

## How Politics Is Ruining the Immigration Courts

Immigration judges are DOJ operatives, which makes them especially vulnerable to the White House's whims



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Jul 8 · 5 min read ★



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The U.S. immigration court system is in collapse. While the courts are still plowing through hearings and closing cases, a damning new report from the Innovation Law Lab and the Southern Poverty Law Center argues that U.S. immigration courts are more a politicized wing of the executive branch than a neutral system of unbiased adjudication. With close to a million backlogged cases, increasing pressure from the Trump administration to rush judgments, ever-tightening restrictions for asylum—as well as ICE agents stalking courthouses and the courts themselves disseminating misinformation—immigrants wanting to stay in the U.S. face an increasingly adversarial, and sometimes downright cruel, system.

According to the report, immigration courts “violate noncitizens’ rights in a systemic, pervasive manner.” At the same time, asylum denial rates in 2018 were at an all-time high at 65%, up from 42% just six years ago. The same study found that denial rates rose around 5% just in the first six months of the Trump presidency, possibly a reflection of Trump’s anti-immigrant animus. In many cases, according to the report, it’s the judges themselves who are creating a biased and hostile environment.

To understand why immigration judges are doing the executive's bidding, and sometimes even acting with hostility toward migrants, we need to understand their role within the court system. Despite their patrician robes, immigration judges do not wield the same authority as their peers in state or federal courts. That's to say, their power doesn't come from Article 3 of the Constitution, which establishes and empowers the judicial system. Instead, immigration judges are "administrative judges" who, as defined by the Justice Department, are "non-supervisory career attorneys employed by" the attorney general. In other words, they are part of the executive branch instead of the judicial branch, and are under the supervision of the nation's top law enforcement officer (currently William Barr), who is a political appointee.

Immigration judges' compromised stature actually predates the Department of Homeland Security (DHS). Long before the creation of DHS, the task of litigating immigration violations fell to the Immigration and Naturalization Service (INS). "Special inquiry officers" of the INS were trained to enforce and adjudicate immigration claims. In 1973, these inquiry officers were given the title of "judges" but still effectively worked as prosecutors: In immigration courts, they played both roles. A decade later, in 1983, after a series of scathing reports describing an extremely biased adjudication system working arm in arm with INS enforcement priorities, the attorney general created the Executive Office for Immigration Review (EOIR), which is the agency currently tasked with ruling on immigration cases. As Ramon Valdez, director of strategic initiatives at the Innovation Law Lab, explains, the immigration court system "never lost that enforcement mentality."

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In recent years, the EOIR has been under unprecedented pressure to abide by the reigning politics of the attorney general's office. "Over the past two years, the attorneys general have plainly encouraged biased decision-making," the report reads, claiming that the recent attorney generals' "manipulation of the immigration courts has irreparably undermined any remaining legitimacy of an immigration court system." A recent incident underscored the politicization of the courts: In May the EOIR publicly released a "Myths vs Facts" memo that sought to debunk common myths about immigration courts. Problematically, the document itself was full of misconstrued statements and even a couple flat lies. The politics, critics contend, push judges to an almost singular goal: to deny and deport.

Political influence from the executive branch isn't the only way that immigration courts are different than standard state or federal

courts. Another significant factor is that immigrants, unlike criminal defendants, are not guaranteed the right to counsel, which makes a judge's neutrality all the more important. Typically, if a case reaches the court, it's the immigrant themselves trying to navigate the labyrinthine convolutions of immigration law in front of a DHS prosecutor and a judge. According to a 2016 study, only 14% of detained immigrants had representation. In 2017, three out of four children were unrepresented in immigration court. Last year, a number of outlets reported on kids as young as 3 appearing alone before judges. "Do you know what a lawyer is?" one judge asked a little boy, who, mystified, looked on silently. "Do you have a lawyer?" the judge pried. He didn't.

In focus groups of attorneys convened by the Southern Poverty Law Center researchers, judges were described as caustic, creepy, evil, hostile, and nasty. In El Paso, one hard-line judge recently described his courtroom, in true Trumpian fashion, as "the bye-bye place." The scales of justice hardly seem balanced when judges themselves are so pugnacious.

Then there's the pipeline issue: A good many judges are hired from former positions in ICE and DHS. Valdez describes it as a "power industry," with the judges and prosecutors working closely together. The appeals system, too, the Board of Immigration Appeals, or BIA, is also controlled by the DOJ, so the courts are effectively tasked with policing themselves. It's "designed so that there's no accountability," Valdez says. Former immigration judge Paul Schmidt, in a statement to researchers, put it even more bluntly, "The whole indoctrination is: You're not judges, you're really enforcement, you're really a branch of DHS in robes." Veteran immigration judge Dana Marks has repeatedly remarked that immigration court is basically "death penalty cases in a traffic court."

The report concludes: "Only by removing the immigration courts from the dangerous control of the executive branch can a fair, independent adjudication system be created." Despite such an obvious and unbiased politicization of the courts, few lawmakers or potential presidential candidates have taken up the issue. Perhaps that's because doing so would actually limit the incoming president's, or their attorney general's, potential to reverse some of the Trump administration's influence on the courts. But that's exactly what advocates are looking for—establishing an unbiased court system that doesn't bend whichever way the political winds are blowing.

