An Article I Immigration Court - Why Now is the Time to Act
A Summary of Salient Facts and Arguments

Experience has shown that it is difficult to get attention directed to the Immigration Courts. Even when comprehensive immigration legislation is considered, the Immigration Courts are a frequently overlooked, albeit essential, component of the system. While not a panacea, structural reform of the Immigration Courts would advance the goals and alleviate concerns expressed by both sides of the immigration debate, liberals and conservatives alike.

The need to address chronic problems at the Immigration Courts has become especially urgent since 2014 because of the continuing surge of Central American adults with children and unaccompanied minors at our southwest border. The misguided choice to move new cases to the front of the docket has only caused additional chaos and dysfunction and not served as a deterrent to recent entrants.

Resources have not kept pace with the increases provided to the Border Patrol and other DHS enforcement programs. Over the last five years, resources for immigration enforcement have quadrupled –from $4.5 billion in 2002 to $20.1 billion in FY 2016. During the same period, the already under-resourced Immigration Courts' saw their funding increase by only 74%. No long term planning or defensible fiscal linkages have been established despite Congress's request for a study in 2009.

Caseloads are at an all-time high and resources are woefully inadequate. Approximately 512,000 cases are now pending before 291 Immigration Judges nationwide. This is an average of over 1875 pending cases per IJ, compared to an average of 440 per U.S. District Court Judge, since approximately 18 Immigration Judges have exclusively or predominately administrative and managerial duties. The Immigration Courts are dramatically understaffed – one judicial law clerk for every two or three Judges, and clerical staffing is woefully inadequate.

DOJ has been unable to keep pace with the hiring, training, administrative, and technological needs of our expanding caseload. A catastrophic hardware failure in April of 2014 disabled EOIR computers for six weeks. Technical problems with videoconferencing frequently impacts hearings. A chronically sluggish hiring process and a veritable tsunami of retirements has meant that the Courts are still almost 25% below the authorized IJ complement of 374.

As the caseload rises, the public and those before the court are hurt by increased delays particularly when a respondent is detained. These delays cause both economic and personal hardship to detainees, their families, employers, friends and communities, while at the same time are costly to the government. The irony is that s only the weak cases benefit from the delay.

Immigration Courts have not been provided other tools needed for prompt and fair adjudications: contempt power for Judges has not been provided despite Congressional legislation in 1996.

Public faith in the Immigration Courts has been undermined by the placement of these tribunals in a law enforcement agency. For years concerns have been raised about impartiality of the Immigration Courts. The lack of public trust has been exacerbated by both real and perceived bias towards enforcement concerns and an inappropriately deferential relationship with the Department of Homeland Security. This public skepticism results in higher rates of appeal to the Federal courts and increased detention costs as appeals are litigated.

This law enforcement bias and deference to the DHS has wreaked havoc with our docket. The best example of this has been the prioritizing of "surge" dockets of recent arrivals – which is counter-intuitive to judicial efficiency and fairness. The principles of efficient court management do not always coincide with an enforcement perspective, which is why no criminal court would allow the police department to control its docket. Our current structure does just that, thereby tainting the neutrality of our court's management decisions. This, in turn, generates class action litigation which needlessly consumes scarce court resources.

DOJ persists in treating Judges as attorneys, holding them to attorney canons of ethics and attorney discipline rules. This puts Judges in the untenable position of potentially risking their jobs for good faith, albeit unpopular, legal positions. The chilling effect is obvious.

Article I[i] is the only enduring solution to these ills. It would provide transparency to the public regarding removal proceedings, transparency regarding judge conduct and discipline, and transparency regarding funding to assure that the Immigration Courts get their due.

This idea has been endorsed by two bi-partisan commissions in the last 30 years and by several prestigious bar associations and legal groups. The Government Accountability Office is currently studying the costs and benefits of a transition. The issue is ripe for action.

The most important action to improve immigration enforcement and enhance due process is to create an Article I Immigration Court. Let's get Congress to act on this NOW.

We invite you to look deeper into this issue. For more information, please contact us at:

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[i] Article I of the U.S. Constitution expressly grants Congress the power to constitute “tribunals” (courts) inferior to the U.S. Supreme Court unlike those created pursuant to Article III of the Constitution, which grants certain protections such as lifetime tenure and a bar against diminution of compensation while in office. By way of illustration, Congress has created bankruptcy courts, a claims against the government court, and a tax court.