A Blueprint For Addressing The Immigration Court Backlog

By **Donald Kerwin** (July 19, 2023)

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While the U.S.-Mexico border dominates the immigration debate, politicians and commentators largely ignore the U.S. immigration court system. Yet the latter is crucial to the success of both U.S. humanitarian and immigration enforcement programs.

As it stands, the courts are buckling under a backlog that has risen from 186,000 pending cases in fiscal year 2008 to nearly 1.9 million in the first quarter of fiscal year 2023, resulting in projected hearing delays of a decade or more in some courts.[1]

As a practical matter, the backlog results from an immigration system that every year since 2009 has placed far more persons in removal proceedings than its courts could accommodate.[2]

In fiscal year 2022, the Executive Office for Immigration Review, the arm of the U.S. Department of Justice that administers the court system, received 706,640 cases and completed fewer than 310,000, and it is on a similar trajectory in fiscal year 2023.[3] Absent decisive reforms, the backlog will continue to grow.

As detailed in a new study by the Center for Migration Studies of New York, or CMS,[4] the backlog significantly hampers individuals with strong cases from obtaining relief from removal and commencing their lives in the U.S. It also prevents the timely disposition of cases with weaker claims. Under both scenarios, it undermines the integrity of the U.S. immigration system and creates uncertainty and hardship for those enmeshed in it. It also makes it far more difficult for indigent persons to secure legal representation and for attorneys to manage their caseloads.

It would be a mistake to blame the backlog on EOIR or its 650 immigration judges. Instead, the backlog results from systemic problems in the broader immigration system, including gross disparities in funding between immigration enforcement and the adjudication of removal proceedings, the failure of Congress to enact meaningful legislative reform, backlogs in the legal immigration system and the limited authorities of immigration judges.

Fixing the backlog, in turn, requires addressing these systemic problems and establishing an immigration system that prioritizes both due process and immigration enforcement. The following ideas offer a blueprint for backlog reduction and reform of the broader immigration system.

First, Congress should appropriate funding for several hundred additional immigration judges, legal staff and court personnel, as well as EOIR's related operations. The CMS report offers various immigration judge staffing scenarios based on projected case receipts and completions.

In fiscal year 2022, EOIR's appropriation of $760 million represented just 3% of the $26.7 billion combined enacted budgets of U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement, the U.S. Department of Homeland Security agencies that feed most of the cases into the immigration courts.

The latter figure understates U.S. immigration enforcement funding by excluding the enforcement activities of U.S. Citizenship and Immigration Services, federal agencies other than the DHS, and states and localities. The CMS report proposes benchmarking EOIR funding at 6% of the CBP and ICE budgets.

Second, the DHS must exercise discipline in initiating removal cases that reflect meaningful enforcement priorities. On June 23, the U.S. Supreme Court held in U.S. v. Texas that Texas and Louisiana lacked standing to challenge the Biden administration's immigration arrest and removal priorities.[5]

To reverse the court backlog, the DHS must exercise discipline and apply enforcement priorities at every stage of the removal adjudication process. In particular, it should limit serving notices to appear — charging documents that initiate removal proceedings — to a number below the number of cases that the courts can realistically adjudicate.

It serves nobody's interests to flood the courts with low-priority cases that they cannot complete for years. The DHS can keep track of these immigrants in other ways than by placing them in removal proceedings.

In the criminal justice system, district attorneys determine if they will prosecute a case. In the immigration system, dozens of officials from DHS agencies issue NTAs. The DHS should more tightly control the issuance of NTAs, and it should vest responsibility for prescreening potential removal cases with ICE's Office of the Principal Legal Advisor, or OPLA, whose attorneys serve as de facto prosecutors in these proceedings.

OPLA attorneys should also work with immigration judges to close and terminate cases that courts do not need to adjudicate. An obvious example is persons with petitions or applications for permanent residence before USCIS.

EOIR reported to CMS that the backlog includes 40,414 cases in which there was a past court adjournment due to an application pending at USCIS. However, this figure understates the size of this population because it excludes respondents who have failed to notify the court of their pending USCIS applications. Why place people in removal proceedings who cannot yet and may never be removed?

Third, Congress should pass legislation to reduce visa backlogs. Many persons mired in immigration court backlogs are also among the more than 4 million stuck in multiyear visa backlogs. Pending bills in the 118th Congress would reissue unused visas and adopt other strategies to address this problem.

EOIR reported to CMS that 731,149 cases in removal proceedings have been pending for at least three years and 277,412 pending for at least five years. Backlogs throughout the immigration system now feed each other, a cycle that needs to be broken.

Fourth, Congress should reform the underlying immigration system. It would relieve pressure on the immigration courts and the enforcement system to align the nation's legal immigration system with its labor and other needs. Congress should also pass a broad legalization bill, which would necessarily reduce the number of U.S. residents subject to removal proceedings.

As it stands, there is a legalization program called registry that has been available since the 1920s for long-term undocumented residents with good moral character. However, Congress last advanced — in 1986 — the entry cutoff date for registry eligibility to Jan. 1,

1972.
Thus, an undocumented person would need to reside in the U.S. for more than 50 years to qualify. Moving the eligibility date forward on a regular basis would significantly reduce the backlog, among other benefits.

Congress should also pass legislation to establish a statute of limitations for ordinary civil immigration violations. Absent a statute of limitations, the DHS can initiate removal proceedings for illegal entries and other offenses that occurred decades in the past.

Fifth, Congress should establish a stronger, more independent immigration court system. As it stands, EOIR is located within a law enforcement agency and treated — albeit not funded accordingly — as an instrument of the DHS.

A case in point concerns the reassignment of immigration judges, a practice known colloquially as docket reshuffling. Large-scale reassignments, particularly to the border between 2014 and 2019, contributed significantly to the backlog.

In many cases, reassigned judges reported having few cases to handle in their temporary positions. Meanwhile, tens of thousands of scheduled hearings in their home courts needed to be rescheduled, often years in the future.

In fact, the great majority of newly undocumented residents over the last decade entered the U.S. legally on temporary visas, which they have overstayed. Reassigning judges to the border has significantly increased the backlog overall, particularly in nonborder courts and cases.

Since 1981, select commissions, bar associations, the National Association of Immigration Judges and diverse commentators have argued in favor of creating an immigration court system under Article 1, Section 8 of the U.S. Constitution, as a way to increase its independence and funding. While not a panacea, this reform would be an improvement on the status quo.

Sixth, Congress should expand the discretion of immigration judges to grant relief from removal based on equitable considerations, which has been severely restricted since 1996.[6] The DHS and the DOJ should also support efforts by the immigration courts to resolve cases in a cooperative manner.

The great majority of criminal cases result in plea bargains. Yet OPLA attorneys mostly view their role as to "win cases" by securing removal, not to work with immigration judges to complete cases in the best way possible.

Finally, U.S. Attorney General Merrick Garland should vest immigration judges with contempt authority, which would increase their ability to manage their dockets fairly and effectively.

Imagine a court system with limited discretion to resolve cases based on equitable considerations, no statute of limitations for underlying civil offenses, no plea bargaining, no contempt authority and no legal counsel for a high percentage of respondents, but a formidable bureaucracy of government-funded prosecutors. These unique characteristics of the U.S. immigration court system make it difficult for judges to resolve and close cases. Addressing these deficiencies will help to increase court efficiency and reduce the backlog.

Seventh, Congress, EOIR, states, localities and private funders should work to provide legal

representation to every indigent immigrant in removal proceedings. Attorneys contribute to the efficient administration of the courts. They help hone the issues before the courts, identify viable and forego meretricious claims, and allow for well-informed decision making. Yet high percentages of immigrants, particularly detainees, cannot afford representation.

Congress generously funds OPLA trial attorneys. It should also actively support universal representation in these adversarial and consequential proceedings.

Many of the broader problems in the U.S. immigration system have seemed impervious to reform. Yet a technical, good-government issue, such as reducing the backlog, may be the right vehicle to begin to remedy past failures. A nation with 45 million foreign-born residents needs an immigration court system that fairly and efficiently adjudicates cases. The alternative will ultimately satisfy none of the stakeholders in the immigration debate.

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[1] Executive Office for Immigration Review (EOIR), Adjudication Statistics, "Pending Cases, New Cases, and Total Completions" (Falls Church, VA: EOIR 2023), https://www.justice.gov/eoir/page/file/1242166/download (last visited June 26, 2023).

[2] https://www.justice.gov/eoir/page/file/1060841/download.

[3] Id.

[4] Donald Kerwin and Evin Millet, The U.S. Immigration Courts, Dumping Ground for the Nation's Systemic Immigration Failures: The Causes, Composition, and Politically Difficult Solutions to the Court Backlog, J. Mig. & Hum. Sec. (2023), https://journals.sagepub.com/doi/full/10.1177/23315024231175379.

[5] U.S. et al. v. Texas, et al., 599 U.S. ___ (2023).

[6] Donald Kerwin, From IIRIRA to Trump: Connecting the Dots to the Current U.S. Immigration Policy Crisis, 6 J. Mig. & Hum. Sec. 192, 194-195 (2018), https://journals.sagepub.com/doi/pdf/10.1177/2331502418786718.