



Statement for the Record

Senate Committee on the Judiciary - Subcommittee on Border Security and Immigration

Hearing on "Strengthening and Reforming America's Immigration Court System"

April 18, 2018

The National Immigration Forum (the Forum) advocates for the value of immigrants and immigration to the nation. Founded in 1982, the Forum plays a leading role in the national debate about immigration, knitting together innovative alliances across diverse faith, labor, law enforcement, veterans and business constituencies in communities across the country. Leveraging our policy, advocacy and communications expertise, the Forum works for comprehensive immigration reform, sound border security policies, balanced enforcement of immigration laws, and ensuring that new Americans have the opportunities, skills, and status to reach their full potential.

Introduction

The Forum appreciates the opportunity to provide its views on the U.S. immigration court system, the Executive Office for Immigration Review (EOIR), which is located in the U.S. Department of Justice (DOJ). The United States is a nation of laws with strong border security and established legal immigration processes. A functioning, efficient U.S. immigration court system is essential for the administration of justice. Yet, in recent years, immigration court backlogs have increased dramatically, approaching 700,000.¹

¹ See Joel Rose, National Public Radio, "Justice Department Will Require Judges To Make Quota For Immigration Cases," April 3, 2018, <https://www.npr.org/2018/04/03/599240676/justice-department-will-require-judges-to-make-quota-for-immigration-cases>.

To address this backlog, the Forum supports increasing funding to EOIR, including dedicated funding for additional immigration judges and support personnel. The Trump administration, to its credit, has already taken steps to fill out the immigration bench, seeking significant additional funding for the immigration courts, an effort that has received bipartisan support.²

The Forum also supports increased use of prosecutorial discretion and administrative closure to decrease backlogs. By permitting DHS to regularly use prosecutorial discretion to deprioritize low-priority cases and by encouraging immigration judges to increasingly utilize administrative closure in appropriate circumstances, tens of thousands of immigration cases can be eliminated from EOIR's docket.³

While we support the efforts above to reduce the immigration court backlog, the Forum does not support actions that would undermine due process and judicial independence. We have deep concerns about recent guidance that would attempt to clear the backlog by setting case quotas for immigration judges.⁴ We believe that a quota-driven approach to evaluating immigration judges could place undue pressure on EOIR to favor speed over due process. Such an approach threatens the independence of immigration judges who want to devote adequate time and consideration to difficult cases. Such an approach also threatens to undermine due process for individuals facing deportation or seeking relief in the immigration courts, as it incentivizes summary consideration of cases rather than encouraging a full hearing of their claims.

² See Danny Vinik, Politico, "The one area Jeff Sessions and immigration advocates agree," April 11, 2017, <https://www.politico.com/agenda/story/2017/04/the-one-area-jeff-sessions-and-immigration-advocates-agree-000411>.

³ See Aaron Reichlin-Melnick, American Immigration Council, "[Already Facing a Backlog, Sessions Aims to Add 350,000 Cases to Immigration Courts](http://immigrationimpact.com/2018/01/16/backlog-sessions-aims-add-cases-immigration-courts/)," Jan. 16, 2018, <http://immigrationimpact.com/2018/01/16/backlog-sessions-aims-add-cases-immigration-courts/>; Joshua Breisblatt, American Immigration Council, "[Data Shows Prosecutorial Discretion Grinds to a Halt in Immigration Courts](http://immigrationimpact.com/2017/07/24/data-shows-prosecutorial-discretion-grinds-halt-immigration-courts/)," July 24, 2017, <http://immigrationimpact.com/2017/07/24/data-shows-prosecutorial-discretion-grinds-halt-immigration-courts/>.

⁴ Elliot Spagat, Associated Press, "Justice Department imposes quotas on immigration judges," April 3, 2018, <https://www.apnews.com/3b1f1f09171141b5b99dece73afbf202/Justice-Department-imposes-quotas-on-immigration-judges>.

We are also concerned by the Trump administration's recent announcement that it is suspending funding for the Legal Orientation Program which helps detained immigrants navigate the immigration court system and an immigration "help desk" program for non-detained immigrants who call a hotline to receive similar assistance.⁵ The program is inexpensive, saves the federal government money, and provides invaluable assistance to those navigating the immigration court system.

To Reduce Backlogs, More Immigration Judges Are Needed

The case backlog in the immigration court system is the product of decisions by Congress and the last several administrations that have ramped up federal immigration enforcement without corresponding increases to the capacity of the federal immigration courts. The shortage of immigration judges and the general under-resourcing of the immigration courts is well-documented.⁶

To the current administration's credit, they have made it a priority to increase the number of immigration judge teams, making significant progress in increasing the number of immigration judges.⁷ The recent bipartisan omnibus appropriations agreement for fiscal year (FY) 2018 provided funding for an additional 100 immigration judge teams – consisting of an immigration judge, judicial clerk, legal assistant and support staff.⁸ While there has been progress on this front in recent years, Congress can do more to staff fully the immigration courts and bring the number of immigration judge teams more in line with the number of cases. Such a move would shorten backlogs while preventing the caseloads of individual immigration judges from reaching unsustainable levels.

⁵ See Mario Sacchetti, Washington Post, "Justice Dept. to halt legal-advice program for immigrants in detention," April 10, 2018, https://www.washingtonpost.com/local/immigration/justice-dept-to-halt-legal-advice-program-for-immigrants-in-detention/2018/04/10/40b668aa-3cfc-11e8-974f-aacd97698cef_story.html?utm_term=.25b87667a49d.

⁶ American Immigration Council, "Empty Benches: Underfunding of Immigration Courts Undermines Justice," Fact Sheet, June 17, 2016, <https://www.americanimmigrationcouncil.org/research/empty-benches-underfunding-immigration-courts-undermines-justice>.

⁷ See Vinik, Politico, "The one area Jeff Sessions and immigration advocates agree."

⁸ Christian Penichet-Paul, National Immigration Forum, "Omnibus appropriations for fiscal year (FY)2018 – Department of Justice (DOJ)," march 29, 2018, <https://immigrationforum.org/blog/omnibus-appropriations-for-fiscal-year-fy-2018-department-of-justice-doj/>.

Increased Use of Prosecutorial Discretion and Administrative Closure Will Reduce Backlogs

The Forum also favors reducing caseloads by eliminating low-priority cases through the use of prosecutorial discretion and administrative closure. While the Trump administration has largely abandoned the use of procedural discretion to close out cases,⁹ and has been critical of administrative closure of cases by immigration judges,¹⁰ these procedural tools are useful in reducing the case backlog. Permitting DHS trial attorneys to utilize prosecutorial discretion in prioritizing cases and to once again encourage the use of administrative closure by immigration judges to close appropriate cases would reduce dockets while devoting more time and resources to priority cases.

Immigration Case Quotas Are Problematic

On March 30, DOJ announced that it will begin evaluating the job performance of immigration judges based on annual case quotas, a directive aiming to require them to close deportation cases more quickly.¹¹ To earn a satisfactory grade under the new quotas, immigration judges will be required to complete at least 700 cases each year, with fewer than 15 percent of their decisions reversed by a higher court. Judges who complete between 560 and 700 cases would be categorized as needing “improvement.” Judges who decide fewer than 560 cases in a year would be deemed unsatisfactory. Over the last five years, the average immigration judge decided 678 cases in a year.¹² The guidance is slated to take effect on October 1, 2018.

The Justice Department guidance also included additional metrics, including a requirement that 95 percent of all hearings be completed on the initial scheduled hearing

⁹ See Breisblatt, American Immigration Council, [“Data Shows Prosecutorial Discretion Grinds to a Halt in Immigration Courts.”](#)

¹⁰ See Reichlin-Melnick, American Immigration Council, [“Already Facing a Backlog, Sessions Aims to Add 350,000 Cases to Immigration Courts.”](#)

¹¹ Spagat, Associated Press, “Justice Department imposes quotas on immigration judges.”

¹² Spagat, Associated Press, “Justice Department imposes quotas on immigration judges.”

date.¹³ Previous guidance from EOIR urged immigration judges to “exercise caution in granting continuances to allow immigrants time to find counsel or for attorney preparation.”¹⁴

Because EOIR is located within DOJ, DOJ has the authority to conduct performance reviews of judges, including establishing such quotas. As “Article II” judges, immigration judges lack the judicial independence and life tenure of “Article III” judges. And the use of performance reviews, including numeric benchmarks, is not uncommon to evaluate other parts of the federal workforce. However, the Forum finds the new performance guidelines, including these minimum case quotas to be deeply problematic.

The Forum believes that everybody deserves their day in court. Basic notions of due process mean that those defending themselves in removal proceedings, those seeking to make an affirmative case for asylum, and others should be able to get a fair hearing. People with valid immigration claims should not be deported. Rather, they must be afforded the opportunity to receive a fair hearing of those claims. Requiring that immigration judges close two to three cases a day, and discouraging them from granting continuances to allow people the time to prepare their cases is a step in the wrong direction.

It is noteworthy that the National Association of Immigration Judges has come out strongly in opposition to the new guidelines, expressing concerns about judicial independence and due process.¹⁵ A spokesperson for the association stated, “We believe the imposition of numerical performance metrics is completely, utterly contrary to judicial independence. . . . We believe assessing quality is fine, not quantity.”¹⁶ As immigration judges feel pressure to close cases quickly in order to meet quotas, there will likely be a perception, if not a reality, that judges are primarily motivated by speed rather

¹³ Laura Meckler, Wall Street Journal, “New Quotas for Immigration Judges as Trump Administration Seeks Faster Deportations,” April 2, 2018, <https://www.wsj.com/articles/immigration-judges-face-new-quotas-in-bid-to-speed-deportations-1522696158>.

¹⁴ U.S. Department of Justice, Executive Office for Immigration Review, “Operating Policies and Procedures Memorandum 17-01: Continuances,” July 31, 2017, <https://www.justice.gov/eoir/file/oppm17-01/download>.

¹⁵ See Meckler, Wall Street Journal, “New Quotas for Immigration Judges as Trump Administration Seeks Faster Deportations.”

¹⁶ Spagat, Associated Press, “Justice Department imposes quotas on immigration judges.”

than providing a fair opportunity to hear the facts of the case.¹⁷ The association also warned that the quotas could ultimately exacerbate the backlog by encouraging individuals who have not received adequate due process to appeal their decision, lengthening the time it takes to close such cases.¹⁸

The Forum also is deeply concerned about threats to judicial independence and the favoring of speed over due process. We believe that a more appropriate solution to the backlog is to provide additional resources to the immigration court system, not to strain the caseloads beyond the breaking point.

Suspending the Legal Orientation Program and the Help Desk Is Misguided

On April 11, DOJ announced that it will suspend funding for the Legal Orientation Program (LOP), a legal-advice program offered to detained immigrants facing deportation, as well as a “help desk” program for immigrants seeking advice over the phone, while it audits the programs’ cost-effectiveness.

The Forum finds the suspension of both programs, which provide valuable assistance to immigrants navigating a complex immigration system, deeply troubling. The programs receive about \$8 million a year in federal funding and provide tens of thousands of people with basic legal information they need to present their cases. LOP, created in 2003 under the George W. Bush administration, last year served 53,000 individuals in more than a dozen states. The program provides information sessions to detainees to explain their rights, how the court process works, and their possible defenses to deportation. The help desk provides similar guidance to non-detained immigrants who face deportation.

The Forum believes that it is misguided to suspend these programs. Since immigrants in the immigration court system are not afforded attorneys, these programs are essential to those with valid immigration claims. Their \$8 million cost is modest in relative terms and

¹⁷ See Meckler, Wall Street Journal, “New Quotas for Immigration Judges as Trump Administration Seeks Faster Deportations.” (National Association of Immigration Judges president A. Ashley Tabaddor: “This is a recipe for disaster. . . . You are going to, at minimum, impact the perception of the integrity of the court.”)

¹⁸ See Meckler, Wall Street Journal, “New Quotas for Immigration Judges as Trump Administration Seeks Faster Deportations.”

a 2012 DOJ cost analysis showed that the program created a net to the federal government of about \$18 million, shortening the length of immigration court cases and detention.¹⁹ As DOJ goes to great lengths to reduce immigration court backlogs, it is inconsistent that it would seek to suspend a program that has been shown to reduce backlogs and save money.

Conclusion

The National Immigration Forum believes that a functioning, efficient U.S. immigration court system is essential for the administration of justice, and that Congress and the administration should work towards reducing the immigration court case backlog.

There is no silver bullet to clear the backlog – a prolonged commitment to increasing the number of immigration judges and resources is a good starting point, however. At the same time, DHS trial attorneys and immigration judges should be able to use their discretion to use existing tools to close out low priority cases, including increasing the use of prosecutorial discretion and administrative closure.

However, the Forum is troubled by recent DOJ's guidance that would attempt to shorten backlogs by requiring immigration judges to meet case closure quotas. Those guidelines threaten the independence of immigration judges while undermining the ability of those with valid immigration claims from having their day in court. Efforts to reduce immigration court backlogs must preserve due process and judicial independence. A better approach would be to increase resources provided to EOIR and the number of immigration judge teams. This would be consistent with increases in federal immigration enforcement efforts over the past two decades and begin bringing immigration court capacity into the current century.

¹⁹ U.S. Department of Justice, "Cost Savings Analysis - The EOIR Legal Orientation Program," April 4, 2012, https://www.justice.gov/sites/default/files/eoir/legacy/2013/03/14/LOP_Cost_Savings_Analysis_4-04-12.pdf.

The Forum is also troubled by DOJ's recent announcement that is suspending LOP and the help desk. Both programs provide invaluable legal information to individuals trying to navigate the immigration court system, saving money while reducing court backlogs.

Congress should act to preserve judicial independence of the immigration court system, increase funding for EOIR, and reestablish the services provided by LOP and the help desk.