



## **SNAPSHOT OF THE CRISIS FACING OUR IMMIGRATION COURTS TODAY**

### **SALIENT FACTS AND URGENT NEEDS**

June 2017

As America wrestles with unprecedented challenges to our immigration system, we are once again at a delicate juncture where we must avoid repeating the mistakes of our past. The most overlooked and often forgotten piece of the complicated immigration puzzle facing the nation is our immigration court system. Action is needed NOW to protect these unique courts from politicization and dysfunction. They are often the only face of American justice that non-citizens experience, and our values must be embodied by them. What is needed is an efficient, fair system that assures independent and timely decisions which protect the public from those who may be dangerous to our communities, and allows noncitizens who qualify (because of close family connections, employment here, or persecution in their home country) to stay here.

#### **RECALCITRANT CASE BACKLOGS**

As of the end of April, 2017, the Immigration Court backlog stood at 585,930.<sup>i</sup> The caseload of the Immigration Court has more than doubled since 2010.<sup>ii</sup>

#### **LENGTHY DELAYS**

The average number of days a case was pending on the Immigration Court docket until decision was 670 days as of April 30, 2017, although 9 states (in order of descending magnitude: Colorado, Illinois, Ohio, New Jersey, Texas, Michigan, Nebraska, Arizona and California) exceeded that average.<sup>iii</sup> The longest wait time is in Colorado, which is 1,002 days.<sup>iv</sup>

#### **SURGING CASELOAD ON THE HORIZON**

In 2014, an unprecedented influx of unaccompanied minors at our nation's southwest border was labeled a humanitarian crisis, prompting the Senate to nearly double the available funding for care and resettlement of child migrants.<sup>v</sup> Those cases remain on our dockets and are not easily resolved: of the 229,357 pending juvenile cases as of April 30, 2017, 42% had no legal representation.<sup>vi</sup> It is inevitable that this influx caused dramatic increases in our dockets and will impact our system for years to come.<sup>vii</sup> Since January of 2017, our courts have been experiencing another significant increase in new cases resulting from the initiatives announced by President Trump and DHS.<sup>viii</sup> Many observers agree this is overwhelming an already strained system.<sup>ix</sup> During the first three months following these announcements, immigration arrests increased 38% over the same period one year earlier.<sup>x</sup>

### **FAILURE TO MEET PREDICTABLE STAFFING NEEDS IN A TIMELY FASHION**

The inability of the Immigration Courts to meet these surges in caseload is due, in large part, to the chronic lack of sufficient court staff. As long ago as 2006, after a comprehensive review of the Immigration Courts by Attorney General Gonzales, it was determined that a judge corps of 230 Immigration Judges was inadequate for the caseload at that time (approximately 168,853 pending cases) and should be increased to 270.<sup>xi</sup> Despite this finding, there were less than 235 active field Immigration Judges at the beginning of FY 2015.<sup>xii</sup> To make matters much worse, 39% of all Immigration Judges are currently eligible to retire.<sup>xiii</sup> Even with a recent renewed emphasis on hiring, the current number of Immigration Judges nationwide stands at approximately 318 today (298 who are actually in field courts), well below authorized hiring levels of 384.<sup>xiv</sup> One expert observer recommends adding at least 150 immigration judges to the corps based on its meticulous analysis of past caseload needs.<sup>xv</sup> The American Bar Association, Administrative Conference of the United States and two expert roundtables convened by Georgetown University's Institute for the Study of International Migration have all called for dramatically increased resources to staff up our courts.<sup>xvi</sup>

### **INADEQUATE SPACE, FACILITIES AND EQUIPMENT**

As caseloads explode, the Immigration Courts find themselves in desperate need of additional physical space and facilities to conduct hearings, to accommodate both staff and the voluminous legal filings. Modernized equipment and electronic filing initiatives are needed immediately in order to respond.<sup>xvii</sup> The current courtrooms are too small to accommodate the large numbers of families now appearing before our courts, raising serious concerns regarding public safety and security. In addition, we don't have enough courtrooms or courtrooms in the appropriate places to address the caseload.

### **FAILURE TO PROVIDE ESSENTIAL TOOLS FOR ADJUDICATIONS**

Despite express congressional authorization of contempt power for Immigration Judges in 1996, the Department of Justice still has not promulgated implementing regulations. Without authority to impose civil monetary sanctions for attorney misconduct, Immigration Judges lack an important tool in controlling court proceedings over which they preside.

### **DEEPENING DISCONNECT IN FUNDING BETWEEN DHS AND THE IMMIGRATION COURTS**

In the past decade, budgets for components in the Department of Homeland Security (Customs and Border Patrol and Immigration and Customs Enforcement) rose approximately 300% compared to 70% for the Executive Office of Immigration Review.<sup>xviii</sup> In the meantime, while grappling with this meteoric rise in our dockets, budget bills fail to "right-size" this funding ratio and properly provide for the predictable needs of our courts.<sup>xix</sup>

### **CHRONIC SCARCITY OF RESOURCES CRIPPLES DAILY OPERATIONS OF THE COURT**

A catastrophic hardware failure on April 12, 2014 took the docketing system off-line for five weeks, impacting the public hotline, digital audio recording and access to the electronic docketing database.<sup>xx</sup> We fear occurrences like this are just the tip of the iceberg as our chronically resource-starved system continues to face the unprecedented challenges of aging technology, surging caseloads and potential retirements.<sup>xxi</sup> We remain behind the curve, lacking state-of-the-art-technology, e-filing and a reliable corps of skilled interpreters. Cases are cancelled on a regular basis because of the language services contractor's inability to provide interpreters and serious due process concerns are implicated as the quality of interpreters which are provided has diminished.

## **JUDGES PUSHED TO THE BRINK**

More than five years ago, Immigration Judges reported stress and burnout at higher levels than prison wardens or doctors at busy hospitals.<sup>xxii</sup> After continuing to struggle in an environment of decreased resources and skyrocketing caseloads for so long, morale is at an all-time low and stress at an all-time high. An unprecedented number of retirements is looming.

## **SOLUTION**

While it cannot be denied that additional resources are desperately needed immediately, resources alone cannot solve the persistent problems facing our Immigration Courts. Structural reform can no longer be put on the back burner. Since the 1981 Select Commission on Immigration, the idea of creating an Article I court, similar to the U.S. Tax Court, has been advanced.<sup>xxiii</sup> In the intervening years, a strong consensus has formed supporting this structural change.<sup>xxiv</sup> For years experts debated the wisdom of far-reaching restructuring of the Immigration Court system. Now “[m]ost immigration judges and attorneys agree the long term solution to the problem is to restructure the immigration court system....”<sup>xxv</sup>

The time has come to undertake structural reform of the Immigration Courts. It is apparent that until far-reaching changes are made, the problems which have plagued our tribunals for decades will persist. For years NAIJ has advocated establishment of an Article I court. We cannot expect a different outcome unless we change our approach to the persistent problems facing our court system. Acting now will be cost effective and will improve the speed, efficiency and fairness of the process we afford to the public we serve. Our tribunals are often the only face of American justice these individuals experience, and it must properly reflect the principles upon which our country was founded. Action is needed now on this urgent priority for the Immigration Courts. It is time to stop the cycle of overlooking this important component of the immigration enforcement system – it will be a positive step for immigration enforcement and due process.

For additional information, visit our website at [www.naij-usa.org](http://www.naij-usa.org) or contact:

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<sup>i</sup> Transactional Records Access Clearinghouse (TRAC), Syracuse University, Backlog of Pending Cases in Immigration Courts as of December 2016, [http://trac.syr.edu/phptools/immigration/court\\_backlog/apprep\\_backlog.php](http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php); TRAC, Syracuse University, *Average Time Pending Cases Have Been Waiting in Immigration Courts as of April 2017*, [http://trac.syr.edu/phptools/immigration/court\\_backlog/apprep\\_backlog.php/](http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php/).

<sup>ii</sup> *Id. and* Human Rights First, Reducing the Immigration Court Backlog and Delays, <http://www.humanrightsfirst.org/sites/default/files/HRF-Background-Immigration-Courts.pdf>

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iii *Supra* note i.

iv *Supra* note i.

v See Presidential Memorandum For the Heads of Executive Departments and Agencies, June 2, 2014, <http://www.whitehouse.gov/the-press-office/2014/06/02/presidential-memorandum-response-influx-unaccompanied-alien-children-acr> and David Rogers, *Senate Democrats Double Funding for Child Migrants*, POLITICO, June 10, 2014, <http://www.politico.com/story/2014/06/child-migrants-immigration-senate-democrats-107665.html>

vi TRAC, <http://trac.syr.edu/phptools/immigration/juvenile/>

vii PBS News Hour, *Last year's child migrant crisis is this year's immigration court backlog*, <http://www.pbs.org/newshour/wp-content/uploads/2015/06/Last-years-child-migrant-crisis-is-this-years-immigration-court-backlog.mp3>, June 18, 2015

viii *Increase in US Immigration Enforcement Likely to Mean Jump in Deportations*, VOA, February 3, 2017, <https://www.voanews.com/a/increased-us-immigration-enforcement-to-mean-jump-in-deportations/3705604.html>

ix Priscilla Alvarez, *Trump's Immigration Crackdown Is Overwhelming a Strained System*, THE ATLANTIC, April 21, 2017, <https://www.theatlantic.com/politics/archive/2014/04/trump-immigration-court-ice/523557>

x Caitlin Dickerson, *Immigration Arrests Rise Sharply as a Trump Mandate is Carried Out*, THE NEW YORK TIMES, May 17, 2017, [https://www.nytimes.com/2017/05/17/us/immigration-enforcement-ice-arrests.html?\\_r=0](https://www.nytimes.com/2017/05/17/us/immigration-enforcement-ice-arrests.html?_r=0)

xi See Press Release, Dep't of Justice, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006), available at [http://www.justice.gov/opa/pr/2006/August/06\\_ag\\_520.html](http://www.justice.gov/opa/pr/2006/August/06_ag_520.html), and TRAC, *Improving the Immigration Courts: Efforts to Hire More Judges Fall Short*, <http://trac.syr.edu/immigration/reports/189/>.

xii Approximately 20 Immigration Judges are now serving in exclusively or primarily managerial positions with little or no pending caseload. See EOIR Immigration Court Listings, <http://www.justice.gov/eoir/sibpages/ICadr.htm>. Moreover, it is extremely difficult to precisely calculate the number of IJs at any given point due to the rapid rate of retirements. See Homeland Security Newswire, U.S. Govt. the Largest Employer of Undocumented Immigrants, May 30, 2014, <http://www.homelandsecuritynewswire.com/dr20140530-u-s-govt-the-largest-employer-of-undocumented-immigrants>

xiii GAO, *Immigration Courts – Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, GAO-17-438 (June, 2017).

xiv *Supra* note xiv; <https://www.justice.gov/eoir/eoir-immigration-court-listing>

xv See, *supra*, Human Rights First, *Reducing the Immigration Court Backlog and Delays*, <http://www.humanrightsfirst.org/sites/default/files/HRF-Background-Immigration-Courts.pdf>

xvi American Bar Association, *Reforming the Immigration Court System* (2010), Administrative Conference of the United States (ACUS), "Immigration Removal Adjudication, Committee on Adjudication, Proposed Recommendation," June 14 – 14, 2012; Georgetown University, Institute for the Study of International Migration, Refugee, Asylum and Other Humanitarian Policies: Challenges for Reform, report on expert's roundtable held on October 29, 2014, available at <https://isim.georgetown.edu/sites/isim/files/files/upload/Asylum%20%26%20Refugee%20Meeting%20Report.pdf>

xvii *Supra* note xiv.

xviii See, Marc R. Rosenblum and Doris Meissner, *The Deportation Dilemma, Reconciling Tough and Humane Enforcement*, MIGRATION POLICY INSTITUTE, April, 2014, <http://www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement>

xix Erica Werner, *Spending Leaves Out Immigration Courts*, ASSOCIATED PRESS, Sept. 18, 2014, [http://hosted.ap.org/dynamic/stories/U/US\\_CONGRESS\\_IMMIGRATION\\_OVERLOAD?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT&CTIME=2014-08-18-16-57-40](http://hosted.ap.org/dynamic/stories/U/US_CONGRESS_IMMIGRATION_OVERLOAD?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT&CTIME=2014-08-18-16-57-40)

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<sup>xx</sup> Elizabeth Summers, *Weeks-Long Computer Crash Sends U.S. Immigration Courts Back to Pencils and Paper*, PBS NEWSHOUR, May 23, 2014, <http://www.pbs.org/newshour/updates/weeks-long-computer-crash-sends-u-s-immigration-courts-back-pencils-paper/>.

<sup>xxi</sup> Laura Wides-Munoz, *Nearly Half Of Immigration Judges Eligible For Retirement Next Year*, Huffington Post, Dec. 22, 2013, available at [http://www.huffingtonpost.com/2013/12/22/immigration-judges\\_n\\_4489446.html?utm\\_hp\\_ref=fb&src=sp&comm\\_ref&comm\\_crj](http://www.huffingtonpost.com/2013/12/22/immigration-judges_n_4489446.html?utm_hp_ref=fb&src=sp&comm_ref&comm_crj).

<sup>xxii</sup> Stuart L. Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57 (2009).

<sup>xxiii</sup> COMM'N ON IMMIGRATION & REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY WITH SUPPLEMENTAL VIEWS BY THE COMMISSIONERS (1981).

<sup>xxiv</sup> Prestigious legal organizations such as the American Bar Association, Federal Bar Association, and American Judicature Society wholeheartedly endorse this reform. While not as certain as to the exact form of change desired, reorganization has also been endorsed by the American Immigration Lawyers Association, and increased independence by the National Association of Women Judges.

<sup>xxv</sup> *Supra*, note ii.