

Mother Jones

Our Immigration Courts Aren't Ready to Handle Millions of Deportations

So the Trump administration is trying to go around them.

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"This courtroom looks fairly formal," says Judge Dana Marks, gesturing to her immigration courtroom on the 9th floor of a high-rise in downtown San Francisco. It has rows of wooden benches and bare walls, and a raised platform from which she hears cases and wields a wooden gavel. But the similarities with a normal courtroom end there. The people whose cases Marks adjudicates "don't have a right to counsel, the federal rules of evidence don't apply, the judges don't have contempt authority over attorneys." Even the basics of modern American courtrooms are missing: "We don't have court reporters."

Marks, a veteran immigration judge and the president of the National Association of Immigration Judges, is explaining the maddening process immigrants go through when they enter the court system. In February, Homeland Security Secretary John Kelly released two memos outlining how President Donald Trump's executive orders on immigration would be enforced, citing immigration courts' "historic backlog" as a justification for expedited removal—in other words, deporting people without giving them a day in court. To speed the deportation process up, the Department of Justice intends to reshuffle immigration judges to border towns and 12 cities.

Kelly is correct that immigration courts are swamped. There are currently more than 542,000 cases pending before 301 immigration judges, according to records obtained by the Transactional Records Access Clearinghouse at Syracuse University. Only about 280 of those judges hear cases, and they may have as many as 1,500 cases on their dockets at any given time. They often hear 30 or more cases a day, and complete nearly 800 cases per year. In comparison, federal district judges generally complete 500 cases a year. For more than a decade, advocates have been calling for more immigration judges, without much luck. In 2006, then-Attorney General Alberto Gonzales called for more resources, including 40 new judges, to deal with what was then a backlog of 169,000 cases. (He then tried to fill those spots with Republican loyalists, and later resigned amid a scandal over politicized hiring at the DOJ.) Last year, Human Rights First, an international human rights organization, calculated that 524 judges completing 500 cases per year would eliminate the backlog by 2023.

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The backlog is an obvious barrier to Trump's stated goal of rapidly deporting two to three million people. Kelly's memo acknowledged the need to hire additional judges, and the administration's budget proposal includes funding for 75 more judges and support staff. Its plan to redeploy judges to particularly busy jurisdictions won't make much dent in the overall caseload, however, Marks says. "They are taking judges from existing dockets and moving them temporarily to assignments at the border area and to courts that have been identified," she says. "What happens to the docket that gets left behind?"

Juggling dockets in this way "causes chaos and makes the whole system unsustainable," says B. Shaw Drake, a fellow at Human Rights First. "You're bringing judges in, you're assigning them a caseload, but that means their caseloads in whatever cities they're currently assigned to are going to be delayed even further."

As it stands, cases can already take several years to complete, and extending the already lengthy process by putting ongoing cases on hold leaves the most vulnerable immigrants, especially asylum seekers, in limbo. Michelle Brané, the director of the Women's Refugee Commission's Migrant Rights and Justice program, says, "Nobody who has a valid asylum claim wants to be waiting around for five years. It makes it more difficult to gather information, the information gets stale, witnesses disappear, people get settled and then if they lose it's much harder to leave. And all of those years are spent in fear and anxiety and uncertainty for those people who've fled violence." The longer a case is delayed, the more difficult it is to argue. Even without delays, Marks notes, "I often say that we do death penalty cases in a traffic court setting. With the case of an asylum seeker—that's life or death."

Marks argues that it also looks bad. "The 'deployment' of judges to the border—just the word feels inappropriate to a lot of judges. It does imply a military force, and while we are related to immigration law enforcement, we are supposed to be neutral adjudicators. We want to be the

most efficient and effective in deciding the cases in front of us, and there shouldn't be any kind of feeling that there is a political basis for influencing how those decisions are made. In law appearances are very important."

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The appearance of impartiality in immigration court is already fragile. Unlike other federal court systems, which operate as a separate branch of government under Article I of the constitution, immigration court is overseen by the Department of Justice. Immigration judges are attorneys who have been hired to serve as judges. Their bosses work for the executive branch and their politics may influence how they want the courtroom process to function. Unlike federal judges, who enjoy broad independence, immigration judges may be disciplined like other federal employees. "That means I can be at risk of losing my job for a good-faith legal decision," says Marks, who has served since 1987. "All of a sudden it doesn't sound so judicial. Because of our unusual structure, judges are at risk, and that has a chilling effect."

Of course, seeing an immigration judge is usually better than never having the opportunity to do so. Marks calls Kelly's decision to use the courts' massive backlog as a reason to bypass the court system by expanding expedited removal "very disturbing." And while this move may clear dockets and reduce costs, it would be at the expense of immigrants' due-process rights, says Drake. "If you aim to address the backlog through the expansion of expedited removal and not adding additional judges, then you're trying to reduce the backlog through keeping more people out of the system to begin with." And many of those people might have a good shot at staying the country, Brané says. During the child migrant crisis of 2014, when tens of thousands of unaccompanied kids showed up at the southern border, "several planeloads of people were deported before we were able to prove that they had asylum claims." Of the families that were not deported, says Brané, at least 80 percent qualified for the next step in the asylum process.

The National Association of Immigration Judges would like Congress to pass legislation that would put immigration courts under Article I like the rest of the federal judicial system. "We believe the immigration court system should be taken out of the Department of Justice," says Marks. In the meantime, she'd like to see the immigration courts given the resources they need to operate at full capacity. "It's frustrating...If you ask for too much due process and too much money, will the fiscally conservative individuals just try to say, 'Well, just don't give these people a hearing'? The proper solution is to have enough judges to hear the cases fairly but in a more reasonable timeframe."

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