

OPINION: The Most Broken Part Of Our Immigration System

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Nearly everyone agrees that the U.S. immigration system is broken, even as they disagree exactly what parts are broken and how they should be fixed. As children and mothers cross our borders seeking safety, the Obama administration puts them in detention and presidential candidates compete to propose the biggest fences. The Obama administration sets records for deportations, and Republicans demand that more immigrants be locked up and removed from the country. The H-1B cap is hit within days of filing, with the government unable to satisfy corporations' demands for foreign worker visas. (See *USCIS Reaches H-1B Visa Cap For Fiscal Year 2016*, Law360, April 7, 2015) And, according to new House Speaker Paul Ryan, R-Wis., comprehensive immigration reform is off the table, at least until after the 2016 presidential election.



Steven H. Schulman

All the while, the most broken part of the immigration system goes largely unnoticed and unfixed: immigration courts cannot come close to handling the burdens placed upon them. This is not simply justice delayed leading to justice denied: it is a crisis of conscience, a matter of humanity, and a moment of threatening consequence. More than 430,000 individual immigrants are awaiting hearings in administrative immigration courts around the country. Many immigrants, some seeking asylum, others fighting deportation for minor criminal offenses, will wait an average of 14 months, but many will wait two, three or four years for their cases to be heard.

Those Central American women and children who entered the U.S. in the summer of 2014 during the so-called "surge" and were promised a quick determination of their claims to asylum? Some have had their trials, but many have their initial immigration court dates scheduled for 2019.

The problem facing the immigration courts is the same one Lucille Ball faced on the candy factory assembly line: the cases are coming faster than they can be completed. During fiscal year 2015 (ended Sept. 30), immigration judges cleared more than 198,000 cases, up 12,500 from FY 2014 (See *Immigration Courts Increase Case Closings by 7.3%*, Law360, Oct. 16, 2015). The rate at which cases piled up was even greater, going from 408,000 to more than 456,000. But over the last 15 years, the number of immigration court judges has declined dramatically, creating a chronic backlog that has resulted in these delays.

The human costs of this backlog are serious. Applicants who can demonstrate a legal right to be in this country after escaping horrific violence languish for years in a purgatory status. Even if they are given

the right to work, they are often separated from their immediate families, who cannot immigrate until the case is decided. Take, for example, the family of a Syrian torture survivor. They remain stranded in war-torn Syria while awaiting resolution of his asylum case. The wife and children of a Christian pastor targeted by Boko Haram are living in hiding in Nigeria while awaiting the pastor's delayed day in court. Family separations often have additional dangerous consequences. Children who have been abandoned by a parent may flee from harm in their home countries, undertaking life-threatening routes to seek safety in the United States.

A disturbing byproduct of this backlog is the obstacle it creates to pro bono involvement by the private bar. Over the past two decades, asylum and other immigration matters have become some of the most pro bono popular cases at large law firms, in part because the process has been both predictable and relatively speedy. Now, individual lawyers are less likely to volunteer to handle matters that will take years to resolve, particularly when the time frame is the result of systemic delay rather than normal case processes. This will have a particular impact on young associates, who are anxious to get in-court and client-handling experience, but are also the most likely to leave the law firm during the many years of immigration court delay. Leaders of law firm pro bono practices have become increasingly wary of allowing our firms to take on new immigration court cases that may require multiple rounds of restaffing before the case comes to trial.

As a result, there exists a very real possibility that the backlogs in immigration court will cause us to lose a new generation of pro bono asylum lawyers. This could set in motion an unfortunate cycle: fewer lawyers with experience in immigration court available to supervise future lawyers interested in representing immigrants, possibly repeating itself for decades, undoing the progress we have made in the pro bono representation of immigrants.

The fix is obvious and should be easy. Adequate funding of the immigration courts is desperately and quickly needed. Building fences and increasing our border patrol are complex and expensive; our immigration system can immediately start working better by hiring more judges, expanding pilot programs designed to enhance representation, growing the legal orientation program that provides much-needed information to newly arrived immigrants, and creating an information desk pilot program for non-detained individuals in immigration court.

First, the Executive Office for Immigration Review (EOIR), an agency within the U.S. Department of Justice, needs the resources to hire as many as 250 additional immigration judges. The backlogs will not go away without more judges to hear cases.

Second, as EOIR hires more judges, it also should invest in programs that bolster pro bono resources. Augmenting the Justice AmeriCorps program, and promoting pro bono involvement throughout the private bar, will improve the level and quality of legal representation for vulnerable populations, including unaccompanied children; protect children from mistreatment, exploitation and trafficking; and make the entire process more just and efficient. Children who are without an attorney are wholly overwhelmed by a system they cannot understand. They are less likely to appear for their court dates, leading to great costs and inefficiencies in the operation of the court system. And the cost to due process, safety, fairness and respect for the law is incalculable. Funding these efforts will, in the end, save a great deal of money and will honor our system of justice.

EOIR can also support the creation of an Information Desk Pilot Program, and expand legal orientation programs for custodians of unaccompanied immigrant children. These will create further efficiencies, save additional money, and impact many more of the lives of those who are entitled, under our laws, to

seek safety and shelter in the United States.

But the problem will not be fixed without more funding of the immigration courts. Until then, as Lucy yelled to Ethel as the candy piled up, “I think we’re fighting a losing game.”

—By Steven H. Schulman, Association of Pro Bono Counsel

Steven Schulman is the pro bono partner at Akin Gump Strauss Hauer & Feld LLP and is the immediate past president, and current board member, of the Association of Pro Bono Counsel. He is also the co-author of a report by Appleseed on the immigration courts, Reimagining the Immigration Court Assembly Line.

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