



Statement for the Record

U.S. House of Representatives Committee on the Judiciary - Subcommittee on Immigration and Citizenship

Hearing on “Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts”

January 29, 2020

The National Immigration Forum (the Forum) advocates for the value of immigrants and immigration to the nation. Founded in 1982, the Forum plays a leading role in the national debate about immigration, knitting together innovative alliances across diverse faith, law enforcement, veterans and business constituencies in communities across the country. Leveraging our policy, advocacy and communications expertise, the Forum works for comprehensive immigration reform, sound border security policies, balanced enforcement of immigration laws, and ensuring that new Americans have the opportunities, skills, and status to reach their full potential.

Introduction

The Forum appreciates the opportunity to provide its views on the U.S. immigration court system run by the Executive Office for Immigration Review (EOIR), which is part of the U.S. Department of Justice (DOJ). The United States is a nation of laws with strong border security and established legal immigration processes. A functioning, efficient U.S. immigration court system is essential for the administration of justice. Yet, as the subcommittee noted in the title of this hearing, the system is truly in “crisis.”

Immigration courts are under-resourced and overworked.¹ Facing shortfalls in immigration judges and support staff, as well as limited space, immigration courts lack capacity to keep up with growing caseloads. In recent years, immigration court backlogs have increased dramatically, exceeding 1,000,000 cases in fiscal year (FY) 2019, according to Syracuse University’s Transactional Records Access Clearinghouse (TRAC).² Immigration judges often face pressure to spend the vast majority of their time on the

¹ American Bar Association, “Executive Summary of the 2019 Update Report: Reforming the Immigration System,” March 2019 at pp. UD ES-18 – ES-21, https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf.

² TRAC Immigration, “Backlog of Pending Cases in Immigration Courts as of December 2020,” https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php.

bench, leaving minimal time available for necessary administrative work to review cases and filings.³ While EOIR is taking steps to move to electronic filing,⁴ the immigration court system overwhelmingly runs on paper, remaining decades behind the times.

At the same time, the immigration court system has seen additional strains – new case quotas that encourage assembly-line justice, new guidance limiting the ability of immigration judges to manage their dockets, and top-down attorney general’s decisions that cut off relief from deserving claimants.

The Forum believes that Congress can and must reform the immigration court system to reduce backlogs, improve due process, and preserve judicial independence. The Forum supports increasing funding to EOIR, including dedicated funding for additional immigration judges and support personnel, improving facilities, and modernizing the case filing system. We also support ensuring that immigration judges have the ability to set aside administrative time to allow themselves the opportunity to review cases and filings. Affording immigration judges the ability to set aside administrative time, as well returning discretion to them to allow them to manage their dockets and use their expertise to rule on cases, supports due process and increased efficiency. Finally, the Forum supports legislation to make the immigration court system independent, separating EOIR from DOJ so that life-altering legal cases can be decided by judges, not politics.

Increasing Resources and Empowering Judges to Reduce the Backlog

The case backlog in the immigration court system is the product of decisions by Congress and the last several administrations, which have ramped up federal immigration enforcement without corresponding increases to the capacity of the federal immigration courts. The shortage of immigration judges and the general under-resourcing of the immigration courts is well-documented.⁵

The enormous and growing backlogs have dramatic impacts on the function and efficiency of the immigration court system. Because of lengthy delays, immigrants with meritorious claims regularly wait years before receiving their day in court to obtain the relief to which they are entitled. And those without legitimate claims are often able to remain in the United States for extended periods before their cases are resolved.

Immigration court case backlogs are fundamentally a resource issue – too many cases for too few judges. After years of underfunding, Congress and the Trump administration – to their credit – have begun to authorize and hire additional immigration judges, an investment that eventually will help reduce backlogs. Adding immigration judges – along

³ Id. at UD ES-19.

⁴ United States Department of Justice – Executive Office for Immigration Review, “EOIR Launches Electronic Filing Pilot Program,” July 19, 2018, <https://www.justice.gov/eoir/pr/eoir-launches-electronic-filing-pilot-program>.

⁵ American Immigration Council, “Empty Benches: Underfunding of Immigration Courts Undermines Justice,” Fact Sheet, June 17, 2016, <https://www.americanimmigrationcouncil.org/research/empty-benches-underfunding-immigration-courts-undermines-justice>.

with needed support staff and facilities space – will reduce stress on overloaded dockets, while affording immigration judges with flexibility to devote more of their calendar to needed administrative time to review cases and filings. At the same time, Congress should provide needed funding to allow EOIR to make its filing system fully electronic, providing needed efficiency gains that further help tackle the growing backlog.

The Forum also supports empowering immigration judges to use their expertise and discretion to decrease backlogs. By restoring power to immigration judges to manage their dockets and close low-priority cases through the use of administrative closure to decrease backlogs, we believe that judges can work to reduce their growing case backlogs. However, DOJ has attempted to limit administrative closure in recent years, leading to the reopening of tens of thousands of otherwise low-priority cases.⁶ The Forum favors reversing these policies and empowering immigration judges to use administrative closure and other tools to better manage their dockets. By returning discretion to immigration judges to utilize administrative closure, tens of thousands of immigration cases can be eliminated from EOIR’s backlog. We also support examining whether immigration judges should be given additional authority to streamline proceedings through procedural authorities that federal court judges have, such as being able to make rulings on pleadings.

While we support the efforts above to reduce the immigration court backlog, the Forum does not support actions that would undermine due process and judicial independence. Setting case closure goals for immigration judges is appropriate. A quota-driven approach to evaluating the performance of immigration judges, however, could place undue pressure on judges to favor speed over due process. Quotas incentivize summary consideration of cases rather than encouraging a full hearing of claims potentially undermining due process for individuals facing deportation or seeking relief in the immigration courts. Also, such an approach threatens the independence of immigration judges who want to devote adequate time and consideration to complex cases.

Creating an Independent Immigration Court System

Several recent administration policies have limited the authority of immigration judges and created roadblocks to individuals obtaining relief in immigration court.

Over the past three years, a series of attorney general’s opinions established new precedents that restricted access to asylum and undercut the level of discretion afforded to immigration judges.⁷

⁶ See Aaron Reichlin-Melnick, American Immigration Council, “Already Facing a Backlog, Sessions Aims to Add 350,000 Cases to Immigration Courts,” Jan. 16, 2018, <http://immigrationimpact.com/2018/01/16/backlog-sessions-aims-add-cases-immigration-courts/>.

⁷ See Dara Lind, “Jeff Sessions is exerting unprecedented control over immigration courts — by ruling on cases himself,” Vox.com, May 21, 2018, <https://www.vox.com/policy-and-politics/2018/5/14/17311314/immigration-jeff-sessions-court-judge-ruling>.

In August 2019, newly promulgated Trump administration rules⁸ made significant changes to EOIR, including giving the director of the EOIR – a political appointee – the power to decide backlogged immigration appeals. The policy also increased the authority of EOIR’s Office of Policy, providing it the ability to oversee the development and implementation of regulations. The new policy also transfers certain duties relating to case adjudication from EOIR’s General Counsel to the Office of Policy, while placing the Office of Legal Access Programs under the management of Office of Policy. These changes have the effect of centralizing EOIR policy-making authority and implementation to political actors within the Office of Policy.

The Forum has expressed concern that these changes threaten to politicize the adjudication of immigration cases, undercutting immigration judges and undermining the rights of litigants in the immigration court system. Accordingly, the Forum supports Congress creating a fully independent immigration court system that would not be subject to intervention by political actors.⁹

Moving EOIR out from under DOJ oversight would let immigration judges set precedents and manage their caseloads. It would prevent politicized decision-making and promote stability in immigration court policies and decisions. The Forum believes significant benefits would arise from empowering immigration judges in this manner, and urges Congress to take steps to create an independent immigration court system.

Conclusion

With case backlogs at crisis levels and immigration judges facing growing restrictions on their ability to manage their caseloads and set precedents, the National Immigration Forum urges Congress to act. The Forum supports additional resources for the immigration court system – including funding for more judges and support staff as well as for electronic filing. The Forum also supports providing immigration judges with increased administrative time to work on cases and empowering immigration judges generally – providing them the tools to manage their dockets and reduce caseloads in a manner consistent with due process, including utilizing administrative closure.

At the same time, the Forum has opposed recent changes that undermined the independence of the immigration courts. Going forward, the Forum supports efforts to create an independent immigration court system that would help depoliticize the immigration courts and promote judicial discretion. Taking these steps will help alleviate the crisis in our immigration courts, and begin to restore the American public’s faith in our immigration system.

⁸ Richard Gonzales, “DOJ Increases Power of Agency Running Immigration Court System,” NPR.org, Aug. 23, 2019, <https://www.npr.org/2019/08/23/753912351/doj-increases-power-of-agency-running-immigration-court-system>.

⁹ National Immigration Forum, “Judges, Not Politics, Should Control Immigration Courts,” Aug. 26, 2019, <https://immigrationforum.org/article/judges-not-politics-should-control-immigration-courts/>.