

FACT SHEET: NONCITIZENS IN THE REMOVAL PERIOD

David K. Hausman¹

This fact sheet estimates the number of individuals with final removal orders within the 90-day removal period as defined in 8 U.S.C. § 1231(a)(1). That period is generally 90 days after a removal order becomes administratively final, as defined in § 1231(a)(1)(B)(i). It may start later if the noncitizen seeks judicial review and obtains a stay from the court, § 1231(a)(1)(B)(ii), or is incarcerated in criminal custody at the time the order becomes final, § 1231(a)(1)(B)(iii); it may extend longer than 90 days if the noncitizen falls within the limited exception in § 1231(a)(1)(C).

In order to estimate the number of individuals with final removal orders who are in the removal period, I relied on public data, which was current as of December 31, 2020 at the time I performed the analysis, from the Executive Office of Immigration Review, a component of the Department of Justice. That public dataset, available at <https://www.justice.gov/eoir/foia-library-0>, contains records of all decisions made by Immigration Judges (“IJs”) and the Board of Immigration Appeals (“BIA”).

Removal orders become final if the noncitizen fails to appeal or if the BIA affirms the decision of the IJ. 8 U.S.C. § 1101(a)(47). Noncitizens have 30 days to appeal. 8 C.F.R. § 1003.38(b).

I first calculated an estimate of the number of individuals in the removal period at a given point in time. I began by counting IJ removal decisions issued in the 90-day-period ending at least 30 days before the last day in the data—in other words, IJ decisions in the 90-day period

¹ Assistant Professor, Berkeley Law School. I previously worked for the ACLU Immigrants’ Rights Project as an attorney, and I still occasionally consult for the project. I was asked to perform this analysis by the ACLU, but I have not been and will not be compensated for it.

ending on December 1, 2020. I excluded decisions from the most recent 30 days because there was no way to know from this data whether those individuals appealed.

I found **6,032** IJ removal orders entered during the 90-day period ending December 1, 2020 in which the noncitizen did not appeal (6,019 cases) or in which the BIA had already affirmed the decision, dismissed the appeal, or marked the appeal as withdrawn as of December 31, 2020 (13 cases).²

In addition, I counted the number of affirmances, dismissals, and withdrawals issued by the BIA in the same 90-day period ending December 1, 2020, but where the individual did not receive a removal order from an IJ during that 90-day period. I found **3,956** such cases.

Adding these numbers together (6,032 + 3,956), I concluded that, as of December 1, 2020, there were approximately **9,988** removal orders that became final during the previous 90-day period.

This calculation provides a snapshot of how many cases were within the removal period on a single day, December 1, 2020. For example, the removal period for an order that became final on November 30 would run for 90 days from that date, so that individual would be near the beginning of the removal period on December 1. Which particular people are in the removal period changes every day, but this count offers my best estimate of how many people were in the removal period on any given day during this time period.

This number is approximate as a measure of the total number of individuals in the removal period on December 1, 2020. For example, some of the individuals who lost before the BIA may have sought judicial review and obtained a stay, tolling their removal period. At the same time, other individuals whose orders became final in the past may have lost their cases

² In counting BIA decisions, I considered only case appeals, since circuit court remands and appeals concerning motions to reopen or bond determinations generally do not result in the entry of a new removal order.

before federal courts (for which they obtained a judicial stay), beginning their own removal period. Similarly, the other exceptions to the general rule that the removal period begins after the BIA rules could affect the overall number. For example, some who seek judicial review prevail.

These figures reflect final removal orders issued through the ordinary removal process, under section 240 of the Immigration and Nationality Act. They do not include expedited removal orders or other summary procedures, which typically result in swift removal.

I understand that there were approximately 1.19 million outstanding removal orders as of January 30, 2021. Declaration of Peter Berg, *Texas v. United States*, No. 21-cv-00003, S.D. Tex., Doc. 78-1 (filed Feb. 10, 2021). My estimate of **9,988** individuals in the removal period on any given day therefore represented **.84%** of that total number of outstanding removal orders.