MCCOLLUM: Immigration courts need an upgrade

Independence from the Justice Department would increase effectiveness

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For years, the need for an immigration court has been obvious, but it has gone unmet. As major immigration-reform legislation moves through Congress, now is the time to create the court, under terms in Article 1 of the U.S. Constitution. It may not be a sensational topic or one that inspires heated debate, but it is essential to reform. It has widespread support in the legal community, and it would result in enhanced due process protections and provide an enforcement mechanism, which would reduce appeals and delay.

Today, immigration judges are classified as attorneys working for the Justice Department in the Executive Office for Immigration Review. They are highly specialized with tremendous responsibilities, but with no true judicial independence. Immigration courts are the trial-level tribunals that determine if an individual is in the United States illegally, and if so, whether there is any status or benefit to which the individual is entitled. Most frequently, matters before immigration judges are initiated by Immigration and Customs Enforcement trial attorneys in the Department of Homeland Security seeking deportation or removal of an individual.

Caseloads are at an all-time high. Currently, there are approximately 327,000 cases pending for 256 immigration judges nationwide — an average of 1,277 pending cases per judge, compared with 440 per U.S. district court judge. Immigration courts are dramatically understaffed — one judicial law clerk for every four judges, unlike district court judges, who have two or three per judge. Sixty percent of respondents are unrepresented by counsel, and 85 percent of detained respondents are unrepresented because these are civil proceedings with no right to counsel despite the high stakes for those involved. One can only imagine how dramatically this caseload will increase after the enactment of a new immigration-reform law.

Within the Executive Office for Immigration Review, there is a Board of Immigration Appeals, where decisions of immigration courts may be reviewed and policy set at the discretion of the attorney general. The Due Process Clause of the Constitution applies to all persons, including aliens. In considerable measure because immigration judges are not independent, and there are inherent conflicts of interest, federal circuit courts of appeal are flooded with requests for review of immigration cases.

Despite legislation passed more than 15 years ago granting it, immigration judges have no contempt authority because the Justice Department has refused to allow them to use it. This appears to come from an aversion to allowing immigration judges, who are Justice Department attorneys, to discipline Department of Homeland Security attorneys, who prosecute immigration cases. Subpoenas issued by immigration judges go unenforced when directed at Homeland Security attorneys because U.S. attorneys won't pick sides between the two sibling agencies.

It is not unusual for immigration judges to face personal discipline when making good-faith legal decisions because the Justice Department responds to complaints from disgruntled parties. The appropriate recourse would be an appeal. The basis of most complaints against immigration judges relate to their decisions, not to allegations of conflict of interest or personal gain by the judge. These judges can also be subjected to personal discipline for not meeting the administrative priorities of their supervisors in the Justice Department and may be placed in the position of having to choose between risking their jobs and exercising "independent" decision-making authority.

The only effective way to address these problems is to reorganize immigration courts under Article I of the Constitution to give them independence from Justice or any other agency. Article I judges are not subject to Article III protections, such as lifetime tenure and against salary reduction, but they are independent judges. The United States Tax Court, the bankruptcy courts and the U.S. Court of Federal Claims are all Article I courts. It was the recommendation of the 1981 Select Commission on Immigration Reform to reorganize immigration courts under Article I. It was formulated into legislation, H.R. 185, which I introduced in the U.S. House in 1999.

The nature and volume of immigration cases dictate that there be a trial division and an appellate division under Article I. The appellate division would do what the current administrative appellate board does and perhaps more, if Congress desires. All judges would be appointed by the president subject to Senate confirmation, or, alternatively, only the appellate division judges would be presidential appointees, with the chief judge of the appellate division appointing trial judges. Tenure should be for a certain number of years, perhaps 15. Among proponents of an Article I court, there are differing views over which higher courts should have jurisdiction to entertain review of decisions of Article I immigration courts, and with which restrictions. Limiting review to the Court of Appeals for the Federal Circuit by writ of certiorari or by application for a writ of habeas corpus would be the most efficient and take into account the benefit of only that court having to tackle complex immigration matters.

Details such as appellate review can be debated and resolved by Congress. The important thing is that the creation of an Article I immigration court should be included in any immigration-reform legislation passed by Congress. Only then will we see our immigration laws effectively and fairly administered and adjudicated.

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