

FEATURE

Legal logjam in immigration court grows to more than 540,000 cases

BY LORELEI LAIRD ([HTTP://WWW.ABAJOURNAL.COM/AUTHORS/27616/](http://www.abajournal.com/authors/27616/))

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Illustration by Sam Ward

The government started trying to deport Octavio, a Mexican immigrant, in 2007. He's still waiting for his case to be resolved, and he will likely continue to wait until at least 2018.

Octavio (the *Journal* is withholding his last name because of his uncertain immigration status) was subject to removal—immigration law's term for deportation—because he'd been convicted of having false identification papers.

He'd already been living in the United States for more than 10 years, had a wife with a heart condition and three stepchildren when the proceeding began in Denver.

There was a backlog of cases, so Octavio couldn't get a final hearing scheduled until early 2013—six years later. When he returned, the judge ordered him removed but said he'd reopen the case if Octavio could find evidence showing his crime did not

merit removal. Having navigated the earlier hearings without counsel, Octavio hired attorney Camila Palmer to reopen his case. The judge scheduled the reopened hearing for the summer of 2013.

But that judge retired. The next judge sent the case from Denver to New York City, reasoning that Octavio lived part of the year in Buffalo, where he works in construction. Months later, the New York judge sent the case to Buffalo. The Buffalo judge sent the case back to Denver, where it's been lingering for years. Octavio hasn't been able to leave the United States to visit family, work toward citizenship or pay back the \$10,000 bond a friend fronted him in 2007. Another hearing was held Nov. 1, 2016. In the interim, his family has welcomed nine grandchildren and a 13-year-old ward, whom Octavio and his wife took in after the child's own father was deported.

The delays in cases such as Octavio's are partly due to the immigration courts' enormous backlog—more than 540,000 pending cases—and partly because his case was not a priority. After the 2014 surge of young people and families fleeing gang violence in Central America, the immigration courts prioritized those cases, pushing people like Octavio to the back of the line. Syracuse University's Transactional Records Access Clearinghouse, which tracks immigration court data, says 94,662 surge cases of unaccompanied minors or families were pending at the end of November. Octavio's final hearing was held this January.

But Octavio won't find out the results, Palmer says, for a year or two. There's only a limited number of green cards for people in his situation, and the outcome of the case isn't disclosed until one is available.

"Thankfully, my client is not going to abscond, and eventually, [the lender] will get his money back," says Palmer of Elkind Alterman Harston in Denver. "But ... it will probably be close to 12 years after he paid the bond that it's going to be released."

This situation is not unusual—at least not in immigration court, where the Sixth Amendment right to a speedy trial does not apply. Immigration Judge Dana Leigh Marks, president of the National Association of Immigration Judges and a sitting judge in San Francisco, told the *ABA Journal* that, in the fall of 2016, some judges were setting hearing dates as late as 2022. A backlog of pending cases has been growing in the immigration courts for more than a decade—reaching more than half a million cases last year—and a second surge of Central American families in 2016 has only worsened it. (U.S. Customs and Border Protection says there were 59,692 unaccompanied minors and 77,674 family units apprehended in fiscal 2016.)

WAVE OF REPERCUSSIONS

That backlog creates serious problems. People who aren't in priority groups can wait years for their days in court—while evidence gets lost and memories fade.

Immigrants who left families overseas may not see them for years, thanks to legal or practical travel restrictions, and they may not be able to help them escape dangerous conditions until their status is adjusted. Those who are detained can lose their jobs in just a few days; those trying to adjust their status to legal can end up working under the table for years, for low pay and in tough conditions.

The situation could be exacerbated under the new administration. Five days after his inauguration, President Donald Trump issued an executive order expanding the definition of a “criminal” for deportation purposes to include not only those with convictions but also those with pending charges, those accused of fraud or misrepresentation against a government agency, and anyone who an immigration officer believes has done something that could be considered a crime. Those criteria are so broad that every one of the 11 million people living or working in the United States without authorization could be deported.

“It’s going to crash the immigration courts,” says Paul Wickham Schmidt, a retired immigration judge and former chief of the Board of Immigration Appeals, which hears appeals from immigration courts. “No matter how you cut it, his broadened immigration priorities are going to mean hundreds of thousands of additional cases, on top of the more than half a million cases that are already there.”

The U.S. Department of Homeland Security released memos in February implementing that order, in which it expressly acknowledged the immigration courts’ record-high backlog as a hindrance to quick deportations.

But rather than address the courts’ problems, DHS proposed to greatly expand the use of “expedited removals,” in which foreign nationals are deported without any hearing at all in immigration court. (ABA President Linda A. Klein released a statement in January

(http://www.abajournal.com/news/article/aba_urges_supreme_court_to_hear_case_about_due_process_in_expedited_deporta) condemning the practice as a violation of due process.) This was previously limited to people arrested within two weeks of entering within 100 miles of the border; it will now apply to anyone, anywhere, who arrived within the past two years. Nothing was said about more funding for immigration courts.

Meanwhile, the immigration courts themselves were in the middle of a hiring spree that got started under President Barack Obama. The DOJ agency that houses the immigration courts, the Executive Office for Immigration Review, was authorized to fill up to 374 judgeships and had requested authorization for 25 more as of February.

But that effort may be too late. As of the end of January, Syracuse University's TRAC said the backlog stood at 542,411 pending cases. Start to finish, cases were taking an average of 590 days to complete.

This upsets people on all sides of immigration politics.

"You get to keep living here, maybe get married, maybe have a kid, and every day here makes it less likely you'll leave," says Mark Krikorian, executive director of the Center for Immigration Studies, which advocates for stricter controls on immigration. "Because they've been here so long, judges will let them stay, or they develop equities that make it difficult if not impossible to throw them out."

"It's not appropriate for cases that can very well result in somebody being returned to their home country and dying," says Christina Fiflis, an immigration attorney in Boulder, Colorado, and a former chair of the ABA Commission on Immigration. "There are all sorts of consequences that flow from these failures, and there's no necessity for them."

In the early 2000s, when the Brazilian economy faltered, Brazilians began coming to the United States in waves. Many ended up in Boston, with relatives in the area's large Brazilian community.

Retired immigration judge Eliza Klein, who sat in Boston at the time, says her court had no control over when and how those cases were docketed. Rather, Customs and Border Protection—the agency that polices America's borders—scheduled court dates directly onto her docket, based on where the immigrants said they were going. But the Brazilians often didn't have clear information about where their relatives lived, and CBP didn't have Portuguese-speaking interpreters. The results were bad, Klein says.

"I'd go into a master calendar—you should have like 25 new cases—and there'd be nobody there," recalls Klein, now retired from the bench and practicing law in Chicago. "And at the same time, there were a lot of people who had been placed into removal proceedings who we couldn't schedule for hearings because all of our hearing time had been used up by these Brazilian cases. ... They completely usurped our court schedule."

And that, immigration court advocates say, shows why those courts have such a big backlog: They're not given the independence or funding of trial courts. Immigration lawyers and former judges say policy is set by bureaucrats at the Department of Justice, which took over control of the immigration courts from the Immigration and Naturalization Service in 1983. At DOJ, there's occasional interference from higher up. And until recently, immigration court budgets were an afterthought.

OUT OF PACE

A major factor in the backlog is that immigration enforcement grew rapidly over the 2000s—but immigration court funding didn't keep up. According to the Migration Policy Institute, that increase in funding was tied directly to concerns about national security after Sept. 11; indeed, immigration enforcement agencies were moved to the newly created Department of Homeland Security right as the spike in funding began. More judges were needed to handle all those new cases—but the money simply wasn't there, says Marks, who emphasizes that she's not speaking for DOJ, but as president of the National Association of Immigration Judges.

Seven years of budgets reflect that. Between 2003 and 2009, the combined budgets for CBP and Immigration and Customs Enforcement—both established in 2003—nearly

doubled, from \$9.2 billion to \$17.8 billion. In the same period, the budget for the Executive Office for Immigration Review, the DOJ agency that houses the immigration courts, went up by 40 percent, from \$191.7 million to \$267.6 million. A



Christina Fiflis. Photograph by McCory James.

2009 DOJ budget request notes: “For years, EOIR’s top funding priority has been to attain the ability to adjudicate the record numbers of cases already received as a result of DHS enforcement increases.”

The funding problem was compounded by a three-year Justice Department hiring freeze enacted in 2011, Klein says. When judges retired, the courts didn’t replace them, even as enforcement agencies kept filing cases. Immigration court funding has since reached parity with enforcement funding, largely thanks to big jumps between fiscal 2014 and 2016. Those jumps coincide with the 2014 influx of unaccompanied Central American minors, which attracted media attention to the backlog.

Even if funding stays parallel under Trump, Marks says immigration courts would still be hobbled by their lack of independence. EOIR is one department in a very large Department of Justice; it received just 1.46 percent of DOJ’s \$28.7 billion budget for fiscal 2016. And it’s not part of the department’s core mission of law enforcement. That’s not the best place to house judges, Marks says. For example, DOJ has asked employees to telecommute in order to reduce its carbon footprint. That doesn’t make sense for court employees whose job it is to meet with the public, Marks says.

“The attitude within the Department of Justice is ... ‘To us, you’re nothing but trial attorneys,’ ” says Bruce Solow, a retired immigration judge and former NAIJ president now in private practice in Miami. “There is an internal built-in disrespect.”

As a result, immigration judges and attorneys say, immigration courts lack many of the features that trial courts take for granted, including adequate numbers of clerks and e-filing. Immigration courts don’t use court reporters; they use recordings, which are time-consuming to refer to when it’s time to write an opinion, and often hard to understand because of the foreign accents routinely heard in immigration court. To reduce the need for in-person judges in remote areas or inside detention centers, EOIR has also relied on videoconferencing—but the technology is not up to par, Klein says. The system frequently shuts down or pixelates, she says, derailing hearings and making it tough to evaluate the speaker’s credibility.

David Bier, an immigration policy analyst at the libertarian think tank the Cato Institute, believes another factor is likely a dearth of attorneys in immigration court. Immigration law expressly says there’s no right to appointed counsel, so immigrants who can’t afford lawyers and can’t find a pro bono attorney are on their own. Dealing with pro se respondents takes time, Marks says—and Bier’s analysis suggests a lot of immigration judges prolong cases to permit respondents to find attorneys.

Bier also believes the backlog was fed by controversial federal programs that called on local police to tell ICE when they're holding a noncitizen charged with a crime. Because immigration law can be vague about which crimes make a person removable, these cases can be time-consuming. Meanwhile, he says, enforcement agencies have reduced reliance on stipulated removals, in which immigrants voluntarily waive their right to a trial, after immigrant advocates won court cases arguing that the practice is coercive.

And Bier agrees that being housed in DOJ hasn't been helpful. Independence would give the immigration courts a stronger voice at budget time, he says, and end the possibility of political interference from above.

A MATTER OF PRIORITIES

Marks and some of her retired colleagues strongly agree. They say because EOIR answers to the politically appointed attorney general, who answers to the president, it's vulnerable to politically motivated orders in a way that the independently run federal courts are not.

In 2016, the most glaring example of political interference was the 2014 order to prioritize surge cases of unaccompanied minors and parents traveling with children. That order rearranged dockets to the detriment of everyone involved, judges and attorneys say. For the families and minors who were prioritized, the cases were being scheduled so quickly that they couldn't find lawyers. Cases that were ready to try were sent to the back of the line.

In fact, thousands of those cases were scheduled for a placeholder date: the day after Thanksgiving of 2019. Advocates say this was never intended as a real hearing date—nor could it have been, with thousands of cases assigned per judge. The idea, Schmidt says, was to artificially clear the dockets “because if you started setting cases for 2028 or 2029, everybody would go berserk.”

As of October, Fiflis says, judges in Denver were rescheduling those cases for 2018. But the rescheduling means that even those that were ready to try when the dockets were reshuffled have to start the process over from the beginning—adding years to the delay. “Can you imagine trying to explain that to your client?” says Palmer. “All people wanted to do was to have their day in court, and they weren't able to get it.”

This has messed up dockets still further, says Schmidt, who sat in Arlington, Virginia, until June of 2016. “If you look, the receipts have actually fallen over the last few years [and] there's a few more judges on,” he says. “But the backlog has mushroomed because the cases are so poorly arranged on the docket.”

And this, Schmidt says, was intended not to benefit the courts but to “send a message” to Central Americans. He is referring to DHS policy under Obama, often repeated during the “surge,” intended to discourage would-be migrants by showing them they’d be deported quickly. This is an inappropriate use of a court system that’s supposed to provide due process, Schmidt says.

Schmidt, who was chief of the Board of Immigration Appeals from 1996 to 2001, can offer a more personal example of politicization. A few months into the George W. Bush administration, he says, he was asked to step down as chair, which his supervisor expressly said was because his opinions were too friendly to immigrants.

Not long after, he says, Attorney General John Ashcroft decided the board would work better with fewer members—and let go of the judges considered immigrant-friendly. The stated rationale was that fewer members would make the BIA more efficient, but Schmidt says it actually left the BIA with too few judges for its workload, forcing it to draft staff attorneys as temporary judges. “They had to go back to using temporary board members,” says Schmidt. “So it was a fairly obvious move to get rid of the people whose views Ashcroft didn’t like.”

Meanwhile, another early-2000s order required BIA judges to start issuing one-sentence rulings and relying on one judge rather than three to write more lengthy rulings. That generated a lot of work for the federal appeals courts, which hear appeals from the BIA—and the appellate judges were not pleased. A 2005 article from the *Los Angeles Times* says appellate judges were describing BIA rulings as “incoherent” and “sloppy adjudication” that “contravened considerable precedent.” There were so many appeals, Schmidt says, that the DOJ drafted staff lawyers with no immigration expertise to defend them.

Two of Schmidt’s former colleagues—both of whom were also let go—agree that the downsizing was politically motivated, as do sources quoted in a November *Law360* article. A 2008 report from the DOJ’s Office of the Inspector General didn’t address this issue, but did find that only attorneys endorsed by Republican elected officials or appointees were hired as immigration or BIA judges from 2004 onward. (This exacerbated the backlog, the report said, because getting political approval slowed the hiring process considerably.) The OIG found that three people, none of them Ashcroft, had broken federal law with these practices.

A spokesman for Ashcroft calls the allegation ridiculous. He cited a 2002 press release announcing the reforms as an attempt to address a backlog at the BIA by “streamlining.”

“Politics played no role in anything John Ashcroft did at the Justice Department,” says Mark Corallo, who was Ashcroft’s director of public affairs at the time.

Regardless, the NAIJ and others say independence would address any potential or actual political interference in the immigration courts. The NAIJ has repeatedly called for the immigration courts to be Article I courts created by Congress, like the U.S. Tax Court or the Court of Federal Claims.

“It is my honest opinion that the only way to fix this is to provide a real court that’s independent of all of these agencies,” says Solow, the retired judge in Miami.

JUSTICE DEFERRED

All of this has real effects on the people who appear in immigration court. Just ask immigration lawyer Hedi Framm-Anton, who had a client literally collapse in her office.

Carmen, the client, was claiming asylum from both rampant gang violence and domestic violence at home in El Salvador. (Her last name is being withheld for her protection.) Like many Salvadoran nationals, she had paid a smuggler to take her and her son north, arrived at the border in 2015 and spent a few months in the government’s immigrant detention center in Dilley, Texas. Carmen’s case was prioritized along with other surge cases, and Framm-Anton requested an expedited hearing—which in immigration court means within six months.

The speed helped resolve Carmen’s case sooner, but it also condensed the process of drawing out Carmen’s story. That was tough, Framm-Anton says, because Carmen was an educated woman, ashamed that she’d tolerated the abuse. That kind of reluctance is common with Framm-Anton’s clients, many of whom were traumatized by events at home. “It’s a delicate balance of ... what’s going to happen to this person if I force her to keep telling her story,” says Framm-Anton, who runs a small law office in San Francisco.

To prepare the case, Framm-Anton had to grill Carmen weekly. Meanwhile, Carmen was working two jobs and leaving her 14-year-old son alone all weekend. The state was threatening to take him away. During that time, Framm-Anton says, Carmen stood up to leave the office one day—and passed out. EMTs said it was the stress.

Carmen won her case. But prioritizing cases like hers has created problems for both the prioritized immigrants and those sent to the back of the line, immigration lawyers say.

For priority cases—unaccompanied minors and families traveling with children—the problem is speed. Framm-Anton, who represents a lot of unaccompanied minors and families, says those cases are supposed to be finished within a year. Because nobody in immigration court gets court-appointed counsel—and recently arrived immigrants rarely have money—the first stumbling block is simply finding a pro bono lawyer.

Without one, their chances are grim; TRAC found last fall that having a lawyer increased a family's chances of winning asylum by more than 10 times. But finding one is tough for people on the prioritized “rocket docket.” Pro bono organizations often come to immigration courts, and their contact information is passed out to detainees—but those groups don't have the resources to help everyone.

Schmidt says it takes six months or more to find a pro bono lawyer in Arlington—and then, the lawyers typically have trouble preparing the case in time. To work around it, he says, judges in Arlington would keep continuing cases until the respondents got lawyers, but other courts simply deported unrepresented people.

Harder to address has been the opposite problem: sending people like Palmer's client, Octavio, who had the parade of judge changes, to the back of the line. His case may have been extreme, but across the board, people with nonpriority cases can expect to wait years—with dates from 2018 to 2023, lawyers and judges say—to have their cases heard. Palmer says one of her clients has been waiting so long that his wife, who's still living in their home country, no longer believes what he says about delays.

This is especially a problem for people with strong cases, lawyers say. One defense to deportation is that it would cause “exceptional and extremely unusual hardship” to a close relative who's a citizen or permanent resident, Fiflis says—and that claim can be lost with time.

For example, if the relative with the hardship is a minor child, the child might “age out” by growing up. Or worse. “It's very unfortunate to say this, but if you have a U.S. citizen child with cancer or leukemia, will that child still be alive in three years?” Framm-Anton asks.

Time can also be an enemy for asylum claimants, who are seeking refuge from persecution at home. Palmer says many with strong asylum cases left relatives behind in the same dangerous conditions. “There's no way for someone to bring their family here to join them until they've had their hearing” and won, says Palmer. “So really strong asylum cases that are being pushed out years and years and years, that's extremely problematic.”

Another problem is changes in the law, Fiflis observes. For nonpriority cases, the wait is so long that courts can pass new law during the pendency of the case, or federal policies can change. Fiflis has had a case linger so long that new case law ended the client's eligibility for relief.

But for the exact same reason, she says, the backlog can help clients who have weak cases but might benefit from a change in the law. Such clients, and their lawyers, might welcome a three-year delay.

Krikorian of the Center for Immigration Studies strongly agrees. He adds that the backlog is also a problem for enforcement agencies. "Either [immigrants] don't show up [to court], or they do show up and are turned down, but there's no consequence to that," he says. "It's difficult to find them if you don't have them in custody."

Meanwhile, says Framm-Anton, the reshuffled docket is also hard on advocates. "I'm trying to get a coherent story that matches up with a credible fear interview ... to have testimony that's coherent, get the person together enough psychologically so they can testify, all within six months—are you kidding me?" she says. "I mean, I could be living here 24/7."

It's not great for business either, says Ben Johnson, executive director of the American Immigration Lawyers Association. "Just the logistics—of trying to stay on top of all of those things and how those changes in the political scene and the changes in the client's environment, all the changes that can happen in that three- and four-year period of time—is a real nightmare for immigration practitioners," he says.

HELP WANTED

In the fall of 2016, the Executive Office for Immigration Review was busy addressing these problems by hiring aggressively, spokeswoman Kathryn Mattingly said.

As of March, she said the agency had 301 seated judges and had requested authorization for a total of 399 judgeships. Those new judges are welcomed by legal and immigration groups—including the ABA, which called for more immigration judges with 2010's Resolution 114B.

But that effort may be overwhelmed by changes under the Trump administration. Trump's actions since taking office emphasize enforcement; his executive orders call for 10,000 more ICE agents and 5,000 more CBP officers, and they substantially reduce use of prosecutorial discretion. In his first months in office, there were several high-profile deportations of immigrants who had previously benefited from prosecutorial discretion and had little or no criminal record.

Although the DOJ eventually said immigration judges weren't subject to the hiring freeze, it's unclear whether immigration courts will be funded enough to handle all the additional cases. If not, Schmidt says, wait times will only worsen.

"If they really put a lot more people in proceedings, then it seems to me the backlog's going to continue to grow," he says. "How are they going to take on more work with the number of cases that are already there?"

Read more: ABA commission had warned of immigration-court backlog

(aba_commission_immigration_court_backlog)

This article originally appeared in the April 2017 issue of the ABA Journal with this headline: "Legal Logjam: Neglect and political interference have created a growing backlog in immigration courts of 540,000-plus cases."

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