

Immigration Courts Overwhelmed, Under Resourced

The Takeaway with John Hockenberry,

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It's estimated there is a backlog of more than 350,000 immigration cases nationwide, and the number of deportations is set to top two million under President Obama. Immigration judges say change is necessary.

In Washington, the tug-of-war over our country's immigration laws drags on.

Comprehensive efforts at reform have stalled in the House, and until Congress passes new legislation the immigration court system, and the immigrants within it, continue to suffer.

It's estimated that there is backlog of hundreds of thousands of cases across 57 courts nationwide, and this month, the number of deportations of undocumented immigrants is set to top 2 million since President Barack Obama took office.

Overwhelmed and under-resourced, immigration judges say change is necessary. Today The Takeaway speaks to **Judge Dana Marks**, president of the National Association of Immigration Judges and an immigration judge in San Francisco for 27 years. Judge Marks weighs in on the size of the backlog and what reform will mean for the court system.

"We believe we are at a crisis point in terms of lack of resources," says Judge Marks. "Public debate rages on about exactly what complexion the law should have in terms of what rights and benefits are afforded to non-citizens of the United States, but the immigration courts are often forgotten piece of the immigration removal process."

Judge Marks says though more money has been spent on the immigration removal process than on any other federal law enforcement initiative, immigration courts "have remained a stagnant after thought in terms of funding." She points to figures she's currently facing on the bench—the judge says she currently has 2,500 pending cases, meaning it would take an individual more than year to even get a first hearing. After the initial arraignment-type hearing, the case must wait another two and a half to three years before it is on the final docket.

In all, Judge Marks says there are about 360,000 cases pending before about 233 sitting immigration judges nationwide. In addition to very long wait times, immigration court also offers several other differences from other court proceedings.

"The biggest difference is the fact that people do not have a right to appointed council—they have the right to provide an attorney at their own expense," says Judge Marks. "Nationwide, 60 percent of the cases proceed to hearing without an attorney representative. If you consider only the detained docket—people who are incarcerated during the course of their hearings—85 percent of those individuals are not represented by council."

Other differences Judge Marks points to is that of the official record—unlike traditional courts, immigration courts have no court reporters and proceedings are instead recorded through digital audio recorders, meaning that judges must make decisions without a written transcript.

"We have another layer of complexity that most courts don't face: The vast majority of the cases that come before an immigration judge are presented through a foreign language interpreter," says Judge Marks.

In 2009, the American Bar Association made a number of recommendations to address some of these concerns, such as hiring an additional 100 judges—something that never happened. Additionally, more training was recommended to standardize the training for judges, something that also did not become reality.

"It doesn't serve anyone's interest to not have adequate resources at the immigration courts," says Judge Marks. "Some people are cynical and believe that non-citizens benefit from the delay and try to encourage delay in the system because it allows them remain longer. But the judges don't believe that is true on the whole. People with meritorious cases can suffer grave injury to their case because of the fact that they can't bring their case to hearing."

Judge Marks says that U.S. immigration law can offer certain benefits for non-citizens, but they require things like a qualifying relative who is a minor or a qualifying relative who will suffer exceptional or extremely unusual hardship, which is often medically related. Delaying hearings can cause individuals to lose that standing.

"People lose their qualifying relatives due to the passage of time because they reach the age of majority, or sometimes tragically due to death because their case is not heard in a timely fashion before their loved ones died," says Judge Marks.

Judge Marks says that though the Justice Department's Executive Office for Immigration Review prioritizes the cases of detained non-citizens so that they're not languishing in a detention facility, the entire process can still take years to sort out.

"There are times that immigration judges are called upon to make very difficult decisions," says Judge Marks. "There is no doubt that the immigration laws are extremely strict of the present time. For example, someone convicted of petty theft with a prior conviction is considered to be an aggravated felon under the immigration definition of that term. That has very harsh consequences. That can mean that someone who has been a lawful permanent resident from the time they were a small child and had no other criminal activity except for repeated petty thefts can be precluded from remaining in the United States, which may be the only country he or she knows. That person can in essence be exiled from the country that has become their home."

Judge Marks adds that others on the bench are trying to push forward initiatives that would provide them with more discretion when issuing a verdict or decision.

"We're members of our local communities—we don't want to allow someone that's going to be a danger to the community to remain anymore than people in Congress do," she says. "But we

need to have a more refined tool to use to evaluate that, rather than the broad categories which simply preclude the immigration judge from using his or her judgment to make that determination. We need more discretion in the law to allow the judges to weigh those factors and come to a fair and just result."

Transcript of Interview

John Hockenberry (JH): You probably are not aware that over the weekend, over 750 detained immigrants when on hunger strike out in Tacoma, Washington, protesting delays in their deportation cases and the conditions of their detention facilities. You probably know nothing about the Colorado case of Raul and Judy Cardenas either, and their three kids. The federal government was trying to deport immigrant Raul, even though he was married to Judy. Their only recourse to prevent their family being broken up was a hearing before an immigration judge.

[Audio clip: the prosecutor did not even have the files with DHS because of the requests that we have made. The petition is still pending, the marriage petition is still pending, and the request for prosecutorial discretion is still pending.”]

JH: That inconclusive, eight-minute hearing took place back in 2011. In 2012, the administration changed its deportation policy, however, and the Cardenas case was eventually closed. But, as of this month, the Obama administration will have deported two million immigrants, illegal and legal, for various offenses, under a court system that is universally understood to be overworked and understaffed and faced with the conundrum Congress’ inability to enact meaningful immigration reform. For judges, this can be beyond frustrating.

We spoke with Judge Dana Marks, president of the National Association of Immigration Judges. She joined us from KQED in San Francisco, where she has been an immigration judge for 27 years.

Judge Dana Marks (DM): We believe we are at a crisis point in terms of a lack of resources. Public debate rages on about exactly what complexion the law should have in terms of what rights and benefits are afforded to non-citizens of the United States. But, the immigration courts are an often forgotten piece of the immigration removal process. More money has been spent on the immigration removal process than any other law enforcement initiative, federally speaking, combined. And yet, the immigration courts have remained a stagnant afterthought in terms of funding.

JH: And, what is the consequence of that stagnation been in the style of the proceedings, the extent to which due process is actually given to immigrants?

DM: There is an adage in law in general which states that “justice delayed, is justice denied.” So, in San Francisco, for example, I have 2,500 pending cases on my docket. That means that it takes more than a year for someone to get their first hearing before me, and that hearing is simply an arraignment type hearing where we triage and try to figure out what we need to do to bring that

case to trial and make it ready for a trial. And, at that arraignment type hearing, it is then another two and half to three years before I can even get a case to my final docket. I am currently setting case in the fall of 2017. To give you a perspective nationwide, there are now approximately 360,000 cases pending before immigration judges, and the current staffing of the immigration judge core is only 233 sitting immigration judges with an additional 15 immigration judges nationwide whose primary responsibility is supervisory and management.

JH: Would I recognize a court proceeding that involved an immigration plaintiff or defendant?

DM: We call them “respondents” in immigration court proceedings and the biggest difference is the fact that people do not have a right to appointed counsel. They have the right to provide an attorney at their own expense, but nationwide, sixty percent of the cases proceed to hearing without an attorney representative and if you consider only the detained docket, people who are incarcerated during the course of their hearings, eighty-five percent of those individuals are not represented by counsel. We record our proceedings on digital audio recordings, rather than a court reporter, so the judge has to make his or her decision without a written transcript. And we have a layer of complexity that most courts don’t face; the vast majority of the cases that come before an immigration judge are presented through a foreign language interpreter.

JH: The ABA, back in 2009, made a number of recommendations to fix the court, or address some of these concerns. They wanted the hiring of an additional 100 judges. Did that ever happen?

DM: No, it did not, and we are hoping for that sometime soon.

JH: There was also a lot of talk in the Commission Report about how there is wide variance in the quality of decisions on the part of judges, the standardization of training for immigration judges is not what it should be, and that even Attorney General Alberto Gonzales addressed some of these concerns in 2006, attempting to upgrade the quality of the judge core. Did any of that happen?

DM: The short answer is no. I cannot speak to policy in my role in the National Association of Immigration Judges, but I can say that it doesn’t serve anyone’s interest to not have adequate resources at the immigration courts. Some people are cynical and believe that non-citizens benefit from the delay and try to encourage delay in the system since it allows them to remain longer. But the judges don’t believe that that is true on the whole. People with meritorious cases can suffer grave injury to their case because of the fact that they cannot bring their case to hearing. There are certain benefits under the immigration law which require a qualifying relative who is a minor, or a qualifying relative who will suffer exceptional or extremely unusual hardship, often that hardship is medically-related. So, people lose their qualifying relative due to the passage of time, because they reach the age of majority, or sometimes tragically, due to death because their case is not heard in a timely fashion before their loved one dies.

JH: So what is the longest time you aware of a respondent who was incarcerated during a delay of the kinds that you’re speaking of?

DM: It is true that the Executive Office for Immigration Review prioritizes the cases of detained non-citizens so that they are not languishing in a detention facility. But it can be years on end between the actual proceeding before the Immigration Judge and the various appeals processes that are available afterwards.

JH: You've seen people in that situation, right?

DM: Yes, I have. People are often very surprised to learn that a stress study done of immigration judges showed that the level of stress in our core in 2009 rated immigration judges as high on the stress and burnout scales and prison wardens and busy hospital room doctors.

JH: Have you ever felt as though respondents have fallen through the cracks in your court systems at some of these very brief hearings that you understood on some level that the verdict you were delivering was not necessarily going to represent justice, but there was nothing you could do about it?

DM: There are times that immigration judges are called upon to make very difficult decisions. There is no doubt that the immigration laws are extremely strict at the present time. For example, someone convicted of petty theft with a prior conviction is considered to be an "aggravated felon" under the immigration definition of that term. That has very harsh consequences. That can mean that someone who has been a lawful permanent resident from the time they were a small child, and had no other criminal activity except for repeated petty thefts, can be precluded from remaining in the United States which may be the only country that he or she knows, that that person can in essence be exiled from the country that has become their home.

JH: So, you have the power to tear up a family over someone whose shoplifted?

DM: I have the duty, at times, to separate family members if I find that the law itself does not allow me to consider some kind of relief from removal for that person. And when Congress tries to micromanage every outcome by making the law so specific, as it did for example with petty theft with a prior being an aggravated felony, and of course we know it's certainly not aggravated and it may not even be a felony in some situations. When those kinds of situations are predetermined, instead of being allowed to weigh all the factors, both positive and negative, it does not achieve as just a result. The immigration judges are fighting to try and get some discretion back into the courtrooms. We're members of our local communities; we don't want to allow someone that is going to be a danger to the community to remain any more than the people in Congress do. But we need to have a more refined tool to use to evaluate that, rather than the broad categories which simply preclude the immigration judge from using his or her judgment to make that determination. We need more discretion in the law to allow the judges to weigh those factors and come to a fair and just result.

JH: I'm curious. What you describe as a fix here, getting the immigration court system out from under the Attorney General's Office and the Department of Justice, and making it an independent, Article I court, that's a recommendation that has been around since the early 1980s.

DM: That's correct, but law is glacial in its speed for change. The National Association of Immigration Judges has been fighting for years to accomplish that, we have gained support in that cause since 1981 by getting the American Bar Association and the Federal Bar Association, extremely prestigious legal groups, to endorse that concept. And now it's our jobs to convince Congress, and the American public, that this is an essential step which needs to be taken soon.

JH: Judge Marks, thank you so much.

DM: Thank you, John.

JH: Judge Marks is the president of the National Association of Immigration Judges, she has been an immigration judge in San Francisco for 27 years.