Making Our 'Immigration Courts' Courts

by Elizabeth J. Stevens

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Recently, the White House announced that it sought to reduce the current immigration court backlog by requesting appropriations for additional immigration judges and instituting performance metrics for all immigration judges.[1] Sen. Claire McCaskill and Reps. Jim Sensenbrenner, Zoe Lofgren, and Trey Gowdy asked the General Accountability Office (GAO) the following questions:

1. What do Executive Office for Immigration Review (EOIR) data indicate about its caseload, including the backlog of cases, and potential contributing factors and effects of the backlog according to stakeholders?
2. How does EOIR manage and oversee immigration court operations, including workforce planning, hiring, and technology utilization?
3. To what extent has EOIR assessed immigration court performance, including analyzing relevant information, such as data on case continuances?
4. What scenarios have been proposed for restructuring EOIR's immigration court system and what reasons have been offered for or against these proposals?[2]

A close read of the GAO's report provides a chilling window into a system in chaos.[3]

Court History

To understand where we may be headed with immigration court reform, it is critical to look at the history of the system's development. Our current immigration court system began in 1893, when Congress replaced various state and local inspection practices with federal "Boards of Special Inquiry" (consisting of three immigration inspectors), which reviewed and decided cases of those seeking to enter the United States.[4] In 1921, after Congress instituted a quota system limiting the number of immigrants, the secretary of labor created a "board of review" to handle administrative appeals[5] and, in 1933, formed the Immigration and Naturalization Service (INS)[6] to handle all immigration matters.

INS moved to the Department of Justice in 1940, and the attorney general renamed the board of review as the Board of Immigration Appeals.[7] In 1952, Congress eliminated the Boards of Special Inquiry and established "special inquiry officers" to review and decide deportation cases.[8] In 1973, special inquiry officers were authorized by regulation to use the title "immigration judge" and to wear judicial robes.[9] On Jan. 9, 1983, the attorney general created the EOIR, separating the administrative courts from the prosecutorial, investigative, and first line adjudications.[10] And in 2002, when the Department of Homeland Security (DHS) was created, Congress decided to keep EOIR in the Department of Justice.[11]

Despite these developments, we still have a half-formal, half-informal adjudication system that is neither a civil court nor a criminal court. Immigration judges have little control over their dockets, are unable to use the contempt authority authorized by Congress,[12] and are now faced with one side that is unwilling to compromise.[13] This has led to a backlog most recently estimated at over 600,000 cases,[14] with some cases scheduled for hearings in 2022.[15]

A plethora of articles—nay, a deluge—revealed the chaos in the current system, but none with quite the weight of the GAO's June 2017 report.[16] The report identified continuances as one of the factors contributing to the growth of the backlog.[17] Another significant contributing factor is the growing complexity of cases.[18] Unfortunately, reducing case complexity would require significant clarification to and change of our current immigration laws, something that has not been successful for over a decade. Some of the EOIR's proposed efforts to reduce the backlog are commendable; for example, the July 2017 guidance clarifying the standards for determining whether a request for a continuance should be granted.[19] Others, however, such as increasing the size of the EOIR bureaucracy, may not help.[20] But fiddling at the margins with continuance guidance, throwing more and more immigration judges and bureaucracy into the mix, or changes to the immigration laws will only stem the current growth—and not fix the underlying problems.

Proposed Solutions

The Federal Bar Association has taken a long look at the issue and believes the optimal addition to the solution is to lift the immigration courts, Board of Immigration Appeals, the Office of the Chief Adminis-

trative Hearing Officer, and their administrative support staffs from the Department of Justice and create a new independent Article I court. In the proposal, present immigration judges and board members would be retained during the pendency of a transition period to ensure continuity. New appellate division appointments would be appointed by the president with the advice and consent of the Senate. New immigration trial judges would be selected by the appellate division on the identification and recommendation of local merit selection panels. Other tribunal-type courts, including the DHS's Administrative Appeals Office and the Department of Labor's Board of Alien Labor Certification Appeals, would be included in studies to determine if they should be transferred later to the Article I court.

Moving the immigration courts out of the executive branch would help alleviate the perception that they are not independent tribunals with DHS and the respondents as equal participants. This would also cure the perception that the immigration courts have become so politicized that decisions change not with the law but with the politics of the current administration. Moreover, due to the number of immigration judges who are former DHS attorneys and the co-location of some immigration courts with Immigration and Customs Enforcement offices, a broad perception exists that immigration judges and DHS attorneys are working together. This perception leads to significant lapses in perceived due process; for example, individuals don't appear because they think the system is rigged, don't appeal a bad decision because they lack resources after the long wait for a merits hearing, or don't pursue potential relief for which they might be eligible. Plus, such a move would allow DHS the opportunity to appeal the Article I appellate division's decisions to the circuit courts of appeals—providing those courts with a broader, more balanced view of issues and decisions of the trial-level immigration court.[21] EOIR's *FY 2016 Statistics Yearbook* indicates that one quarter of the initial cases decided were grants—none of which were ever reviewed by the courts of appeals.[22]

With a move to an Article I court, both trial level and appellate division judges would have fixed terms of office and tenure protections that would facilitate judicial decisions without fear or favor. (If one believes that current members of the Board of Immigration Appeals are truly independent, one should research the "streamlining" of the board down to just 11 members.[23]) Current board members and immigration judges are arguably government attorneys with the same client as DHS attorneys.[24] They are subject to case completion goals—with or without express reliance on numerical goals—and may be subject to discipline by the attorney general.[25] The currently proposed performance metrics are not new—most have been in place in one form or another since 2002.[26]

Last but not least, removing the immigration courts from the Department of Justice should speed the courts' ability to regulate itself. First and foremost, the individual immigration judges would have control over their dockets and not be subject to decisions by headquarters to prioritize case A over case B (and then back again)—or send trial judges off to border courts to handle a few cases when their backlogged dockets have to be re-scheduled.[27] The Article I court as a whole would be able to issue rules and regulations without the current byzantine requirements for consultation with a number of different offices and agencies. And, finally, hiring an immigration trial judge would not take two years.[28]

Moving Forward

Other options exist; all have flaws. None of the options will single-handedly fix the backlog. We all have strong opinions about whether our nation's immigration laws need a complete overhaul or a quick fix—and how to go about either or both—but as we look to implement changes in our current immigration system, we must also aspire to lift the immigration courts from "halfway there" not-quite-courts to true Article I courts. ⊙

Endnotes

[1]White House, *Immigration Principles & Policies*, at 2 (Oct. 8, 2017), *available at* https://www.politico.com/f/?id=0000015e-fe3d-dc15-a3fe-ff3d27fb0000.

[2]U.S. Gov't Accountability Office, GAO-17-438, Immigration Courts: Actions Needed to Reduce Backlog and Address Long-Standing Management and Operational Challenges 1-4 (June 2017), http://www.gao.gov/assets/690/685022.pdf.

[3]*Id*.

[4]Immigration Act of 1893, Act of March 3, 1893 (27 Statutes-at-Large 570).

[5]Exec. Office for Immigr. Rev., Evolution of the U.S. Immigration Court System: Pre-1983 (2013), https://www.justice.gov/eoir/evolution-pre-1983.

[6]Exec. Order No. 6166 (June 10, 1933).

[7]5 Fed. Reg. 3,502 (Sept. 4, 1940).

[8]Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat.163 (June 27, 1952).

[9]38 Fed. Reg. 8,590 (Apr. 4, 1973).

[10]48 Fed Reg. 8,038 (Feb. 25, 1983).

[11]*See generally*, Homeland Security Act, Pub. L. No. 107-296, § 1517, 116 Stat. 2135, 2311 (Nov. 25, 2002) (codified at 6 U.S.C. § 557).

[12]Pub. L. No. 104-208, div. C., § 304, 110 Stat. 3009, 3009-589, codified as amended at §240(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(b)(1). No regulations have ever been promulgated.

[13]Memorandum from Sec. John Kelly on the Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017), *available at* https://www.dhs.gov/publication/enforcement-immigration-laws-serve-national-interest (limiting uses of prosecutorial discretion by individual ICE attorneys).

[14]Statement of James McHenry, Acting Director, Executive Office for Immigration Review, U.S. Dept of Justice, before the Subcommittee of Immigration and Border Security, Committee on the Judiciary, U.S. House of Representatives (Nov. 1, 2017), *available at* http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=106561 [hereinafter McHenry Statement].

[15]*See Despite Hiring, Immigration Court Backlog and Wait Times Climb*, TRAC Immgr. (May 15, 2017), http://trac.syr.edu/immigration/reports/468.

[16]*Supra* note 2.

[17]*Id*. at 27.

[18]*Id*. at 27-28.

[19]Exec. Office For Immigr. Rev., Operating Policies and Procedures Memorandum 17-01: Continuances (July 31, 2017), https://www.justice.gov/eoir/file/oppm17-01/download.

[20]McHenry Statement, *supra* note 13, at 5.

[21]Currently, only the respondents may file a Petition for Review in the

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contemporary issues, including: (1) the concept of the model minority; (2) employment discrimination and the "Bamboo Ceiling"; (3) profiling and the question of "spies"; (4) education and the thorny question of reverse discrimination; and (5) contemporary violence. A theme of the course is that discrimination, while not as overt as it may have been a century ago, still exists in the form of limitations in employment, education, and political life.

While in private practice, Judge Chin provided extensive pro bono representation to the Asian American Legal Defense and Education Fund. He served as president of the Asian American Bar Association of New York (AABANY) from January 1992 through January 1994. He has served on the boards of numerous nonprofit organizations, including Hartley House, Care for the Homeless, the Clinton Housing Association, and the Prospect Park Environmental Center. He is currently a vice president of the Fordham Law School Alumni Association, a member of the advisory boards of the Feerick Center for Social Justice and the Center on Law and Information Policy at Fordham Law School, and a member of the Board of Trustees of Princeton University.

In addition to the many community activities that Judge Chin leads, over the past decade, he has developed a series of "reenactments"—scripted performances of historically noteworthy cases. The works are authored and narrated by Judge Chin and Kathy Hirata Chin, partner, Cadwalader Wickersham & Taft. These one-hour scripts are performed by a cast of actors, often law students, academics, and practitioners, and include key sections of hearing transcripts, relevant court documents, newspaper articles, and historic photographs from the time period.

Many of these works examine the prominent role that Asian-Americans have played in America's legal history, which, in spite of their relatively limited numbers, have been at the center of many legal controversies that continue to reverberate today. Through these reenactments, history is brought to life, reminding us of the important role Asian-Americans have played in our collective legal history.

A number of the performances have been held at the AABANY, and on March 14, the FBA and AABANY will team up with Fordham Law School to perform *22 Lewd Chinese Women: Chy Lung v. Freeman.* Sponsored by the FBA International Law Section, this program will bring together a cast of 29 law students and leaders in the academic and legal community to examine and relive this immigration case that reached the Supreme Court in the 1870s. The case recounts how 22 Chinese women traveling without husbands or children were detained at the Port of San Francisco as "lewd women" and how this implicated immigration and federalism concerns that wound up at the U.S. Supreme Court. At the time, California law required the payment of $500 bonds to the State Commissioner of Immigration attendant to the transportation of "lewd and debauched women." This reenactment examines the limits of state and federal power and touches on sexism, racial profiling, and human trafficking.

This particular program was first performed by AABANY on Jan. 30, 2014, and it and other reenactments have been performed at Princeton University, the U.S. Court of Appeals for the Second Circuit, the State Bar of California Annual Meeting, the UC Davis Law School, and many others. In addition to offering an educational and entertaining program for FBA and legal community members, this reenactment performance aligns with the FBA's effort to support diversity and inclusion in the FBA and the greater legal community as it builds on the FBA's external partnerships to advance diversity and inclusion.

Judge Chin is a leader on the bench, in the classroom, and in the greater community. That he is a pioneer in the creation of programs that advance greater understanding of our historical, legal, and social underpinnings should come as no surprise to those who have been following his remarkable career. Judge Chin devotes a significant amount of his personal time to advancing better understanding of important legal concepts, and this is a testament to the sincerity of his drive. He is an extremely valuable partner to the Federal Bar Association. ⊙

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Courts of Appeals. 8 U.S.C. § 1252. As a result, the Courts of Appeals only see denials of benefits and orders of removal—they do not get a chance to weigh whether grants of benefits and terminations of proceedings are in accordance with the law.

[22]Exec. Office For Immigr. Rev., FY 2016 Statistics Yearbook (Mar. 2017), *available at* https://www.justice.gov/eoir/page/file/fysb16. Significantly, grants of voluntary departure are considered to be "removal orders" in EOIR's statistics.

[23]*See*, *e.g.*, Ricardo Alonso-Zaldivar & Jonathan Peterson, *5 on Immigration Board Asked to Leave; Critics Call It a "Purge,"* L.A. Times (Mar. 12, 2003), http://articles.latimes.com/2003/mar/12/nation/na-immig12.

[24]*See* 8 U.S.C. § 1101(b)(4).

[25]*See* U.S. Gov't Accountability Office, GAO-06-771, Executive Office for Immigration Review Caseload Performance Reporting Needs Improvement 20-21 (Aug. 2006) (Report to the Chairman, S. Comm. on Finance).

[26]*Id*.

[27]*See* Meredith Hoffman, *Trump Sent Judges to the Border, Many Had Nothing To Do*, Politico Mag. (Sept. 27, 2017), https://www.politico.com/magazine/story/2017/09/27/trump-deportations-immigration-backlog-215649.

[28]*Supra* note 2, at 40.