19) and shifts in substantive policies, each of which affects immigration patterns beyond the agency's control. In the past, such as in 2021 when USCIS experienced a major budget shortfall, its leadership requested emergency funding from Congress, an unpromised tactic.¹⁵⁷ Congress can guard against this problem and reinforce USCIS's capacity to respond to the backlog and unexpected emergency situations, which will likely resurface in the future, by providing appropriations on an annual basis. Most recently, Congress provided USCIS with \$275 million in federal funding to support application processing through FY 2022, under the Continuing Appropriations Act of 2022, signed into law by President Biden on March 11, 2022.¹⁵⁸ The efficacy of such federal appropriations will likely take time to gauge. However, Congress can stabilize USCIS's unreliable fee-based structure by granting annual funding. Doing so would support USCIS's efforts to expedite processing times and clear its backlog.

2. Courts

External measures to aid backlog reduction are also operable through court-supervised settlements and court-ordered injunctions. These are best

151. See *Bill Analysis: Jumpstart Our Legal Immigration System Act*, NAT'L IMMIGR. F. (Apr. 22, 2022), <https://perma.cc/63R4-9UEG>.

152. Press Release, Office of Rep. Zoe Lofgren, Lofgren Introduces the Jumpstart our Legal Immigration System Act (Apr. 4, 2022), <https://perma.cc/2QTV-23DQ>.

153. See H.R. 3648, 117th Cong. (2021-2022).

154. See *Beltway Buzz*, April 8, 2022, NAT'L L. REV. (Apr. 9, 2022), <https://perma.cc/5U8U-LX48>.

155. See Peri & Zaiour, *supra* note 121.

156. See CONTINUED RELIANCE ON MANUAL PROCESSING, *supra* note 67, at 13.

157. ANNUAL REPORT: 2021, *supra* note 623, at 9.

158. Extension of Continuing Appropriations Act, H.J. Res. 75, 117th Cong. (2022).

applied as supplemental measures to ensure that USCIS adheres to its internal objectives and fulfills its operational capacity as defined by Congress. Given the abundance of litigation brought against USCIS and DHS, federal courts have ample opportunities to impose these measures. Indeed, various plaintiffs have brought lawsuits challenging USCIS's processing delays, which have stonewalled work authorization, employment applications for foreign students, visas for foreign workers' spouses, and green-cards for approved individuals.¹⁵⁹ For example, in *Li v. USCIS*, a class action lawsuit filed in February 2021, eighteen students who had applied or intended to apply for employment authorization asserted that USCIS delays caused them and similarly situated students irreparable harm.¹⁶⁰ On July 23, 2021, the District Court for the Southern District of Ohio issued a consent order that outlined the terms of agreement between the two parties.¹⁶¹ Under the court order, USCIS committed to processing applications for post-graduate optional practical training (OPT) and STEM Extension OPT within a 120-day timeline.¹⁶² USCIS also agreed to provide monthly reports to the court and plaintiff's counsel to monitor its compliance.¹⁶³

Other lawsuits have produced injunctions with equally favorable outcomes for applicants and petitioners who have endured USCIS's backlog.¹⁶⁴ In *Pacharne v. DHS*, five employment-based visa applicants from India alleged that USCIS's delay in processing their applications was unreasonable and violated the Administrative Procedure Act.¹⁶⁵ The District Court for the Northern District of Mississippi, emphasizing "the Plaintiffs face an extensive backlog, which has, at least in part, been created and perpetuated by USCIS's inefficiencies," found that delay unreasonable and granted the Plaintiffs' request for injunctive relief.¹⁶⁶ Thus, the District Court ordered USCIS to adjudicate those I-485 visa applications before the end of Fiscal Year 2021.¹⁶⁷

159. Chishti & Gelatt, *supra* note 1.

160. Consent Ord., *Li et al. v. USCIS*, 2:21-cv-00677-MHW-CMV (S.D. Ohio July 23, 2021) (No. 21072703), <https://perma.cc/X42B-8ZBF>.

161. *See id.* at 6–9.

162. *See* AILA Doc. No. 21072703, *Consent Order Issued in Li v. USCIS, A Class Action Lawsuit Challenging Certain OPT Delays*, AM. IMMIGR. LAWS. ASSOC. (July 23, 2021), <https://perma.cc/EHF3-3K8F>.

163. *See id.*

164. *See* *Asylumworks et al. v. Mayorkas*, F. Supp. 3d, 2022 WL 355213 (D.D.C. Feb. 7, 2022) (vacating aspects of DHS' employment authorizing rules); *Shergill et al. v. Mayorkas*, 21-cv-1296-RSM (W.D. Wash. Nov. 18, 2021) (reversing USCIS policy that prohibited H-4 spouses from receiving automatic extension of employment authorization during pendency of standalone employment authorization document applications); *MadKudu Inc., et al. v. USCIS et al.*, 20-CV-02653-SVK, 2020 WL 5628968 (N. D. Cal. Sept. 14, 2021); *Subramanya et al. v. USCIS*, 2:20-cv-03707-ALM-EPD (S.D. OH. Aug. 21, 2020) (setting a schedule for EAD card production and allowing individuals to use I-797 Notices of Approval as List C documents in Form I-9 employment).

165. *Pacharne v. Dep't of Homeland Sec.*, 1:21-CV-115-SA-DAS, 2021 WL 4497481 (N.D. Miss. Sept. 30, 2021).

166. *Id.* at 12.

167. *See id.*

Li v. USCIS and *Pacharne v. DHS* demonstrate that courts can provide effective oversight to facilitate backlog reduction. Through managing settlements and ordering injunctions courts can supervise USCIS's commitments to process certain applications in a timely manner and bind USCIS to provide relief to certain immigrants who have suffered from or will be harmed by unreasonable processing delays. But court-supervised or court-ordered measures are never guaranteed and cannot provide comprehensive methods to reduce processing delays.¹⁶⁸ Court-driven intervention is inherently limited because these judicial measures are by nature purely reactive. Moreover, courts cannot functionally supervise all of USCIS's processes, particularly given the sheer volume of the current backlog. Judicial measures also offer passive recourse because legal outcomes hinge on individuals' capacity to bring a lawsuit, requiring substantial resources and time.¹⁶⁹ These obstacles to judicial remedies clash with USCIS's promise to maintain an immigration system based on "fairness, integrity, and respect for all we serve."¹⁷⁰

Congress—and better-yet USCIS—can stay ahead of the curve by crafting comprehensive reforms to internal agency functions or through effectuating improvements to bureaucratic operations. Conversely, courts have limited institutional authority and restricted capacity under the Constitution to implement wholesale reforms to reduce USCIS's backlog.¹⁷¹ Courts should continue to keep USCIS accountable and provide recourse for individuals who risk suffering from delays that contravene USCIS's core responsibilities. However, external oversight from courts, and Congress, is insufficient to curb USCIS's backlog.

CONCLUSION

USCIS's current state of affairs is troubling. If the backlog continues at this rate, then USCIS's administrative waste, humanitarian costs, economic concerns, and dwindling public trust will persist. Yet USCIS's recent commitment to take more accountability over its backlog is an encouraging

168. For example, on December 22, 2021, the federal district in the North District of California denied preliminary relief in *Tony N. v. USCIS*. The lawsuit, brought on behalf of five individuals who had applied for asylum, challenged USCIS's delays and failure to process work permit renewals for asylum seekers. See Order Den. Pls.' Mot. for Prelim. Inj., *Tony N. v. USCIS, et al.*, 3:21-cv-08742-MMC (N.D. Cal. Dec. 12, 2021) (No. 60867052) <https://perma.cc/H2AG-WSBA>.

169. See Jennifer L. Colyer, Sarah French Russell, Robert E. Juceam & Lewis J. Liman, *The Representational and Counseling Needs of the Immigrant Poor*, 78 *FORDHAM L. REV.* 461, 463 (2009) (describing the vulnerabilities of individuals facing immigration court proceedings, including the lack of "money, substantial education, or language skills.") <https://perma.cc/S2B9-U93C>.

170. See *MISSION AND CORE VALUES*, *supra* note 29.

171. For example, standing requirements in Article III's Case or Controversy Clause limit federal judicial power. See U.S. CONST. art. III, § 3 ("The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States... to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.").

development. At a February 2022 webinar, Director Ur M. Jaddou addressed the issue head-on, noting: “It doesn’t matter what benefit we are talking about or what you applied for, every single applicant who seeks a benefit from USCIS is entitled to a timely decision.”¹⁷² Likewise, Congress should play its part by revising the backlog definition, reactivating wasted green cards, removing per-country caps, and providing USCIS with annual appropriations.

A key takeaway of this Note is that no single solution is likely to rein in or eradicate USCIS’s backlog. Congress and the courts should support backlog reduction by adopting external measures available to each of those political branches of government. Indeed, the responsibility and resources needed to reduce USCIS’s backlog require all hands on deck.

172. DIRECTOR UR M. JADDOU’S VIRTUAL BRIEFING WITH STAKEHOLDERS TO MARK ONE-YEAR ANNIVERSARY OF EXECUTIVE ORDERS AIMED AT RESTORING FAITH IN OUR IMMIGRATION SYSTEM (Feb. 3, 2022), <https://perma.cc/ZP5L-5QVH>.