

The Best Way to Protect Immigrants From the Whims of Politics

Truly independent immigration courts could help undo the harm that's been inflicted by the Trump administration.



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Marcia Brown / October 5, 2020

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immigrant's fate in the United States, that decision is subject to change, based on the caprice of the attorney general. If the nation's top attorney objects to a decision, they have the latitude to reverse it and issue a binding precedent for all immigration courts.

During the Trump administration, the dangers this power structure poses have become viscerally apparent. The administration has referred at least 15 immigration cases to the attorney general for precedent-setting rewrites. Trump's first attorney general, Jeff Sessions, reversed decades of asylum precedence by denying victims of domestic or gang violence the right to qualify for asylum. He limited continuances, which allowed foreign nationals to postpone their court cases while they waited for the U.S. Citizenship and Immigration Services to adjudicate their applications. Sessions also limited judges' ability to terminate cases and ended administrative closure—an option judges previously used to temporarily remove cases from their docket—allowing the backlog to balloon to nearly 1.5 million cases.

Attorney General William Barr's term brought even more change. He ended judges' ability to hold bond hearings for arriving asylum-seekers, forcing Immigrations and Customs Enforcement to hold people in custody while their cases are pending—sometimes for years. Barr made it more difficult for an asylum-seeker's family members to seek protection unless they could show that they had personally been persecuted. He also expanded his own power, growing the number of cases in which he is able to set new, binding precedents.

“The level of direct interference exercised by this administration has far surpassed any other administration before,” said A. Ashley Tabaddor, president of the National Association of Immigration Judges. The administration influences the courts not only on a macro level—for instance, by setting up tent courts at the border—but also on a minute level, through micromanagement of judges' dockets and setting case quotas and deadlines.

Nevertheless, in many ways the Trump administration has merely followed its predecessors: The Obama administration exerted influence of its own over immigration courts, changing their enforcement priorities, reshuffling their dockets.

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Taken as a whole, there's a clear lesson to be gleaned from the last two presidential administrations: It would be uniquely beneficial to all involved if these immigration courts could gain independence from the Department of Justice and put some distance between their important work and the mischiefs of politics and nakedly partisan appointments. Tabaddor is just one among many who have spent the past decade calling for independent immigration courts with increasing urgency, even as the Trump administration cemented the practice of using the structure of the court as a tool to carry out political micromanagement at the expense of human lives.

If Joe Biden wins in November and William Barr is gone, the underlying problem of political influence in immigration courts will remain, unless Biden's administration embraces a realignment of the immigration court system as a much-needed course correction. This would remove the courts from the attorney general's purview and enable judges to exercise control over their dockets and decide cases without fear that they must please their boss or lose their jobs. At the moment, the Democratic nominee's support for independent courts appears to be only lukewarm, but it may be the best way to reverse the extremes of the Trump era and restore public trust in the immigration court system.

Since last year, calls for independent Article I immigration courts have grown louder.

Organizations such as the American Bar Association and the American Immigration Lawyers Association have loudly advocated for a change. The Federal Bar Association has drafted model legislation. The immigration judges' union, NAIJ, has also lent its voice to the cause, leading the Trump administration to try to decertify NAIJ last year. (The Federal Labor Relations Authority rejected its petition.)

Throughout the presidential primary, nearly half of the Democratic candidates supported the creation of independent immigration courts. Biden, by contrast, initially supported only milder reforms. Since Biden secured the nomination, however, his position on the matter has evolved.

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recommendations—released a month before the Democratic National Convention—go one step further, pushing the Biden administration to make immigration courts independent. It's not clear that Biden has taken on that position: The party's final platform did not include the language that directly references independent Article I courts, and Biden's immigration platform and his agenda for the Latino community fail to even mention the idea.

The Biden campaign declined to comment for this article.

Nonetheless, the NAIJ views even this mention as a step forward, says Tabaddor. "There has to be, structurally, this sound system in place that isn't sort of politicized the way it has become over a number of administrations."

But despite this step forward, Tabaddor cautions that most reforms just aren't possible without independent courts. "You can tweak all those other areas, but they all get bottled up in immigration court. A chain is only as strong as its weakest link," she says.

Even before the Trump administration, the construction of the immigration courts differed in crucial ways from that of criminal or even civil courts. Immigrants can be held for as long as their case takes to be adjudicated—sometimes years. In other words, people who haven't committed crimes can be sentenced to indefinite detention. Unlike in other courts, the burden is on the individual to prove that they shouldn't be detained. And among judicial systems, these immigration courts are an entirely paper system—currently holding more than one and a half million files.

Prior to the 1980s, immigration judges were under the supervision of the same agency that prosecuted immigration cases. Since 1983, when the Executive Office for Immigration Review was created, the courts have been what's known as Article III courts, nested under the authority of the president. For decades, advocates have said that this structure is the root of the problem. Except for one congressional bill introduced in the 1980s, there has been little movement on the issue.

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Congress as a standalone court, prohibiting the executive branch to use it as an extension of its law enforcement priorities. The court's top judges would be appointed by the executive, but staggered, so that every president's administration appoints appellate judges via Senate confirmation.

"The judges should be ... selected based on merit and given support structurally to manage their independent decision making," said Tabaddor. Under the courts' current iteration, she says, "We are hired, fired, and evaluated by our chief prosecutor, the attorney general."

Paul Schmidt, who served as a board member and board chair of the Board of Immigration Appeals under the Trump administration, said that Trump is not the first to manipulate the courts. In 2003, President George Bush's Attorney General John Ashcroft removed board members whose views did not match the administration's ideas for immigration. "You can track the downward trajectory of the immigration courts from Ashcroft," he said. "We call it the purge. If you're not with the program, your job could be on the line.... Ashcroft rejiggered the system so there's no dissent."

Schmidt said he "got bounced" because of his views, which makes him skeptical of the courts ever being independent in the current system. "How can you be a little bit independent?" he said. "It's like being a little bit pregnant. You either are, or you aren't."

Despite the issue's historic lack of prominence, some Democrats have started to prioritize it. Representative Zoe Lofgren, chair of the Judiciary Subcommittee on Immigration in the House, has said she plans to pursue the legislation that would make the courts independent. In January this year, Lofgren hosted the House Judiciary Subcommittee hearing on the lack of independence and due process in the nation's immigration courts.

Senators Elizabeth Warren and Sheldon Whitehouse have publicly condemned the Trump administration's political influence on immigration courts. On August 21, Whitehouse, Dick Durbin, and Mazie Hirono wrote a letter to the Government

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Among the signees were presidential hopefuls Amy Klobuchar, Cory Booker, and Biden's pick for vice president, Kamala Harris. Harris's inclusion is significant: At times, during the presidential primary, she was not in favor of an independent immigration court, suggesting she may be moving on an issue that has become more urgent.

During the Covid-19 pandemic, the courts' lack of independence has become more apparent. In March, *The Miami Herald* reported that the White House itself was deciding which courts would be open during the pandemic. The courts' statuses were changing so often some lawyers were waking up and checking Twitter to determine if their clients would have a hearing that day. In New Jersey, the American Immigration Lawyers Association filed a motion to prohibit the government from requiring attorneys to attend in-person proceedings at the Newark Immigration Court. To date, "we still have zero idea how decisions are made to open and close immigration courts around the country," says AILA's Laura Lynch, whose organization has been tracking the Executive Office for Immigration Review's operational status throughout the pandemic.

"I think the level of dysfunction and inefficiency that's occurring in the courts right now cannot be overemphasized," said Chicago immigration attorney Ashley Huebner. "We are in a situation where, again and again and again, we have hearings that are scheduled with judges that do not exist."

The longer the court remains in its current structure, the longer it will be vulnerable to political influence, Huebner concluded. "I think the lack of independence has always been problematic ... particularly when it comes to scheduling, but I think we've definitely seen these issues get amplified [to] a level that we had not seen before in any other administration," she said. "I think the court needs to be a fully independent, Article I court."

The stakes are often a matter of life or death in immigration court. Thousands of asylum-seekers make their way to the U.S. every year, hoping for protection but too often stuck in the backlog. Some immigration judges have track records of rejecting virtually all asylum-seekers. The obliteration of our constitutional rights, the

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charge rules,” Schmidt added. “They diminish all our communities when they allow the administration to carry out a race-driven program.”

Lynch says it will be hard to fix the nation’s “broken immigration system with one bill,” but that a Biden administration’s support for independent court legislation would go a long way. “The issue [of independent courts] really has to be a part of any comprehensive package,” she said. Without independent courts, future administrations will be free to continue creating precedent-setting case law without any legislation.

“Most people aren’t on trial for their lives except in immigration court,” said Schmidt. Immigration court dockets are “bigger than the rest of the federal criminal and civil docket put together, and it’s making important determinations—who gets to be part of our society. It determines really how we treat not only people coming into our society but people who are already in our society.”

“Ultimately, it determines all of our rights,” Schmidt says.

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