

## Immigrant Advocates Resource Collaborative (Immigrant ARC)

### BRIEFING PAPER

#### The Truth About Immigration Courts

One of the most fundamental building blocks of the American experiment in democracy is the impartiality of our judiciary system. It is a value so deeply entrenched that most Americans don't question it and accept the assumption as fact when debating the fairness of our systems. Never has the strength of our judiciary been more critical to our survival as a nation, however. In the face of constant assaults on the very core of our government systems by an unprecedented presidency, the Judiciary has stood as our strongest institution, implacably pushing back on each attempt at discrimination, cronyism, and hatred.

Yet there are glaring examples of where that aspiration fails, and one of those is immigration court.

Immigration court is a place where guilt is presumed and innocence must be proved. It is a place where individuals are forced to defend themselves, alone and often in a foreign language, against trained government lawyers who have the resources of an entire agency behind their actions. It is a place where you are consistently judged against your worst moments, and no opportunity is afforded to highlight your best. As one immigration judge put it not so long ago, it is "death penalty cases in a traffic court setting."

Members of the Immigrant Advocates Resource Collaborative (Immigrant ARC) came together to highlight the most abhorrent practices in a court system that many Americans are affected by, that most debate the merits of, and yet that so few truly understand. This paper lays out some of their experiences and findings, based on their experiences in the New York Immigration Courts. New York's courts have the third largest backlog, with 93,533 cases pending as of March, 2018<sup>1</sup>, and the third highest number of judges.

**Immigration Courts are not independent - they are an administrative office within the US Department of Justice (DOJ).** Hearings are heard by one of 334 immigration judges, employees of the DOJ, in 54 courts spread around the country. Last year over 273,000 families, nearly 24,000<sup>2</sup> of them in New York, were impacted by decisions made in this quasi-judicial system, that operates within a government agency but has an impact more significant than even independent criminal courts do at times. Because all immigrants, including green card holders, are vulnerable to deportation the impact of the broken immigration court system can be devastating.

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<sup>1</sup> Transactional Records Access Clearinghouse (TRAC) Immigration Court Backlog Tool, available at [http://trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/) (last accessed May 10, 2018)

<sup>2</sup> EOIR Statistical Year Book for 2016, available at <https://www.justice.gov/eoir/page/file/fysb16/download> (last accessed May 10, 2018)

**If you have a case in immigration court, it is because the US Government is trying to deport you.** The sole purpose of the US Immigration Court system, an administrative court housed within the Department of Justice and operating with none of the independence we usually associate with the judiciary, is to determine whether an individual or a family is deportable from the United States. Persons appearing in front of the country's 334 immigration judges range from just a few months old to elderly, from orphans to childless individuals, from single persons to entire families.

**You are not guaranteed a lawyer** - You are allowed to find one on your own, which means either paying for one or, if you are lucky to live in an area that has any, relying on local non-profits agreeing to take your case. Most organizations in New York are beyond capacity however and have long wait lists. Even minor children or individuals who lack the mental capacity to represent themselves are not entitled to an appointed lawyer.

If you appear in Court for the first time without a lawyer, you will be given time to find one. How long you will have and how many chances you will be given will vary by judge. Ultimately, however, if you cannot find a lawyer to represent you, you will be expected to determine what, if any, relief from deportation you can apply for under immigration laws, prepare the application, find and submit evidence according to the rules of the Immigration Court Practice Manual, give testimony, prepare and present witnesses for their testimony, make objections to evidence the government is seeking to introduce, cross examine any witness the government chooses to put forward, argue how the law applies to your case, and reserve appeal if you are unsatisfied with the decision.

How much of this you may need to do - and how much cross examination you will be subject to - also vary widely depending on the judge and the government attorney. Some will not force you to relive traumatic events while others will expect you to be questioned in minute detail, often doubting the veracity of your claim or the sincerity of your reactions.

Finally, in Immigration Court, the burden of proof is nearly always on the immigrant, meaning that whether you have a lawyer or not, you will still need to prove - through your testimony and additional materials - that you qualify for whatever legal status you are applying for. At times, this might mean proving a negative such as showing that you do not have a criminal history or that you have not done anything that warrants the US Government granting you permission to stay. Because of the REAL ID Act, a judge can also choose to not believe you simply because of the way you hold yourself on the witness stand - a determination that is nearly impossible to overturn on appeal.

All of this information will be presented in a quasi-public setting, with the doors to the courtroom almost always open even for your trial, when you may be presenting sensitive and personal information. Because there are no uniform rules or overarching rules protecting privacy (except

for victims of crime or domestic violence), some judges will allow complete strangers to sit in the courtrooms while they hear your case.

**The government, on the other hand, has a long list of trained lawyers** - many of who go on to become judges later on in their careers. In fact, the DOJ Inspector General found years ago that the Bush administration had engaged in unfair hiring practices, giving immigration judge positions to government lawyers and supporters of the administration but denying the applications of any who had built careers defending immigrants. In practice this means that the government lawyers and judges are often friendly, may have been former colleagues, and are far more comfortable with each other than would be allowed in an independent court.

These government lawyers are also held to much more lenient standards and the rules are much more flexible for them than for immigrants and their attorneys. Unlike an attorney representing an individual, the process to file a complaint against a government attorney is so difficult to the point of discouraging most from pursuing it as a remedy. In addition, because Immigration Courts are administrative courts and immigration law is civil law, Fourth Amendment constitutional protections are weaker. To get evidence against you suppressed, for example, you must show that the Government's behavior not only was an unreasonable search and seizure of your property, but that it was egregiously so. More often than not the judges will give deference to the government's evidence and include it in the record, even if it may have been obtained in ways that would have it thrown out of independent judiciary courts.

Often the government attorneys will appear unprepared. They may not have reviewed the notes of their colleague who appeared on a previous hearing in the same case, or have lost original documents that were given to them. It is not uncommon for a government attorney to appear in Court without the file. At times, some judges will take over questioning when they are unsatisfied with the performance of one or both attorneys, acting as both judge and advocate for one side.

**Ultimately, what judge you get can lead to wildly different results, even when you do have a lawyer<sup>3</sup>.** Statistical reports show that some judges have 95% grant rates, whereas other judges have 95% denial rates. Judges in the same courts may have very different opinions on how the law should be applied, meaning that one case could have very different results depending on the luck of the draw when the case is assigned to a judge.

Beyond judges' own differences, and as noted above, Immigration Judges are not part of the independent judiciary. They are administrative judges and employees of the US Department of Justice. In practice, this makes them, and how the immigration courts are run, far more susceptible to the policy goals of the administration in power at the time.

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<sup>3</sup> See generally: TRAC Immigration Judge Reports - Asylum, available at <http://trac.syr.edu/immigration/reports/judgereports/> (last accessed May 10, 2018)

Even sympathetic judges, however, are limited in many ways by the total lack of discretion they are given to consider the totality of factors that make up any individual's life. For many criminal convictions, for example, judges cannot consider the fact that someone may have completed the criminal sentence, that the arrest may have taken place a long time ago (even when "a long time ago" is 20 or 30 years), that they may have gone through a rehab program or overcome the moment in their life and dedicated the many years since to productive contributions. Similarly, in most instances judges cannot look at the family members, businesses, and communities and the impact of the loss they will suffer when someone is suddenly taken from their midst because they are deported.

**There are not many forms of relief for immigrants facing deportation.** The ability to protect yourself from deportation once you are in immigration court proceedings hinges on your eligibility for relief from removal. However, as with other aspects of immigration law, options for individuals without specific family relationships (usually a US Citizen parent, spouse or child), or high level educational or professional achievements are extremely limited. One of the most common forms of relief is asylum or related protections from harm in the home country to yourself or a close family member. Simply having been in the United States for a number of year, even if paying taxes, or having children or other family members who are US Citizens is not sufficient to protect someone from deportation. What is more, the judges have no discretion to simply close the case for someone who may not qualify for relief but also poses no risk to the United States and is a caretaker for US Citizen family members.

**You can be jailed while awaiting trial.** If the Government believes you are a flight risk, a risk to public safety, or that you have committed any of an enumerated list of crimes, they can detain you while your immigration court case goes forward. Increasingly under the Trump administration, individuals have been taken into custody simply because they either do not have legal status at that time, even if they are in the process of applying for it, or because the government believes them to be deportable even if they have legal status or a green card. Because immigration law is civil, not criminal, you have no right to a speedy trial, an appointed lawyer, or protection from cruel and unusual punishment. Despite this, if you are detained by Immigration and Customs Enforcement (ICE), regardless of any criminal history or lack thereof, you will be held in either a county jail or a privately run prison and you will appear in Court in a jumpsuit and shackled at the wrists and ankles. Only certain jailed immigrants will qualify for bond (immigration's version of bail), which by law must be a minimum of \$1,500 but is rarely below \$5,000 and routinely in the double digits even when the person has no criminal record. Also unlike criminal bail (which can start at \$1 in New York), the full amount must be paid upfront for the individual to be released.

**The consequences of decisions in immigration can often be tragic.** Many people who have been deported, sometimes because the judge simply didn't believe them based on their own biases, are killed when returned to their countries. This fact never comes back to the judges or their leadership, however, and they continue on without change. In 2017, only 189 complaints against immigration judges were closed by the Executive Office for Immigration Review, 60 % of

which were dismissed, corrective action was taken in 22%, and 12% were closed because the judge left, retired, or was dismissed. None ended in formal discipline.<sup>4</sup>

**Immigration Court is a chaotic, undisciplined place** where too many cases in the backlog lead to judges being overwhelmed and frustrated at decision making time, where government attorneys regularly lose original documents or even entire files but are granted any number of chances to come back despite the delays it causes in making decisions, and where an immigrant's chances of success are not only tied to their ability to get a lawyer, but to find a competent one from the start. Even then, rules and procedures in immigration court can vary so much by individual immigration court, and much more compared to independent courts, that experienced attorneys who practice in other jurisdictions or are taking an immigration case pro bono may struggle without proper mentorship by a local, experienced immigration lawyer.

The backlogs also create bureaucratic and administrative headaches. Lines to get into the immigration court building in New York City can often take an hour or more to get through, risking someone missing their hearing and being deported in their absence. The contract security guards who usher people through the metal detectors do not speak most of the languages people coming through the doors understand, further adding to confusion, delays, and the atmosphere of fear. Courtrooms in New York City are small, windowless, and often are so packed that people spill into the hallway. On Master Calendar hearing days (hearings that precede the trial-type "Individual Hearings") it is not uncommon to have 30 or more cases scheduled per hour from 9AM to 12PM. As a result, most people appearing have to wait hours, including those who brought children because they cannot afford childcare. Although New York used to have special dockets in front of specific judges to hear cases of children who are facing deportation, increasingly those children are being included in the regular dockets even when they are very young (under ten years old). Some judges will refuse to waive the appearance even of school-aged children while others will get upset if a child is taken out of school to attend court. The only way to know the preference of the judge, however, is through experience as you will not be notified in advance as to whether a child is expected in Court or not.

These issues have been exacerbated by Attorney General Jeff Sessions' mandate that cases be completed on faster timelines, forcing judges to rush through cases without being able to take the proper time to resolve issues or hear full testimony on important points. This in turn leads to judges being more exasperated, yelling at attorneys and immigrants appearing before them alike, and limiting chances to rectify problems. To make up for time, many parts of immigration hearings, including the reading and pleading to of the charges against an individual as well as smaller issues deemed to be "housekeeping" related, will go forward without an interpreter and with the judge asking attorneys to waive the explanation to the client. This means that significant parts of the case may happen without the immigrant being advised as to what is happening, or having the proceedings translated into a language they understand.

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<sup>4</sup> EOIR Report: "Complaints Against Immigration Judges: Fiscal Year 2017" available at <https://www.justice.gov/eoir/file/1002746/download> (last accessed May 10, 2018).

All of this adds to the feeling of chaos and lawlessness that pervades most courtrooms in New York immigration courts, terrifying immigrants whose lives hang in the balance of this less-than-justice system.

To address the backlogs, the Department of Justice has begun requiring judges in other jurisdictions to appear via video to conduct hearings in New York City. However, the Trump administration's decision to re-assign judges to the Southern Border and other places often mean that these hearings are cancelled with no notice of the cancellation or the new date to either the immigrant or their family, despite regulations requiring the Court to provide notification ahead of time. This is particularly damaging to immigrants who often have to take unpaid days off work and travel several hours to attend their hearings. Some attorneys estimate that up to 75% of their clients' hearings do not go forward on the day they were originally scheduled.

In October, 2017, AG Sessions also announced that job performance evaluations of immigration judges would be based on "numeric performance standards", effectively imposing case completion quotas on judges and tying salary and job retention decisions to these numbers.

Back-end Court functions suffer as well in this undisciplined environment. Motions take a very long time to be adjudicated, and many times won't be ruled on until the hearing date even if the request was to change the date or substitute a new attorney. Because of the crushing number of cases - all of which are held in paper files since the immigration court does not accept electronic filings - the Government often loses files or does not receive them in time.

**Cases can take years to be decided because of this lack of organization and increased enforcement.** As explained above, the civil nature of immigration law means that there is no constitutional right to a speedy trial, even for immigrants who are imprisoned by immigration authorities while awaiting a decision on their case. Since January, 2017, ICE no longer prioritizes who they will target for arrest and deportation, which has led to a significant increase in the backlog each court has already contended with for years. In New York, the average case will take 651 days according to statistical surveys, but providers report that a case with a pending application for relief is much more likely to take 3 to 4 years. The growing number of cases on each judge's dockets means that they do not always have sufficient time to hear and consider each application before them. Often, a decision as to whether someone meets the complex requirements for asylum will be given after a trial of less than two hours, for example.

**The decisions that are made in Immigration Court will follow you forever.** Once a decision is made to deport you, you will always have that deportation order until you depart the United States, even if 20, 30, or even more years have passed. The only way to "undo" an immigration court decision is to file a motion to reopen, which requires complex legal analysis and arguments.

**You can be ordered deported simply for not showing up.** If you fail to appear for a scheduled hearing, you will be ordered deported from the United States simply because of your absence, regardless of how strong your case may be. This is particularly problematic in the Trump years because Court personnel, which over overseen by Attorney General Jeff Sessions, seem to have been instructed to no longer communicate critical information, such as new hearing dates when scheduled ones are cancelled.