National Institute for Trial Advocacy

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Immigration Court and Due Process—NITA's Official Position

Posted On November 16, 2017 By Marsi Buckmelter

Part of the mission of the National Institute for Trial Advocacy (NITA) is to promote justice through effective and ethical advocacy as a means of improving the adversarial justice system. We believe in due process, adequate representation, and access to justice for everyone, including immigrants who wish to remain in the U.S. NITA supports the immigration position of the American Bar Association:

The ABA supports measures to improve the immigration court system and to increase due process safeguards, including access to counsel, for those in removal proceedings. The ABA opposes mandatory detention of those in removal proceedings, supports alternatives to detention, and supports strengthening the ICE National Detention Standards and promulgating them into enforceable regulations. The ABA supports comprehensive immigration reform that promotes legal immigration based on family reunification and employment skills and that provides for new legal channels for future workers, a path to legal status for much of the undocumented population currently residing in the United States, and enhanced border security.

In response to an article that recently appeared in The Washington Post, The Legal Advocate asked Losmin Jimenez, a Direct Representation Attorney for Kids in Need of Defense (KIND) in its Baltimore office, to explain the impact on due process and access to justice on persons appearing before such a tribunal, should the DOJ proposal go into effect.

Shortly on the heels of the presidential inauguration in January, the Trump Administration issued Executive Orders 13767, 13768, and, 13769 delivering on its promise of ramped-up enforcement on immigration matters. Some of the Administration's enforcement measures include limiting the number of refugees and other foreign nationals from Muslim-majority countries. In September 2017, the Administration rescinded Deferred Action for Childhood Arrivals (DACA), impacting the lives of 800,000 Dreamers and their families. DACA was originally instituted in a memorandum from the Department of Homeland Security titled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" in 2012 under President Barack Obama.

The current immigration system is experiencing a seismic shift. One such development is a Department of Justice (DOJ) proposal to use "numeric performance standards"[i] and "establish performance metrics for immigration judges." It is in this vein that this blog post provides a brief discussion on the current status of immigration court and outlines the likely impact these proposed measures would have on 1) due process and access to justice for immigrants seeking protection in the U.S. and 2) those fighting deportation to remain with their families in the U.S.

The Immigration Court system is referred to as the Executive Office for Immigration Review (EOIR), an agency within DOJ. Immigration judges are appointed by the U.S. Attorney General; thus, immigration judges are DOJ employees. Immigration judges are administrative law judges who do not have the same protections, such as life tenure, as members of the federal judiciary. However, the National Association of Immigration Judges (NAIJ), a voluntary organization, is designated as the recognized representative for collective bargaining for all immigration judges.[ii]

At the end of September 2017, the Immigration Court backlog had grown to 629,051 cases.[iii] This number may prompt one to ask, "How is this possible?" Over the last decade, the immigration courts have been severely underfunded in comparison to the exponential increases Congress has provided for immigration enforcement. Case in point: the budgets of the U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection exceed $20 billion.[iv] In contrast, the budget for EOIR is estimated at $420 million. [v] To provide scale of the disparity in funding, consider the Baltimore Immigration Court, the immigration court for all respondents in immigration proceedings residing in Maryland. This court has five immigration judges tending to, at present, 23,074 pending cases.[vi]

Meanwhile, armed conflicts, natural disasters, gender-based violence, and other root causes for migration have resulted in 66.5 million forcibly displaced people worldwide, and of these 22.5 million are refugees.[vii] Consequently, thousands of people, especially women and children, have sought asylum in the United States in recent years.

Adding to this underfunded and overwhelmed court system is the fact that respondents in immigration court have a right to be represented by an attorney in immigration court, at no expense to the government;[viii] there is no right to appointed counsel in immigration proceedings, even if the Respondent is a child. Approximately 37 percent of immigrants nationally and 14 percent of immigrants in detention have counsel.[ix]

As every judge and trial lawyer and judge know, pro se litigants slow things down for the court—yet, pro se litigants have a right to procedural due process and must be afforded some opportunity to present their case. At a master calendar hearing, which is a respondent's first hearing in immigration court, respondents often appear without an attorney and, if English is not the language they know best, participate in the hearing with the aid of a court-provided interpreter. Respondents almost always request a continuance to secure pro bono counsel or a private attorney. For those respondents who managed to secure counsel prior to the first hearing, counsel will often ask for a continuance while they wait for documents from the respondent's home country to arrive, begin to evaluate case strategy, and await documents from the client's Alien File in the custody of the government.

Challenges for due process in immigration court are even more complex for detained immigrants. Detention centers are sometimes in remote locations, far from respondents' families, removed from immigration lawyers and pro bono counsel, and provide prohibitive telephone costs just to communicate with a loved one or a lawyer. The law library at a detention center may be comprised of several immigration law books in English.[x]

In my experience representing immigrants, I recall a time in 2011 that an immigration judge in a detention center told an unrepresented Honduran woman seeking asylum that she needed to complete the asylum application in English and that she needed to have some documents translated from Spanish to English by a competent translator, as required by the Immigration Court Practice Manual.[xi] This

unrepresented woman did the best she could and found a fellow detainee who spoke her native Spanish and a Spanish-speaking detainee translated the documents for the pro se Respondent.

Was the translation accurate? Did the unrepresented woman have a choice? What if she spoke Amharic, Mam, or Nepalese—would she have been able to find a fellow detainee to translate documents from her home country? What about issues of confidentiality? Where do unrepresented, detained immigrants find counsel and translators?

It would be unfair to initiate deportation proceedings against an immigrant, detain him, not provide him an attorney, not allow him time to try to secure pro bono counsel or a private attorney, and not allow him sufficient time to gather evidence for his case. What about when a three-year-old facing deportation shows up to Immigration Court without a lawyer? Granting a continuance is the only sensible and human thing to do. An immigration judge would, and should, grant a continuance to a person whose life is at stake and where she may be returned home to face religious persecution, torture, or death.

If the DOJ proposal to establish performance metrics for immigration judges is approved, immigration judges will be forced to grant fewer continuances, rush through an already crushing docket, and decide cases in which respondents are more likely to be pro se and without all of the evidence necessary to present their case. This will result in more respondents being deported from the United States without, in contravention of existing human rights obligations, first having a meaningful opportunity to be heard.

It is easy to see how the immigration court backlog has come into existence. It naturally follows that establishing performance metrics for immigration judges is not a solution. Immigration judges should be focused on the facts of the case and be provided with sufficient time and resources to afford due process to those who appear before them. They should not be under the threat of metrics and numeric performance standards to evaluate their performance. The legal profession must push back against this proposal by the Trump administration.

Losmin Jimenez is currently a Direct Representation Attorney at Kids in Need of Defense (KIND) in Baltimore, where she represents children in immigration and state court proceedings. Before moving to Maryland in 2014, Losmin worked as a Litigation Attorney at Americans for Immigrant Justice (AI Justice) in Miami, working on impact litigation, appeals, policy, and advocacy defending the basic human rights of immigrants. She previously wrote about immigration relief for unaccompanied minors for The Legal Advocate. Her free studio71 webcast, Introduction to Immigration Advocacy—Overview of Humanitarian Relief, is available on demand.

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[i] Maria Sachetti, Washington Post, "Immigration judges say proposed quotas from Justice Dept. threaten independence," Oct. 12, 2017, https://www.washingtonpost.com/local/immigration/immigration-judges-say-proposed-quotas-from-justice-dept-threaten-independence/2017/10/12/3ed86992-aee1-11e7-be94-fabb0f1e9ffb_story.html?utm_term=.c10b81209fe7.

[ii] National Association of Immigration Judges, https://www.naij-usa.org/about.

[iii] See Backlog of Pending Cases in Immigration Courts as of September 2017, Transactional Records Access Clearinghouse (TRAC) at Syracuse University, http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php.

[iv] Department of Homeland Security Budget in Brief, Fiscal Year 2017, https://www.dhs.gov/sites/default/files/publications/FY2017BIB.pdf.

[v] EOIR FY 2017 Budget Request at a Glance, https://www.justice.gov/jmd/file/821961/download.

[vi] See Individuals in Immigration Court by their Address, Transactional Records Access Clearinghouse (TRAC) at Syracuse University, http://trac.syr.edu/phptools/immigration/addressrep/.

[vii] United Nations High Commissioner for Refugees (UNHCR), Figures at a Glance, http://www.unhcr.org/en-us/figures-at-a-glance.html.

[viii] Immigration and Nationality Act, 8 U.S.C. § 240(b)(4)(A).

[ix] Ingrid Ealy and Stephen Shafer, American Immigration Council, Access to Counsel in Immigration Court (2016), https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court.

[x] Author's personal knowledge from visits to an immigration detention center as an attorney.

[xi] EOIR, Immigration Court Practice Manual, Filings with the Immigration Court, § 3.3 (a), https://www.justice.gov/eoir/office-chief-immigration-judge-0.

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