



Lasting Lessons from the Border Surge: It's Time We Fund an Independent Immigration Court System

Media reports of the “surge” in unaccompanied minors

apprehended along our southern border captured national attention this summer. The surge generated greater public awareness of the devastating gang violence that has ravaged El Salvador, Guatemala, and Honduras for the past decade. It also threw into relief the lamentable state of our immigration court system and highlighted the desperate need for pro bono legal representation. As the story gradually recedes from the headlines, we cannot forget the human tragedy wrought from an ill-prepared immigration court system. We must remain steadfast in our resolve to repair it.

During the apex of the surge, House Republicans proposed repealing the added protections afforded by the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008 to unaccompanied minors hailing from countries not bordering ours:¹ the guarantee of a hearing before an immigration judge prior to removal.² Fortunately the bill floundered and died. Even with the TVPRA protections in place, kids have slipped through the cracks. We have already deported children to violence and death.³

Let's adopt a slightly more humanitarian approach, ensuring at the very least that the immigrants and refugees who reach our shores are afforded the legal process they are due under our immigration laws and the Constitution. This is not a novel proposition, yet it bears repeating over and over until it is finally heeded. Achieving this modest objective requires a greater financial commitment than Congress has been willing to make thus far, but only because it has historically starved our immigration courts.

Of Scarcity and Immigration Courts

Our immigration courts are overwhelmed and underfunded. Although Congress has allocated ever greater funds to immigration enforcement along our country's borders and in the interior, it has failed to ensure that our immigration courts have the resources necessary to timely and fairly adjudicate these cases. Marking an all-time high, there were 408,037 cases pending before our immigration courts in August, an increase of roughly 63,000 over FY2013. The backlog is not a new phenomenon: the number of

pending cases has steadily risen over the past decade, more than doubling since FY2004, when there were about 168,000.⁴

Notwithstanding these gains, the number of immigration judges has remained relatively constant. While the Department of Justice (DOJ) hired 50 immigration judges in FY2010 and 2011, all but 13 of these new positions filled vacancies left open by attrition.⁵ A hiring freeze subsequently went into effect that was lifted only this year.⁶ As a result, there are now 227 field immigration judges hearing cases in 59 immigration courts located throughout the United States,⁷ only a slight increase over the 212 employed in 2004,⁸ when the pending caseload was less than half what it is today.

Because hiring has not kept pace with the burgeoning caseload, immigration judges have approximately 1,800 pending cases on their individual dockets. In August, there were some 2,400 cases on the docket of an immigration judge at the San Francisco Immigration Court.⁹ Nationwide, the average processing time is 506 days for all cases, 867 days for cases where relief was granted.¹⁰ Merit hearings on applications for relief from removal are currently being set as far out as December 2018 in some courts.¹¹ That's a wait of four years just to have your case heard. And with the directive to move the surge cases to the front of the docket,¹² cases already in the pipeline will be pushed back even farther.

The backlog has serious human consequences. More than 30,000 immigrants are locked up each day, awaiting their fate in U.S. Immigration and Customs Enforcement (ICE) detention facilities, county jails, and private prisons.¹³ Many immigrants have valid claims for lawful status. Yet they languish in our system for years, their lives in limbo. Alleviating this bottleneck should readily garner bipartisan support, even in this time of political stalemate. Alas, no. This past July, the Obama administration asked Congress for an emergency supplemental appropriation to address the surge, including an additional \$45.4 million for the DOJ to hire new immigration judges and pay for court expenses.¹⁴ But his request went unheeded.¹⁵

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The inadequate funding of our immigration courts has proved intractable. It has persisted regardless which party controls the White House or Congress. Back in 2006, former Attorney General Alberto Gonzales recognized the immigration courts had long been shortchanged. Following a comprehensive internal review, he pledged to hire an additional 40 immigration judges.¹⁶ The promise went unfulfilled: a study conducted two years later by the Transactional Records Access Clearinghouse (TRAC) found that the total number of immigration judges had instead declined.¹⁷

These cases cannot be resolved swiftly through an abbreviated legal process. Human lives hang in the balance. And our immigration laws are comparable in complexity to our tax laws. Immigration judges must keep abreast of the ever-changing landscape of immigration law. They are responsible for knowing the political, social, and economic conditions in countries spanning the globe. They must understand federal and state criminal laws in order to properly evaluate the immigration consequences of convictions. They must do this while hearing cases for 36 hours per week from the bench and with only a fraction of a law clerk's time. And the nature of their work—listening to heart-wrenching stories of persecution and torture every day—takes its toll: one study found that immigration judges “suffer from significant symptoms of secondary traumatic stress and more burnout than has been reported by groups like prison wardens or physicians in busy hospitals.”¹⁸ Is it surprising that mistakes are made while performing such a herculean feat? Perhaps not, but any error remains indefensible when the consequences are so grave.

Hope Against Hope

There are some encouraging developments afoot. The DOJ is in the process of hiring 30 new immigration judges, although these positions will again primarily serve to backfill vacancies left open by attrition in the immigration judge corps.¹⁹ With many immigration judges nearing retirement age, the DOJ will need to sustain this hiring effort to maintain current numbers, let alone start to address the backlog. Still, it is a step in the right direction. Similarly promising, the DOJ hired a greater number of law clerks through its Attorney General Honors Program this year.

Providing free legal representation to indigent immigrants would also go a long way in alleviating the pressure on our immigration courts. Our immigration laws are not easily navigated without help from a seasoned practitioner. The odds of being granted lawful status increase exponentially when immigrants are represented by an attorney. A recent study of unaccompanied minors in removal proceedings revealed that nearly half of represented minors were allowed to remain in the United States, whereas only 10 percent of unrepresented minors were.²⁰ Yet immigrants often face our legal system alone; they are entitled to an attorney only at their own expense.²¹ And the absence of counsel adds to the work of immigration judges, as they must carry out their duty to develop the record and inform respondents regarding their eligibility for relief from removal, without the benefit of an advocate's thorough review of the immigrant's case and circumstances.²²

Congress also ignored Obama's plea in July for \$15 million in funding for the DOJ to provide free legal representation to children in removal proceedings.²³ And the DOJ has contested



a lawsuit filed by advocates demanding that indigent children be provided legal counsel in removal proceedings at government expense.²⁴ Nevertheless, together with the Corporation for National and Community Service, the DOJ will provide \$2 million to legal aid organizations to fund 100 lawyers for unaccompanied minors.²⁵ The Department of Health and Human Services has stepped in, pledging \$9 million in late September.²⁶

State and local initiatives along with private donors have also started filling the gap. Both New York and San Francisco will give roughly \$2 million in legal aid for unaccompanied minors.²⁷ California's legislature recently enacted SB 873, which promises to funnel \$3 million to nonprofits representing immigrant children.²⁸ And private donors have contributed a combined \$560,000.²⁹ These efforts are admirable, yet they cannot substitute for long-term, sustained funding of legal representation for indigent children.

But Money Can't Buy Fairness

Deficient funding has not been the only scourge of the immigration courts while housed in the DOJ. Its law enforcement mission is also at odds with neutral and impartial adjudication. Examples abound of how this mismatch plays out to the detriment of judicial independence. In 2012, the DOJ recused Immigration Judge A. Ashley Tabaddor from all cases involving Iranian respondents.³⁰ This across-the-board ban did not stem from any alleged misconduct or wrongdoing, but instead from her Iranian-American heritage and her presence at the White House Office of Public Engagement's "Roundtable with Iranian-American Community Leaders," an event she received departmental approval to attend.³¹ Earlier examples include former Attorney General John Ashcroft's culling of liberals from the Board of Immigration Appeals (BIA) in 2003³² and the unlawful political hiring of immigration judges and BIA members from 2004 to 2006.³³ Such actions send a strong message to immigration judges who strive to decide cases based on their fair application of the law to the facts in the cases in front of them.

Last year, the Federal Bar Association joined the call for the creation of Article I immigration courts.³⁴ We are in good company: the National Association of Immigration Judges, the American Bar Association, the National Association of Women Judges, the American Immigration Lawyers Association, and the Chicago Appleseed Fund for Justice have all endorsed this position.³⁵ Removing our immigration courts from the DOJ will provide immigration judges with the independence necessary to review immigration cases fairly and without fear of losing their livelihood.

While comprehensive immigration reform is desperately needed, it has thus far proved elusive. In the meantime, we can do much to alleviate the current crisis by fully funding immigration courts and pro bono attorneys. We can also join the swelling tide of support for Article I immigration courts. These measures cannot atone for the injustices wrought by our harsh immigration laws, but they can ensure that those brought before our legal system will have their claims heard timely by a fair and impartial judge. ☉

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