



Sessions's immigration orders threaten judicial independence

By Sarah Sherman-Stokes, opinion contributor — 12/18/17 09:40 AM EST 82
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An executive memo just released by Attorney General Jeff Sessions promises to reduce the crushing caseload in immigration courts nationwide. Unfortunately, the memo contains dubious assertions about the current state of our immigration court system and appears poised to lead to improper hiring, dangerous quotas, a threat to judicial independence and the further erosion of the rights of noncitizens, including lawful permanent residents and asylum seekers.

It's true that the immigration courts face an unprecedented backlog of more than 650,000 pending cases. But it's not for the reasons asserted by Sessions.

For one, Sessions alleges that policy changes have slowed down the adjudication of cases and "incentivized further illegal immigration." Unfortunately, the policy changes he cites — the just-ended Deferred Action for Childhood Arrivals (DACA) program, prosecutorial discretion and provisional waivers — do neither.

In fact, none of these three avenues to potential lawful status is actually adjudicated by the immigration courts; instead, the Department of Homeland Security (DHS) makes these decisions. Moreover, the idea that DACA has incentivized migration is erroneous

on its face. To qualify for DACA, a program created in 2012, applicants needed to have continuously resided in the United States since June 15, 2007.

Similarly, prosecutorial discretion has been a feature of the immigration removal system since its creation. Years before the emergence of a backlog of cases, and in acknowledgement of limited resources, DHS had to consider both economic and humanitarian factors in making decisions about enforcement, detention and prosecution.

Finally, provisional waivers — part of the package needed for some to acquire a green card — were created to shorten the time that U.S. citizens and lawful permanent resident family members were separated from their families during the immigration process. In so doing, provisional waivers promote family unity, a supposed pillar of the GOP family values platform.

But there's more. Sessions goes on to allege that "representatives of illegal aliens" — those he has referred to as "dirty immigration lawyers" — have used tactics designed to delay, such as requesting continuances to prepare cases. Immigration law is notoriously complex. Describing the immigration statute, the Fifth Circuit has lamented that even for experienced judges, "morsels of comprehension must be pried from mollusks of jargon." Add to that noncitizens who may be very young, very old, deeply traumatized, and seeking asylum and protection in the United States, and it's no wonder that immigration attorneys need time to adequately prepare and argue their cases.

If Sessions's description of the source of the alleged problem is troubling, his proposed solutions are no better.

First, Sessions proposes implementing a "streamlined hiring plan" to speed up the pace of immigration judge hiring. We don't need to look back very far to know the risks attendant to such a rush to pack the bench. Under the George W. Bush administration, a number of quick political hires later were revealed to have been made without so much as an interview of the candidate. Indeed, in 2007 it became clear that the Department of Justice had engaged in speedy — and illegal — hiring practices, basing immigration judge hiring on the candidate's Republican Party affiliations alone. In a desperate push to grow the immigration judge ranks, these practices easily could be replicated.

Next, Sessions proposes establishing nationwide scheduling and docketing standards to "move cases to completion," as well as providing guidance to judges about "timely completion" of cases. Immigration judges are under enormous pressure to act quickly on complicated legal and factual cases, involving life or death stakes. One judge famously described the work as akin to "trying death penalty cases in traffic court." Sessions's proposed changes sound eerily like the creation of a quota system, a serious threat to the careful consideration of high-stakes cases in which wrongful deportation

can mean the erroneous removal of a U.S. citizen, indefinite family separation for longtime green card holders or, for asylum seekers, a death sentence.

Finally, Sessions proposes that the immigration court “enhance its partnership” with DHS in order to “improve docket efficiency.” For years, immigration judges were tasked with acting as enforcer and adjudicator, ostensibly playing the role of both judge and prosecutor. As concerns over the impropriety of this dual role emerged, the Homeland Security Act was passed in 2003, creating separate agency heads for DHS trial attorneys prosecuting cases and independent judges serving under the Department of Justice. Sessions’s proposal threatens to set back this progress, imperiling the sanctity of judicial independence.

Attorney General Jeff Sessions has made no secret of his disdain for immigration attorneys and for the immigrant community at large. His newest pronouncement targets noncitizens facing deportation, whose sensitive, complicated and high-stakes cases would be rushed through an increasingly unfriendly and unforgiving machine. More insidiously, it targets the independence of an entire judicial system.

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