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The crisis in the immigration courts

Summary

The cornerstone American principle of fair justice, including timely and meaningful access to justice, is neglected in the immigration court system

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The glaring deficiencies in our immigration court system have lingered for far too long. The cornerstone American principle of fair justice, including timely and meaningful access to justice, is neglected in this system. We must elevate this principle back to its proper place. President Obama recently took a step forward by demanding the implementation of prosecutorial discretion within the system. The responsible federal actors must execute that demand. Additionally, further steps are needed to address more comprehensively the shortcomings of the immigration court system.

Our nation's immigration courts are charged with determining who may be removed (deported) from the United States. Immigration judges, employees of the Department of Justice, preside over hearings to consider the government's charge that an individual should be deported. While there are many challenges facing the immigration courts, the main challenges are overwhelming caseloads, a lack of resources, a lack of lawyers representing foreign nationals, and a lack of independence for immigration judges.

Immigration judges completed 353,247 matters in Fiscal Year 2010. As of December 2010, there were only 272 immigration judges to tackle this caseload. These matters are not simple or routine, but rather require intensive factual inquiry and the application of a body of law said to rival the federal tax code in its complexity. Often the facts are emotionally charged, as these cases frequently involve claims that an applicant will be persecuted if returned to his or her home country. The complexity of these matters (both legally and emotionally), means that these adjudications take time, special care, and constantly evolving expertise. As the number of new matters drastically has grown through increased enforcement efforts, the number of immigration judges has remained relatively stable. Under those conditions, it is not surprising that the backlog in cases is jaw-dropping: 275,316 as of May 2011. One report calculated the average

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wait time for a pending case in immigration court to be 482 days.

These overwhelming caseloads can be matched to a lack of resources. The funding of the immigration courts has failed to keep pace with the need for adjudication created by increased enforcement. The Department of Justice predicts that it will receive more than 400,000 matters in Fiscal Year 2011. Despite temporary additional funding that allowed for the hiring of some 36 additional immigration judges, the courts are still falling behind, as evidenced by the backlog. Policymakers must recognize that increased enforcement demands increased access to the immigration courts, and realistic funding should be provided so that immigration judges have the necessary time and space to consider these complex cases. In 2010, we joined the American Bar Association in recommending the hiring of at least 100 additional immigration judges. Not only is that goal unmet, but as the number of matters increases, the number of needed immigration judges must also rise. The lack of resources has led to a poor working environment. Immigration judges scored higher than any other professional group on a workplace burnout test, reporting greater levels of burnout than prison wardens.

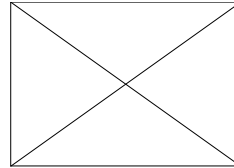
A lack of attorneys representing foreign nationals compounds the heavy workload of an immigration judge. In cases where the foreign national is detained during proceedings, only approximately 16% had an attorney in Fiscal Year 2007. In all cases (detained and non-detained), only 43% had counsel in Fiscal Year 2010. There is a statutory right to counsel during immigration proceedings, but not at the government's expense. The great majority of foreign nationals are left to navigate the labyrinth of immigration law on their own. Not only does this call into question the fairness of the entire adjudication system, but this state of affairs also slows down the work of immigration judges. Without representation, immigration judges face the choice of slowing down the proceeding to try to explain immigration law and to seek out potential avenues of relief, or to speed through it, knowing that the foreign national is not informed. Either way, in the great majority of cases, no one in court is dedicated to representing the interests of the foreign national. The government is represented by counsel, however. These matters are important enough to justify the appointment of government-funded counsel, as recommended by the American Bar Association.

A further challenge is a lack of independence for immigration judges. As employees of the Department of Justice, immigration judges are under the control of the Attorney General and lack the job protections provided to Administrative Law Judges. The Attorney General is in charge of the hiring, firing, training and reviewing of the immigration judge corps. This lack of independence for immigration judges is unacceptable, especially given the sensitive nature of these matters. Immigration judges should not have to decide cases wondering what his or her boss, the Attorney General, will think of the decision. In 2010, we joined the American Bar Association in recommending the creation of an Article I Immigration Court, or in the alternative, an independent agency, to increase the independence of immigration judges. As no major action has been taken to increase the independence of immigration judges, we renew the call for greater independence.

The Obama Administration took a step toward alleviating the crisis in the immigration courts in mid-August by establishing procedures meant to ensure the implementation of prosecutorial discretion. Prosecutorial discretion is a long-time feature of immigration enforcement. For example, agency officials have the authority to decide whether to begin or to stay a particular enforcement action. The new procedures systematically aim to direct enforcement efforts, and subsequently immigration court resources, towards high priority matters, such as those involving national security and public safety. The Administration has created a working group to review pending cases. This direction of efforts holds promise for temporarily alleviating the caseloads

of the immigration courts, but it must be implemented consistently on the ground and for the long-term for the promise to be fulfilled. News reports of local offices bristling against the new procedures and the objections of certain enforcement officers are ominous signs. Even if these new procedures do lower the number of cases, the lack of lawyers for foreign nationals and the lack of independence for immigration judges will remain as major challenges.

The crisis in the immigration courts is not new. For years, even government officials have acknowledged it, along with lawyers, legal scholars and major legal organizations. As time passes, the crisis only intensifies. The time for action is now.



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