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Let Immigration Judges be judges

By Dana Leigh Marks - 05/09/13 04:03 PM ET

The upcoming congressional debate over comprehensive immigration reform presents a rare opportunity for immigrants living in this country to have a real chance at pursuing the American dream. As reform legislation is drafted and debated, we must consider the essential role immigration courts play in ensuring that everyone has a fair day in court when presenting their case to remain in the United States. Congress must revisit the courts' current resources and structuring, and better equip and empower our benches to secure due process for all.

Immigration courts are often the first and last glimpse immigrants see of American justice; they should reflect our nation's esteem for due process and fundamental fairness. They are the trial level courts where the cases of people accused by the Department of Homeland Security of being in the United States illegally are heard. These courts decide if the charges are correct, but also make the crucial ruling of whether, even if deportable, these people are qualified to receive some sort of immigration benefit.

Our immigration courts face crushing caseloads and chronically insufficient resources, with a current backlog of 327,483 cases and an average wait of 555 days before a case is resolved. It's inconceivable that nationwide, we have only 254 judges serving hundreds of thousands of cases each year.

The overwhelming majority of people coming into immigration courts do so without lawyers, despite the high stakes and incomprehensible nature of immigration law. On a daily basis, immigration courts are charged with determining who should be removed and who should be granted the benefits of attaining or keeping their lawful status in the United States. The consequences are banishment to a country where a person fears for their very life, as in the case of asylum seekers, and permanent separation from their U.S. citizen family members.

For decades, immigration judges have been presiding over hearings to determine whether to deport immigrants, including those here with lawful status as well as old criminal convictions for which they have already served their time. Historically, the law allowed judges the discretion to consider all the individual factors, including U.S. military service, rehabilitation, and family ties, to determine if it is in the best interests of the United States to let someone remain in the country.

But in the 1990s, Congress curtailed the discretion of immigration judges by restricting their authority to grant relief from deportation to a rigidly defined category of offenses called "aggravated felonies," a categorical misnomer that includes many offenses that are neither aggravated nor felonies. Consequently, judges are no longer allowed to grant most forms of relief for individuals with an aggravated felony on their record, no matter how minor or old the conviction.

In addition, Congress created a group of people with certain convictions who must be locked up and cannot be released on bond while their deportation proceedings are pending, even if they may ultimately be able to remain here. Under current law, an immigration judge cannot release on bond many who pose no flight risk or threat to community safety, even if there are compelling circumstances that would make them eligible to stay in the country, such as combat military service and dependent family members.

Another significant challenge for immigration courts is that under current administrative structuring, our benches are housed inside the Department of Justice. Under the DOJ, immigration judges are now employees of the executive branch, and are improperly considered by the Department of Justice as “attorneys” employed by the U.S. government rather than true judges. As long as we are a part of the nation’s top law enforcement agency, there will continue to be tensions between these two conflicting functions. While subject to the direction and mandate of the DOJ, we will continue to struggle to achieve judicial independence and transparency.

Immigration courts must be restructured as real courts under Article I of the Constitution, similar to Tax and Bankruptcy Courts, so we can maintain administrative independence and ensure total transparency in our proceedings. This would free them from any control or influence by the Attorney General or Department of Homeland Security. While seemingly technical, this change is essential to achieve the most fundamental expectation we American’s hold about judges: that they are independent and protected from undue influence by any party to their proceedings. It is a reform which is much needed and long overdue.

Enhancing the courts’ resources and allowing immigration judges to consider the individual circumstances unique to each case would create a fine-tuned tool, and a more accurate way to serve the public and private interests instead of the blunt instrument that now exists. Enhanced due process and a more efficient removal process are solutions that would satisfy all sides of the immigration debate.

So far, proposed legislation does not resolve these critical issues. This golden opportunity to act should not be squandered. Let Immigration Judges be judges, with discretion in an independent tribunal.

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