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Immigration Courts: The Case for Independence from the Executive Branch



June 23, 2020; [American Prospect](#)

The US court system is complicated. State courts vary by state, of course, which leaves the federal judiciary easier to understand by contrast, since it's a uniform national system, even if its structure of district and appeals courts may confuse many.

But separate from all of the regular federal courts, there is another judicial system that operates solely under the executive branch of our government. That's the system of immigration courts and judges. That system is, today, straining to do its job and, according to many of its judges, fighting with the executive branch to do it well.

In a [video](#) released last October, the [National Association of Immigration Judges](#) (NAIJ)—that’s correct, these judges have formed a union to represent their 465-plus members—lay out the problems with reporting to the White House. They cannot, according to the video and their union, mete out impartial justice. What they are being required to provide is “assembly-line justice.”

Immigration courts operate under the US Department of Justice, as part of the executive branch. All of the immigration judges, most of whom bring stellar legal backgrounds and long careers in government and law enforcement, are appointed to these positions by the US Attorney General, who also has the power to fire them. The Trump administration has sought to [decertify the judge’s union](#). Doing this could be a first step in “union-busting,” or weakening other federal unions. And while the union will most likely prevail at the local level, things may get tougher at the higher levels of appeal to the Federal Labor Relations Authority (FLRA), where Trump has appointed two of the three board members.

Why are the immigration judges so concerned? First off, they are dealing with a backlog of 1.1 million cases. The Department of Justice, under Attorney General Jeff Sessions, [mandated that all immigration judges hear 700 cases per year](#) or be fired. While the judges and their union fought this mandate as a violation of due process, it speaks to their limited judicial independence. But the second point of concern is a constitutional one. The immigration judges are seeking to become part of the independent federal judiciary established under Article III of the Constitution, which would remove them from being under the thumb of the US attorney general.

“Imagine going to a court where you’ve been charged by a prosecutor, and when you come to court you find out that the judge is hired by the prosecutor and can be fired by the prosecutor,” [said Ashley Tabaddor, president of the NAIJ](#), at a March press conference. Welcome to the world of immigration court and immigration judges.

Two other courts, the US Bankruptcy Court and the US Tax Court, made this switch before NAIJ’s current attempt. These two courts now function independently from the federal agencies that would most benefit from their decisions.

One might wonder what happened with Jeff Session’s mandate for 700 cases per year, per judge. Did that work? This was especially geared to move asylum cases quickly through the system and was to be especially harsh on cases claiming domestic violence and gang violence threats as their reasons for seeking asylum. The 700-case plan was rolled out in April 2018, and in 2019, [a study by the union](#) found that 378 of 380 judges failed to meet either the quotas or other deadlines set by court officials.

As for asylum claims, the numbers are grim. In 2019, 69 percent of all asylum claims nationally were denied which reflected a steady increase of 72 percent over the denial rate in 2015 (before attorney general Session’s order restricting requests from those fearing domestic abuse or gang violence). And the appeals rate to the Board of Immigration Appeals (BIA) was abysmal in 2019 as the court was filled with judges appointed who had a high rate of denying immigrant’s asylum requests.

When people get their “day in court,” they expect to appear before a judge who will give them a fair hearing. Most immigration court judges would like to do that. But our immigration court system faces structural defects that often preclude that outcome.

As [Judge Samuel B. Cole of Chicago’s immigration court has said](#), “I have practiced as a lawyer and as a federal prosecutor. I have a really good sense for what should be, and I do my best. People need to be given an opportunity to be heard. Arguments need to be based on the law and decisions need to be well reasoned. Even if I know I might be penalized for doing the right thing, I’m going to do it. That’s my job as a judge. And if that means I can’t be an immigration judge anymore, then so be it.”—Carole Levine

ABOUT THE AUTHOR[Carole Levine](#)

Carole Levine is a principal consultant at Levine Partners, providing consulting services to nonprofit organizations. She has held senior management positions in national nonprofits: The National PTA (Deputy Executive Director); Communities in Schools (Vice President of Expansion and Technical Assistance); The Family Resource Coalition (Director of Technical Assistance); and National Lekotek Center (Director of Development). Carole holds a BA in education and political science from Washington University, and an M.Ed. in Early Childhood Leadership and Advocacy from National Louis University. Carole has served on the boards of numerous organizations, holding national positions on the board of National Council of Jewish Women and on the International Council of Jewish Women. She is currently the Chair of Courts Matter Illinois, serves on the Steering Committee of Chicago Women Take Action and is the co-chair of BenchMark: NCJW's Judicial Nominations Campaign. Carole is passionate about nonprofit, purposeful work, justice for all and her family (which includes 5 amazing grandchildren!).
