

Immigration courts, lacking judges, are sinking under a massive backlog of cases

By Glenn Garvin

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When Miami immigration attorney Tammy Fox-Isicoff takes on new clients, the first thing she tells them — no matter how simple the case, no matter how open-and-shut — is, “This is going to take, at an absolute minimum, one year to resolve.”

And she’s probably low-balling it. The average time for a case to wend its way through South Florida’s hopelessly backlogged federal immigration courts is 551 days— closer to two years. Even if those courts stopped taking new cases tomorrow, it would take about four years to work the backlog down to zero.

“The backlog in these courts is terrible, and it’s getting worse every day,” Fox-Isicoff said. “It’s not a new problem — it’s been growing for years, and everybody in the system knows it.”

South Florida’s clogged immigration dockets are merely a reflection of a much larger national problem. A recent report by the federal Government Accounting Office (GAO) revealed that a chronic shortage of immigration judges doubled the backlog of cases across the country between 2009 and 2015.

Nearly 600,000 immigration cases are awaiting decisions, the report says, and some overwhelmed courts are so far behind that they’re already scheduling cases for the year 2020. In some of them, the average time for a single case is nearly three years.

Immigration judges and lawyers, as well as the GAO, say many different problems have contributed to the glut of cases. But the main one, they agree, is a lack of judges. “For the past 15 years, they haven’t hired enough judges to handle the backlog,” said Andrew R. Arthur of the Center for Immigration Studies in Washington, D.C., who served eight years as an immigration judge.

There are only about 300 judges, which means they have an average caseload of about 2,000 each, a number that practically everybody agrees is unmanageable. To make matters worse, about 40 percent of the judges are eligible for retirement and could leave at any moment.

It’s a daunting obstacle to the Trump administration’s plans for more aggressive enforcement of immigration laws, which have already run afoul of a major shortage of Border Patrol officers. Hiring another 200 to 250 judges — the consensus agreement of what the courts need to get a handle on the backlog — and the support staff to back

them up, then find finding the space to accommodate them all, would require a gusher of cash that no recent president has been willing to commit.

“We’re sort of like the Cinderella of the Department of Justice,” said Denise Noonan Slavin, a judge who worked 20 years in South Florida courts before moving last year to Baltimore, where she is executive vice president of the National Association of Immigration Judges, the judges’ union. “We’re at the end of the line when it comes to money.”

And even if the cash were to materialize, it would probably be years before the new judges follow. According to the GAO, it takes more than two years, on average, to hire a new judge.

“That’s just a ridiculous amount of time,” said attorney Fox-Isicoff. “Especially since nearly all the judges they hire now are former [Immigration and Customs Service] prosecutors. It’s not like you have to start checking their backgrounds from scratch. They’ve already been extensively vetted.”

The shortage of judges amplifies other problems in the immigration system. Unlike the judges in U.S. district courts that hear criminal cases and civil lawsuits, immigration judges are not part of an independent legal system.

They work for the Justice Department, which oversees their court dockets. That means the judges and their courts have to conform to the changing winds of Washington policy, which can seriously disrupt the case flow — especially after a change of presidential administrations.

When a surge of undocumented immigrant children arrived at the U.S. border in 2013 and 2014, the Obama administration ordered the immigration courts to hear their cases first on the theory that if they were deported promptly, it would stop the flow, experts said.

But that meant a lot of cases that were ready for trial got bumped to the back of the line, while the kids’ cases went to the front, even though they were more complicated and mostly hadn’t yet met even the simplest of preliminary requirements, like getting them lawyers.

Something similar happened in February when the Trump administration ordered many immigration judges to leave their regular courtrooms and head to border towns, in hopes it would quicken the pace of deportations. Once again, cases that had been in preparation for years and were ready for trial were shuffled to the rear.

“Our criticism on this has been bipartisan,” said Dana Leigh Marks, the San Francisco judge who is president of the judges’ union. “We criticized the Obama administration for politicizing the surge — we said, you’re moving cases not ready for hearings to the front of the line, and we’re not going to get as much done. We were proven right...”

“We said the same thing with the current administration’s decision to move judges around. This is not going to speed things up, it’s going to slow them down. We’re just simply short of judges, and taking docket management out of the hands of judges only makes it worse.”

The issue has become so serious that a growing number of judges want the courts to be taken out of the Justice Department and put in an independent system. “This is just crazy,” said Slavin. “You don’t see the attorney general telling a U.S. district judge, ‘Okay, drop all the bankruptcy cases to concentrate on drug cases,’ or whatever the priority de jour is.”

The Trump administration has already announced plans to hire 125 new immigration judges over the next two years, but many observers think the new hires will likely be swamped by a wave of retirements. “There’s a tremendous amount of burnout among the judges because of the case load,” said Arthur, the former judge.

“An immigration judge can sit on the bench for eight hours a day, five days a week, with maybe only half an hour off each week — sometimes every other week — for preparation for upcoming cases. And the cases themselves can be gut-wrenching, with all kinds of stories of abuse back in the home country. Or maybe he’s being asked to send people to a place they came from as a child, a place they’ve never really lived. Judges are human.”

A 2009 study of immigration judges conducted by University of California-San Francisco psychologists concluded 63 percent of them showed signs of traumatic stress. “Judges reported more burnout than any other group of professionals to whom the [test] had been administered, including prison wardens and physicians in busy hospitals,” the study said.

Even if the Trump administration is willing to seek more money for judges, it remains to be seen — in a time of tight budgets and tempestuous national controversy over immigration — whether it will be successful. The White House is liable to encounter some surprising opposition.

Last week, during an angry and divisive meeting in New Orleans, the American Immigration Lawyers Association, a long-time supporter of hiring more judges, reversed course and voted to oppose any money for new judges.

“We don’t trust Trump and Sessions,” said Fox-Isicoff, a past president of the group. “They’re going to hire anti-immigration judges...And if they hire two or three hundred of them right now, basically we’ll be stuck with all these horrible judges forever.”

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