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Why Experts Say The Immigration Courts Need An Overhaul

By Nicole Narea

Law360 (April 11, 2018, 3:18 PM EDT) -- The Trump administration's recent move to impose quotas on immigration judges has reignited a decades-old debate about making immigration courts officially independent.

The Executive Office for Immigration Review, an arm of the U.S. Department of Justice, oversees immigration courts under the delegated authority of the attorney general. But over the last three presidential administrations, there has been mounting support among immigration lawyers and judges for divorcing immigration courts from the agency.

Experts say this would enhance due process and give judges more control over their dockets to handle an **ever-growing backlog of cases**. The National Association of Immigration Judges, the immigration judges' union, as well as the Federal Bar Association and the American Immigration Lawyers Association have endorsed the idea of creating an Article I tribunal, which is set up by Congress to review agency decisions, to deal with immigration cases.

The issue has taken on new urgency in light of the EOIR's **announcement this month** that it would evaluate immigration judges' performance against certain case quotas to encourage expediency and whittle down the backlog. Both the NAIJ and the FBA are taking the opportunity to lobby members of Congress to gauge support for reform legislation, Judge A. Ashley Tabaddor, president of the NAIJ, told Law360.

"The quotas threw us over the cliff," she said. "We're at an absolute crisis point. The heart and soul of the court is an independent decision maker. But the judge now has a financial interest in how the case is being handled, basically destroying the integrity of the court."

Here, we examine why these groups say reform should be a bipartisan concern and what an independent immigration court could look like.

Making Due Process a Universal Goal

Tabaddor said that immigration courts should be immune to the political whims of Democratic and Republican administrations, which have each created chaos in their dockets.

She argued that the Obama administration flouted the idea that due process requires each

case to be adjudicated on a first-come, first-served basis. It emphasized prosecutorial discretion, ordering that certain cases involving individuals who did not pose a threat to public safety be deprioritized and closed.

It also pushed cases involving unaccompanied children to the front of the docket during the migrant crisis of 2014, creating a larger backlog, she said. As of February, there was a backlog of more than 680,000 cases in immigration courts nationwide, according to a report from the Transactional Records Access Clearinghouse at Syracuse University.

The Trump administration, on the other hand, has not only imposed new quotas but also ordered a third of immigration judges transferred to border courts, "turning all the dockets on their heads," Tabaddor said.

Paul Wickham Schmidt, former chairman of the Board of Immigration Appeals during the Clinton administration, told Law360 that allowing immigration judges to have control over their own dockets would significantly aid in reducing the case backlog. Rather than carrying out the enforcement priorities of a given administration, they would be able to focus on fairly adjudicating cases in accordance with due process.

He said that ensuring the independence of immigration courts should therefore be a bipartisan issue, noting that it has been in the past. During the late 1990s, Republican Bill McCollum, former Florida attorney general and member of Congress, had routinely proposed bipartisan legislation to devise new Article I immigration tribunals, much like the U.S. tax and bankruptcy courts, which underwent reforms in 1969 and 1978 respectively.

But with the current lack of political appetite to address any bipartisan solution to immigration issues, Schmidt said it's unlikely that Congress will find such a proposal palatable.

"Due process ought to be a unifying concept," he said. "But it just doesn't seem to be these days."

Designing an Independent Immigration Court

Advocates have endorsed creating new immigration courts under both Article I and Article III of the Constitution. Article I tribunals are also known as "legislative courts" and have differing levels of independence from the legislative and executive branches. Article III courts, by comparison, are wholly independent from the legislative and executive branches and have life-tenured judges.

In February, the American Immigration Lawyers Association issued a memo recommending that Congress create an Article I tribunal modeled after bankruptcy courts with both trial and appellate divisions. The organization advocated for creating trial-level and appellate-level courts with additional review at the circuit courts and U.S. Supreme Court to avoid overburdening Article III district courts.

The AILA also suggested that all judges in the new system be appointed by the Federal Circuit and serve for a fixed term of 10 years with the option of reappointment. Though judges for Article I courts are usually appointed by the president, the organization argued that the hiring of immigration judges should be delegated in the interest of efficiency.

"Such an entity would protect and advance America's core values of fairness and equality by safeguarding the independence and impartiality of the immigration court system," the

organization wrote.

However, Stephen Legomsky, a professor at the Washington University School of Law in St. Louis, told Law360 he prefers the structure of Article III courts because they are “institutionally impartial.”

Writing in a 2010 Duke Law Journal article, he proposed converting existing immigration judges into administrative law judges and moving them into a new, independent executive branch tribunal. He also suggested replacing both administrative appeals at the Board of Immigration Appeals and appellate court review with a single round of appellate review by a new, Article III immigration court, staffed by Article III district and circuit judges for two-year terms.

“This new system would significantly depoliticize the hiring, judging, supervision, and control of immigration adjudicators,” he wrote. “It would consolidate the two current, largely duplicative rounds of appellate review into one ... restoring the Article III jurisdiction.”

But regardless of the particular design of the courts, advocates for reform can agree that that the current system is not working anymore.

“It’s already a system with quality control and consistency problems,” Schmidt said. “You can’t keep pushing a broken system to go faster, or it’s going to be a train wreck.”

--Editing by Brian Baresch.

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