



# Bipartisan Policy Center

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Submission for the Hearing Record

House Judiciary Subcommittee on Immigration and Citizenship

Hearing on

*For the Rule of Law, An Independent Immigration Court*

January 20, 2022

Chairman Lofgren, Ranking Member McClintock and Members of the Subcommittee,

Thank you for the opportunity to submit testimony for the record on *For the Rule of Law, An Independent Immigration Court*. Our immigration courts have long had systemic issues. According to the American Immigration Lawyers Association (AILA), “the U.S. immigration court system suffers from profound structural problems that have severely eroded its capacity to deliver just decisions in a timely manner, as well as public confidence in its outcomes.”<sup>1</sup>

Chief among the systemic issues that the immigration courts face is the massive backlog of pending cases. The backlog for this fiscal year sits at nearly 1.6 million cases, a more than 1000% increase since FY1998, when the backlog was slightly over 129,000 cases, and a historical record.<sup>2</sup> And the problem has become particularly acute since 2016 – the backlog has tripled since FY2016, with pending cases that year sitting at slightly over 500,000.<sup>3</sup> Average wait time for a case to make it through the system is two and a half years, and for asylum seekers is nearly four years.<sup>4</sup>

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<sup>1</sup> American Immigration Lawyers Association, “Featured Issue: Immigration Courts,” American Immigration Lawyers Association, December 22, 2021, <https://www.aila.org/advo-media/issues/all/immigration-courts>.

<sup>2</sup> TRAC Immigration, “Backlog of Pending Cases in Immigration Courts as of December 2022,” TRAC Immigration, December 2021, [https://trac.syr.edu/phptools/immigration/court\\_backlog/apprep\\_backlog.php](https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php)

<sup>3</sup> The Economist, “The backlog in America’s immigration courts keeps growing,” *The Economist*, November 19, 2021, <https://www.economist.com/graphic-detail/2021/11/19/the-backlog-in-americas-immigration-courts-keeps-growing>

<sup>4</sup> Ibid.

The Bipartisan Policy Center's Immigration Project has been working to address this issue since 2015, when we published a proposal to fund immigration courts.<sup>5</sup> The proposal pointed out that as of its writing, the backlog of pending cases in immigration courts grew by 160 percent since 2006, but the number of immigration courts grew by only 15 percent. We proposed funding more judges to reduce the backlog, which would allow the enforcement system to function more efficiently and help migrants receive a fairer hearing. Expediting processing while helping migrants get a fairer hearing would address important concerns from both sides of the aisle, which in theory makes funding additional immigrant judges less controversial compared to many other immigration policy proposals.

As the proposal pointed out, the arrival of tens of thousands of Central American migrants in 2014 prompted a shift in priorities. Many of these Central American migrants did not attempt to evade detection, instead turning themselves in to CBP agents, a pattern that has held to this day. Thanks to the overwhelmed state of immigration courts, many migrants who arrived illegally and sought asylum were given a notice to appear and were then released into the country on their own recognizance, a practice that has persisted. But more and more migrants were also detained, leading to overwhelmed detention centers. Immigration courts were instructed to prioritize cases involving families and children, which helped these cases reach a resolution more quickly, but meant that other unresolved cases were pushed further back in line. Recent arrivals have contributed exponentially to the backlog. According to TRAC, the influx of cases recently filed by the Department of Homeland Security for individuals who were released without notices to appear in the last year has been a major contributor in the last quarter to the backlog.<sup>6</sup>

While this hearing is focused on creating an independent immigration court, outside of the Department of Justice, the pending case backlog is an urgent matter. There are many reasons why an independent immigration court might be a good idea from a policy and due process perspective, but in and of itself it would not resolve the urgent need to address the record case backlog. While an independent court might be able to make decisions that could help reduce the backlog, such as enabling judges to close cases that are not worth advancing when the foreign national has other options available, or when the government has not built a sufficient case, and managing the dockets according to case processing needs and not political positioning, without a massive influx of resources to address the cases it might inherit, these mechanisms will be insufficient on their own to get our immigration court system back to a rational caseload.

Funding immigration courts would help migrants by allowing them to have their day in court sooner and giving them more time to have their cases heard. A news article published in 2014 pointed out that immigration judges' overwhelming schedules can reduce hearing times to as little as seven minutes.<sup>7</sup> On a test of professional burnout, immigration judges were more burnt out than prison wardens and physicians in busy hospitals. Burnout became particularly acute in 2020, with many immigration judges quitting or retiring early at faster than average rates due to job stress and frustration, with some judges

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<sup>5</sup> Matt Graham, "Funding Immigration Courts Should Not be Controversial," Bipartisan Policy Center, May 20, 2015, <https://bipartisanpolicy.org/blog/funding-immigration-courts-should-not-be-controversial/>.

<sup>6</sup> TRAC Immigration, "Immigration Court Backlog Now Growing Faster Than Ever, Burying Judges in an Avalanche of Cases," TRAC Immigration, January 18, 2022, <https://trac.syr.edu/immigration/reports/675/>.

<sup>7</sup> Eli Saslow, "In a crowded immigration court, seven minutes to decide a family's future," *The Washington Post*, February 2, 2014, [https://www.washingtonpost.com/national/in-a-crowded-immigration-court-seven-minutes-to-decide-a-familys-future/2014/02/02/518c3e3e-8798-11e3-a5bd-844629433ba3\\_story.html](https://www.washingtonpost.com/national/in-a-crowded-immigration-court-seven-minutes-to-decide-a-familys-future/2014/02/02/518c3e3e-8798-11e3-a5bd-844629433ba3_story.html)

saying that morale had never been lower.<sup>8</sup> Some pointed to a quota system implemented by the Trump administration in 2018 as a particular source of stress.<sup>9</sup> The system required each judge to close at least 700 cases annually, which some judges argued contributed to a “factory model” that puts pressure on judges to push cases through the courts and exacerbates already-present issues in which migrants receive very little time in court for their cases to be heard.

Although stakeholders on both sides of the aisle have raised other concerns about the immigration court system, giving judges adequate time to hear and weigh the facts of a case would likely make the system function better, regardless of what other changes are needed. Former National Association of Immigration Judges president Dana Lee Marks recommended a ratio of 600 pending cases per immigration judge.<sup>10</sup> The case ratio in 2015, 1,750 pending cases per judge, was nearly three times that. With today’s backlog, the case ratio is approaching 3000 pending cases per judge.

In June 2018, we published an op-ed in Roll Call that called for staffing up the courts.<sup>11</sup> We pointed out that the backlog forced the administration to choose between releasing families into the United States or detaining them for extended periods of time. The choice is bad for border security, since if potential immigrants believe the risk of immediate deportation is low, more will try to cross illegally. This pattern is visible in this administration, as well. We cautioned against simply speeding things up, arguing that pushing the system to work faster could lead to charges that the system is not fair to those with valid asylum claims or that due process is being denied, both of which undermine public confidence. Hard-line policies can become more appealing as a means to secure the border when immigration courts are not functioning properly. Funding immigration courts is a way of balancing objectives and avoiding hardline, morally questionable policies. It would also potentially have a deterrent effect, discouraging migrants from crossing illegally if they believe their ability to stay in the country for a longer period is lower.

Though staffing up the courts would require significant resources, the costs pale in comparison to those of more drastic solutions. In June 2018, we estimated that adding 375 judges and court teams would help eliminate the backlog by the end of 2019, at a cost of just over \$400 million. Though significant, that is less than 2 percent of the \$25 billion in funding that was proposed for the border wall, and an equally effective solution for securing our border.

The cost effectiveness of this solution is not limited to border security. In a piece published July 2018, BPC estimated that adding 100 more judges in 2014 would have allowed the government to make

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<sup>8</sup> Alexandra Kelley, “Immigration judges are quitting and retiring early due to job stress,” *The Hill*, January 27, 2020, <https://thehill.com/changing-america/well-being/mental-health/480165-immigration-judges-are-retiring-and-quitting-early>

<sup>9</sup> Molly Hennessy-Fiske, “Immigration judges are quitting or retiring early because of Trump,” *Los Angeles Times*, January 27, 2020, <https://www.latimes.com/world-nation/story/2020-01-27/immigration-judges-are-quitting-or-retiring-early-because-of-trump>

<sup>10</sup> C-SPAN, “Immigration Judges,” National Press Club, August 27, 2014, <https://www.c-span.org/video/?321164-1/discussion-us-immigration-courts>

<sup>11</sup> Cristobal Ramon and Theresa Cardinal Brown, “Opinion: Enough of Border Crackdowns. Try Staffing Up the Courts,” *Roll Call*, June 25, 2018, <https://www.rollcall.com/2018/06/25/opinion-enough-of-border-crackdowns-try-staffing-up-the-courts/>

significant savings in enforcement costs between 2014 and 2018.<sup>12</sup> Though adding these 100 judges and paying their salaries would have cost the government \$109 million during this period, it would have saved \$823 million in detention costs to house people apprehended and detained by immigration authorities during this period. Adding these judges would have also limited the backlog's growth during this period, showing that adding more judges would be an effective method of offsetting the backlog's growth over time.

Due to little action in the intervening years on expanding immigration court capacity, and the continued arrival of migrants placed into the immigration court system, the immigration courts are facing untenable backlogs, requiring emergency steps to get things under control. An independent immigration court system, without sufficient resources, will still result in the same challenges to future administrations in managing the border and providing fair asylum and immigration hearings.

We credit this committee with addressing the situation of the immigration courts, and urge it to address the resource needs, as well as the structure of the courts, to improve their functioning in the future.

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<sup>12</sup> Cristobal Ramon and Tim O'Shea, "Why Hiring More Judges Would Reduce Immigration Court Backlogs," Bipartisan Policy Center, July 25, 2018, <https://bipartisanpolicy.org/blog/why-hiring-more-judges-would-reduce-immigration-court-backlogs/>