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THE U.S. IMMIGRATION COURT SYSTEM AND THE ILLUSION OF JUSTICE

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Abstract

The purpose of this study is to examine disparities within the U.S. immigration court system relative to the location of a court, a judge's impact per case, and the court's backlog of cases. The basis of this study is set on hearings observed at the Los Angeles Immigration Court with different judges. The recent rise of xenophobic legislation has had serious consequences on the timeliness and justice each migrant's case will receive. The Los Angeles Immigration Court on Olive Street is one of the largest immigration courthouses in the country and has a diverse judge voting record. By using observational reports from a number of hearings at the court, I hope to draw further support for the major discrepancies in the immigration court system and compare nationwide discrepancies to what is most prevalent in the Los Angeles Immigration Court. Through comparing national immigration discrepancies to what is most prevalent in Los Angeles, I hope to shed light on the severity of the issues and propose possible solutions to speed up a case's timeline and ensure it is treated more fairly. This will allow the public to get a better understanding of the lack of justice within the immigration courts and realize why immigration reform requires much more attention than just the construction of a border wall.

INTRODUCTION

Hundreds of thousands of immigrants are waiting every year for their opportunity to have their case heard by an immigration judge. The United States immigration system has a complex structure and includes several different areas of immigration such as family-based immigration, employment-based immigration and refugees and asylees. The focus of this paper is on the immigration court system, but specifically removal proceedings which have become severely inept at providing timely and fair decisions. Currently there is a backlog of over one million cases in the immigration court system and very little has been done to address this issue. Along with the overflow of cases, immigrants also have to deal with subjective decisions from judges and the possibility that their case may be more likely to be rejected primarily because of the court their case was assigned to.

This work approaches the immigration court system through several different angles. First, it briefly takes a look at the immigration system as a whole then dives into the immigration courts and the removal process, which makes up the majority of cases in immigration courts. Second, an analysis of state immigration laws will be made. Although immigration law is decided strictly on federal law, the laws and programs a state has in place can significantly affect an immigrant's civil rights and chance of being detained and placed in removal proceedings. Lastly, personal observations from visits I made to the Los Angeles and Arlington immigration courts provide further insight on how judges can vary in different locations.

With the Trump administration in office the discussion of immigration has been reduced to the construction of a wall along the country's southern border, but the most important issue lies within the court system that is responsible for keeping thousands anxious, oblivious and detained. The lives of many are at stake, so why is it that more funding is being appropriated for

detention rather than the judicial process? Why are immigrants not provided adequate resources to defend themselves in a foreign court system? Why are two similar cases likely to have completely different results if they are tried in different states? While the Trump administration is not the first administration to have had a large focus on immigration, the issue has become more exacerbated now than ever even with lower unauthorized immigration levels than previous years.¹ The generalizations and misinformation commonly spread about the immigration system is what has prompted this work to shed light on an important and broken structure regulating immigration and will hopefully influence lawmakers and the general public to pay attention to the judicial aspect of the immigration debate.

Breakdown of Immigration Court System

The United States immigration system and its laws are quite complex, but the current system focuses on family reunification, employment based migration, promoting diversity and protecting refugees. “The body of law governing current immigration policy is called The Immigration and Nationality Act (INA)”.² The INA is what has set the numerical limit of 675,000 permanent immigrant visas that are given out each year. That number is divided between the different visa categories, but does not account for family-based migration of U.S. citizens’ spouses, unmarried minor children, and parents which does not have a limit. Aside from this there are also several different forms of temporary relief such as Temporary Protected Status (TPS) and Deferred Action for Childhood Arrivals (DACA). In addition, there is also no numerical limit for the number of immigrants who may be granted asylum each year while refugees are numerically limited by country of origin. In order for someone to qualify for U.S.

¹ Passel, J. S., & Cohn, D. V. S. (2018, November 27). U.S. Unauthorized Immigration Total Lowest in a Decade. Retrieved from <https://www.pewresearch.org/hispanic/2018/11/27/u-s-unauthorized-immigrant-total-dips-to-lowest-level-in-a-decade/>

² How the United States Immigration System Works. (2019, October 10). Retrieved from <https://www.americanimmigrationcouncil.org/research/how-united-states-immigration-system-works>

citizenship they have to have been a legal permanent resident first, which can only be granted through family-based migration or having received a permanent immigrant visa through a different application process.

Immigrants who overstay their visas, enter the country without proper authorization, or are criminally detained and discovered to be undocumented are then taken through the immigration courts for removal proceedings. An immigrant does not necessarily have to be detained by U.S. Immigration and Customs Enforcement (ICE) agents at the border to be taken through removal proceedings. If an immigrant is detained by law enforcement officers during a traffic stop, for example, and is taken back to a police station and discovered to be undocumented then the police station may contact ICE so that they can detain the person in custody. After being detained by ICE and sent to a detention center that person will automatically be taken through immigration courts for their removal proceedings. On the other hand, an undocumented immigrant can receive a Notice to Appear (NTA) by mail as well which notifies them that removal proceedings will be held against them.³ The NTA will also state the allegations and charges against the person it was addressed to, and possibly the court hearing date. However, court dates are not always included because it depends on the availability of the court the person had their case assigned to. With immigration court dockets at an all time high backlog, it can take several months to a year for a separate hearing notice to be sent. Immigrants who are in detention are more likely to have a faster scheduled hearing, but their court assignment also dictates that time frame.⁴ Overall, the length of a court case can take up to

³ What Does My Notice to Appear (NTA) Mean? (2020, May 31). Retrieved from <https://www.nolo.com/legal-encyclopedia/what-does-my-notice-appear-nta-mean.html>

⁴ When You'll Get the Immigration Court Judge's Decision. (2020, May 31). Retrieved from <https://www.nolo.com/legal-encyclopedia/judges-decision-immigration-court-how-long-it-will-take-get.html>

several years because of the current case backlog, and for detained immigrants who cannot pay or were not granted bond they will have to spend that time in a detention center.

Once immigration court proceedings begin they will typically start with a Master Calendar Hearing (MCH). The MCH can be characterized as the formal introductions of the proceedings as the judge will verify personal information, list the charges against the respondent, schedule a subsequent court date, and one can state the form of relief he/she is seeking from deportation.⁵ These are short 10-15 minute hearings, so if some information is not available another MCH may be scheduled at a later date. Other reasons as to why the judge may schedule another MCH are because the respondent, person in removal proceedings, needs more time to find an attorney or an interpreter is needed and one was not already provided by the court, so there are various circumstances that may extend the court process even more months or years.

While removal proceedings are pending against an immigrant they have the opportunity to file for several different forms of relief at the discretion of the immigration judge. The main forms of relief that immigrants can have a chance to prove are cancellation of removal, asylum, or adjustment of status. If an immigrant does not believe they have a solid case to stay in the United States then they can seek voluntary departure which would require the immigrant to leave and admit to the charges held against them, but they would avoid a formal order of deportation on their record and would not be automatically barred from reentering the country in the future. For immigrants to qualify for a cancellation of removal they would have to meet certain criteria that includes having lived in the United States for at least 10 years, been a person of good moral character during that time period, not been convicted of a crime that would make the respondent removable, and demonstrated that removal would lead to severe hardship of their immediate

⁵ Myslinska, D. R. (2020, May 31). What Will Happen at Your Master Calendar Hearing? Retrieved from <https://www.nolo.com/legal-encyclopedia/what-will-happen-at-your-master-calendar-hearing.html>

family members who are either U.S. citizens or legal permanent residents.⁶ To be eligible for asylum, an immigrant must demonstrate they cannot be removed because of previous or future persecution in their home country “based upon their race, religion, nationality, membership in a particular social group, or political opinion.”⁷ An adjustment of status to prevent removal is only available for people who can be sponsored by either an employer, family member, or spouse. All forms of removal are subject to the immigration judge’s discretion after all evidence has been presented by the respondent and Department of Homeland Security (DHS) attorney arguing for removal.

Because immigration courts are civil courts immigrants are not provided an attorney for free and will not have access to one unless they can afford it. There are nonprofit organizations that provide pro bono representation to immigrants facing deportation proceedings, but there are not enough attorneys to assist all immigrants so they will typically be assigned by a lottery system or first come first serve basis through the nonprofit organization. However, there are also not many nonprofits that provide pro bono representation throughout the country either so most immigrants typically handle their case alone. “In 2016, the American Immigration Council found that only 37 percent of immigrants secured legal representation in their deportation proceedings.”⁸ This lack of representation often compromises an immigrant’s case because they are most likely not aware of how the immigration court system works, fluent in English, or able to properly develop a defense. For people who are detained and are undergoing their removal proceedings they will either be called into the court for their hearings via video teleconference (VTC) from the detention center or brought into the court from the detention center.

⁶ Teika, M. (2020, May 14). Cancellation of Removal. Retrieved from <https://immigration.findlaw.com/deportation-removal/cancellation-of-removal.html>

⁷ Teika, M. (2020, May 13). Avoiding Removal. Retrieved from <https://immigration.findlaw.com/deportation-removal/forms-of-relief-from-removal.html>

⁸ Cerza, S. (2018, August 7). Fact Sheet: Immigration Courts. Retrieved from <https://immigrationforum.org/article/fact-sheet-immigration-courts/>

After the general information has been verified through the MCH(s), immigrants will undergo their individual hearings, which are much longer and the judge will usually decide the outcome of the case at the end. Individual hearings can last several hours. Here the judge reviews all evidence from the respondent and DHS attorney and listens to any witnesses that have been called for the case. If the judge does not decide the case in favor of the respondent then they have the opportunity to appeal the decision. The respondent can file for a motion to reopen or reconsider a case with the immigration court if they feel that they have new important evidence to add to their case or believe the judge did not interpret the law correctly. They can also choose to appeal directly to the Board of Immigration Appeals (BIA), and can continue to appeal through the federal appellate courts and U.S. Supreme Court.⁹

The entire process can last up to several years in the immigration courts, however, there are obvious reasons for this that can be addressed but have not been changed by the current administration. There are a total of 460 immigration judges in 67 immigration courts throughout the country and they face a staggering backlogged caseload that has reached over 1 million cases.¹⁰ When compared with U.S. District Courts who have a considerably smaller caseload at over 375,000 combined filings for civil and criminal cases there are over 650 judges, which means there are over 150 more judges for a caseload that is just over a third of what the immigration court's backlog is.¹¹ Since President Trump took office in 2016 the number of pending cases in the U.S. immigration courts have more than doubled while the funds appropriated for the Executive Office for Immigration Review (EOIR), which manages the immigration courts, has hardly changed. In 2018, the funds Congress appropriated for ICE and

⁹ Bray, I. (2020, May 31). How Many Times You Can Appeal an Asylum Denial. Retrieved from <https://www.nolo.com/legal-encyclopedia/how-many-times-you-can-appeal-asylum-denial.html>

¹⁰ Office of the Chief Immigration Judge. (2020, May 29). Retrieved from <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios>

¹¹ Authorized Judgeships - From 1789 to Present. (2019). Retrieved from <https://www.uscourts.gov/sites/default/files/allauth.pdf>

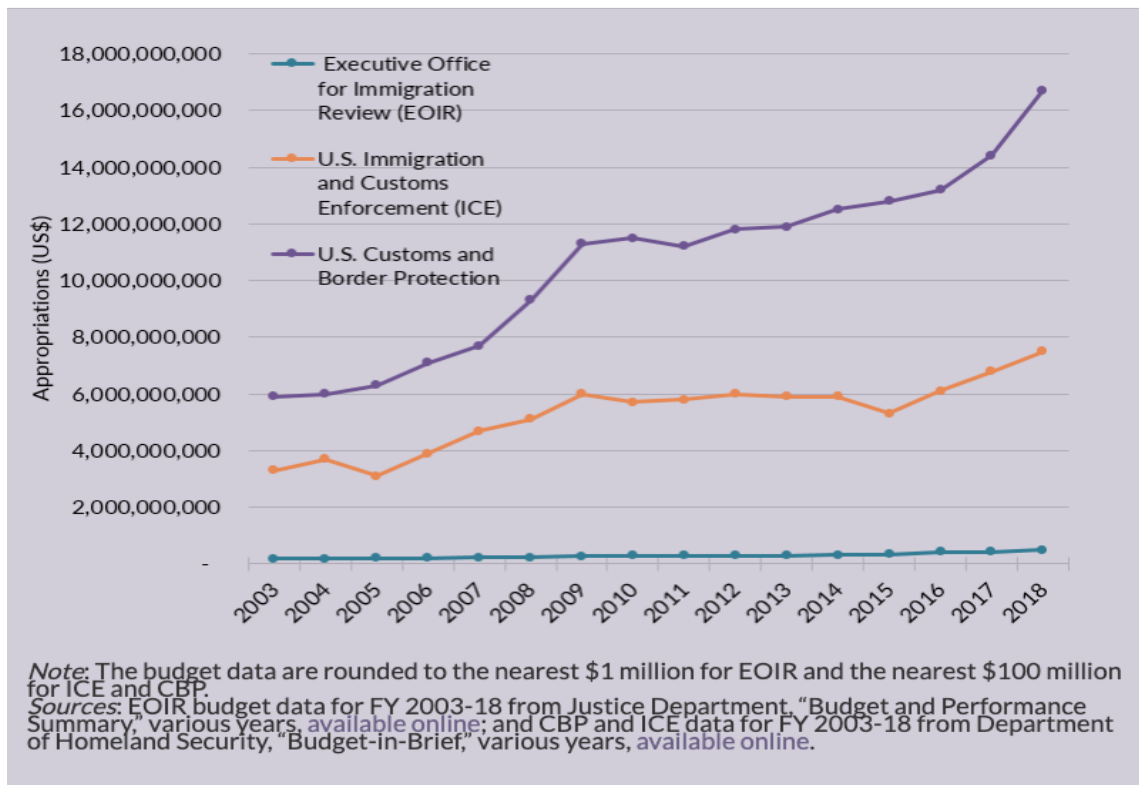
U.S. Customs and Border Protection have risen to \$16.7 billion and \$7.5 billion dollars respectively (see Figure 1). The immigration courts were only given \$437 million dollars.¹² This lack of resources with an increase in caseload has had visible consequences within courtrooms across the country. According to the Associated Press, it is quite common to see “young children are everywhere and sit on the floor or stand or cry in cramped courtrooms.”¹³ There are also discrepancies across different immigration courts with respondents in some courts not having access to any nearby attorneys and those who are lucky enough to get representation have their attorneys drive hours to reach a courthouse in a rural county that is very secluded from city centers. This also makes contact with family members difficult as these detention centers are most likely not well equipped with working phones or internet and may also lack sufficient resources for immigrants to prepare for their case. Immigration courts are at their breaking point, and yet there are still more issues that can severely impact whether an immigrant will be able to survive the immigration court system.

Figure 1

Budget for ICE, U.S. Customs and Border Protection, and EOIR from 2003-2018

¹² Esthimer, M. (2019, October 3). Crisis in the Courts: Is the Backlogged U.S. Immigration Court System at Its Breaking Point? Retrieved from <https://www.migrationpolicy.org/article/backlogged-us-immigration-courts-breaking-point>

¹³ Brumbach, K., Hajela, D., & Taxin, A. (2020, January 18). AP visits immigration courts across US, finds nonstop chaos. Retrieved from <https://apnews.com/7851364613cf0a1bf67cf7930949f7d3>



Note: information regarding these three immigration enforcement agencies is provided by the Migration Policy Institute. There has hardly been any change in funding for the EOIR in over a decade, while the funding for ICE and U.S. Customs and Border Protection have more than doubled in the same time frame.

Federal Immigration Laws vs. State Immigration Laws

States across the country vary significantly in terms of how much resources there are for immigrants before and during their immigration court proceedings. Different states also have laws in place to either increase an immigrant’s likelihood of detention or help them live more comfortably. However, although states do have immigration laws in place there is a difference between federal and state immigration laws. In U.S. immigration courts the law immigration judges use to make final decisions are strictly federal.

Federal immigration law has not undergone any significant changes in several decades that would have led to comprehensive reform. The INA, mentioned previously above, governs

immigration policy and sets the annual numerical limit for permanent immigration visas, but the Immigration Reform and Control Act (IRCA) passed in 1986 controls and discourages unauthorized immigration to the country. It is the most recent form of comprehensive immigration reform and it also led to further militarization of the U.S. Customs and Border Protection agency. Along with increasing the stigma for undocumented immigrants in the country, it also provided criminal sanctions for employers who knowingly hired undocumented immigrants.¹⁴ The Immigration Marriage Fraud Amendments to the INA sought to limit the number of immigrants gaining permanent residency status through marriage. More guidelines were included for spouses before applying and it increased criminal penalties for marriage fraud.¹⁵ A third piece of federal immigration law, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), added more criminal penalties for immigrants who have committed a crime or are in the country without proper authorization.¹⁶ All of these federal laws have led to more immigrants being criminalized and detained, which has also contributed to the backlog of immigrants being processed through the immigration courts. IRCA did provide the opportunity for immigrants who had been living continuously in the United States since 1982 to apply for permanent residency, but no other immigration act has provided a pathway for immigrants to obtain permanent residency status since then.

Although state immigration law cannot provide any path to permanent residency, the benefits an immigrant can obtain in certain states provide a significant difference for how they will be treated in the country. State immigration law can serve to protect an immigrant's civil rights, provide access to public resources such as state healthcare or monetary benefits, and

¹⁴ Immigration. (2020, May 31). Retrieved from <https://www.law.cornell.edu/wex/immigration>

¹⁵ McCollum, B. (1986, November 10). H.R. 3737 - 99th Congress (1985-1986): Immigration Marriage Fraud Amendments of 1986. Retrieved from <https://www.congress.gov/bills/99th-congress/house-bill/03737>

¹⁶ Illegal Immigration Reform and Immigrant Responsibility Act. (2020, May 31). Retrieved from https://www.law.cornell.edu/wex/illegal_immigration_reform_and_immigration_responsibility_act

dictate how local law enforcement branches interact with federal immigration authorities. However, these laws vary significantly from state to state and can range from states with progressive laws such as California to very discriminatory states such as Arizona. For this work, I have decided to focus on three states in particular, California, Virginia, and Arizona, for their immigration laws because California and Virginia will be discussed later on in detail since I was able to view an immigration court hearing in person. Arizona will be included because it is one of the states with the strictest immigration laws in the country. These three states provide an excellent example of states who strongly consider their immigrant population both positively and negatively and a state who does not prioritize their immigrant population when writing state legislation.

California has some of the most accommodating immigration state laws in the country. Aside from limiting law enforcement cooperation with federal immigration authorities, it has also made pursuing higher education more accessible for immigrants and protects their labor rights. In 2017 California put into effect the Transparent Review of Unjust Transfers and Holds (TRUTH) Act which provides individuals in “custody with basic due process and information about their rights should federal immigration authorities seek to make contact with them.”¹⁷ The law requires that local law enforcement will provide the immigrant with a consent form in their native language, receive a copy of the action ICE officials may try to take against them, be notified of any notification given to ICE as to when they will be released from custody, and all records of the law enforcement agency in contact with ICE will be made public. California also does not have housing laws in place which restrict the renting of property to undocumented immigrants. California also allows undocumented immigrants to obtain driver licenses, which is

¹⁷ California Laws Protecting Immigrants' Civil Rights. (2020, May 31). Retrieved from <https://oag.ca.gov/immigrant/ca-law>

not the case in many other states since there is usually a proof of citizenship or permanent residency requirement. Unlike other states, immigrants also comprise a large and important part of the state's economy and total population. According to the American Immigration Council, "more than a quarter of California residents are immigrants" and within that immigrant population over 2 million are undocumented immigrants.¹⁸ They also are involved in a variety of different jobs in different industries and contribute billions of dollars in taxes every year. The benefits immigrants provide to the state have been well-documented and the state legislature has made sure to protect their immigrant population. State policies such as the ones enacted in California are able to prevent many immigrants from becoming entangled in the immigration court system and provide them with the benefits they need to live more safely and comfortably.

Virginia does cooperate with federal immigration authorities through the ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS) program. Through this several local law enforcement agencies in the state share information with ICE to enforce federal immigration laws.¹⁹ Local law enforcement also has the ability to stop and question the immigration status of any individual without needing to arrest them. The state does not provide driver licenses for undocumented immigrants either or any aid to immigrants seeking university tuition assistance. In one Virginia county, undocumented immigrants are completely denied access to any community services. When compared to California, Virginia does not have as large of an immigrant population and has an even smaller number of undocumented immigrants. Virginia only has 310,000 undocumented immigrants and a total of one million immigrants overall compared to California having over 10 million total immigrants. Although one million is a fairly large population, the state has decided to not provide many benefits to the

¹⁸ Immigrants in California. (2017, October 4). Retrieved from <https://www.americanimmigrationcouncil.org/research/immigrants-in-california>

¹⁹ Virginia State Immigration Laws. (2016, June 20). Retrieved from <https://immigration.findlaw.com/immigration-laws-and-resources/virginia-state-immigration-laws.html>

immigrant population. Some measures have been attempted to be passed in the state legislature such as allowing undocumented immigrants to obtain driver licenses but are yet to be enacted into law.²⁰

Arizona is one of the leading states in anti-immigrant laws. In 2010, the state passed Arizona Senate Bill (SB) 1070 which was one of toughest and most far-reaching state immigration laws at the time. The law was initially supposed to require law enforcement officers to check the immigration status of a person they pulled over and had a reasonable doubt that this person may be in the country without proper documentation. It was also going to charge immigrants with a misdemeanor for not carrying proof of their legal status, but this provision and several others of the original law were struck down in a Supreme Court ruling.²¹ For the Supreme Court ruling, opposition parties cited the Supremacy Clause of the Constitution which makes this bill a great example as to the limitations of a state's authority in immigration laws. Nevertheless, since then the Arizona state legislature has continued to pass several more anti-immigration laws. Arizona prohibits undocumented immigrants from receiving state aid for university tuition fees. Local law enforcement agencies are still required to run checks on people whenever "reasonable suspicion exists". All employers are also required to use E-Verify in order to make sure that prospective employees are authorized to work in the country.²² Arizona has nearly the same number of immigrants in the state as Virginia, but U.S. citizens are more likely to have at least one immigrant parent. Immigrants in Arizona have also provided more money in taxes than immigrants in Virginia. With the southern border issues having so much importance in state politics due to the state's close proximity, it has become common for immigration debate to

²⁰ Mena, K. (2020, February 12). Virginia Senate advances bill allowing driver's licenses for undocumented immigrants. Retrieved from <https://www.cnn.com/2020/02/12/politics/virginia-drivers-license-for-immigrants/index.html>

²¹ Arizona Immigration Law (S.B. 1070). (2018, January 19). Retrieved from <https://immigration.findlaw.com/immigration-laws-and-resources/arizona-immigration-law-s-b-1070.html>

²² Arizona State Immigration Laws. (2018, January 18). Retrieved from <https://immigration.findlaw.com/immigration-laws-and-resources/arizona-state-immigration-laws.html>

spark mass controversy. Immigration laws such as the ones in place in Arizona have come to endanger many more immigrants subject to being detained by federal immigration authorities.

Impact of Judge and Court Assignment

State immigration laws can significantly affect an immigrant's life in the United States and potentially affect their chances in becoming detained by federal immigration authorities. Yet the most important aspects significantly affecting an immigrant's chances of staying in the country are the individual biases of an immigration judge and the court they are assigned to. The immigration court and judge an immigrant is assigned to can make nearly all the difference when determining the outcome of their case. Despite federal immigration laws being applied equally across the country, a judge's discretion at interpreting the facts of an immigrant's case varies significantly. Once an immigrant is in the United States and is placed in removal proceedings the court they will get assigned to is typically based on their current address and the nearest court available. Detainees are typically assigned to an immigration court at random depending on which detention facility they were sent to, and for people who face life or death consequences if they are returned back to their home country this game of chance implicates much more than a judge's decision.

The asylum process within the immigration courts will be the primary example analyzed when discussing grant rates based on a court's location or individual judge because more research has been completed on this form of deportation relief than any other. To enter the asylum process immigrants have the option to file affirmatively or defensively. Filing an affirmative asylum process is for immigrants who have not been placed in removal proceedings. They are then taken through an initial screening with a United States Citizenship and Immigration Services (USCIS) officer who will decide if they are eligible for asylum or not. If

they are denied then they can continue the process by pursuing their case through the immigration courts as if it were a defensive asylum process because if the immigrant does not have a visa or any authorization legalizing their stay in the country after being denied asylum they would have to be removed. The defensive asylum process allows individuals in removal proceedings to seek asylum as a form of relief from removal proceedings. Rather than a USCIS officer deciding whether or not the person applying for asylum is eligible, the immigration judge will make the final decision. An immigrant is eligible for asylum if they meet the definition of a refugee, which is “ a person with well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group, who has been forced to flee his or her country because of persecution, war or violence”²³. The difference between a refugee and asylee is that refugees apply for protection outside the U.S. while asylees seek protection while already in the country or at a port of entry.

When an immigrant has been placed in removal proceedings and is seeking asylum it is at the judge’s discretion whether or not they find the person to have a well-founded fear. Judge decisions vary significantly across the country and within immigration courts as well. There is typically an implicit bias within an immigration judge’s decision which leads to a high number of incorrect decisions and this is due to multiple factors including lack of independence, limited opportunity to engage in deliberate thinking, low motivation, legally complex cases, and low risk of review. Judges are typically seen as impartial arbiters when deciding complex legal matters, but because immigration judges are assigned by the Department of Justice their independence becomes questionable since “they belong to the same agency that represents the government in removal cases before the federal courts of appeal”²⁴. Prior to their judicial appointments, most

²³ Fact Sheet: U.S. Asylum Process. (2019, January 10). Retrieved from <https://immigrationforum.org/article/fact-sheet-u-s-asylum-process/>

²⁴ Marouf, F. (2011). Implicit Bias and Immigration Courts. Retrieved from <https://scholars.law.unlv.edu/facpub/787/>

immigration judges worked as trial attorneys for DHS specifically trying to remove immigrants from the country. Immigration judges who had previously been a DHS trial attorney are more likely to have lower asylum grant rates and immigration judges who previously held this position for over 10 years had even lower grant rates. Respondents in immigration courts are also not entitled to any protections in bias that are seen in criminal trials. The absence of structural norms for immigration judges to impede implicit bias and encourage independence makes it easier for their decisions to be skewed by their implicit bias. The extremely high caseload required for immigration judges also gives them a limited opportunity to critically think about each individual case. In 2018 the Justice Department set a quota of 700 cases per year that must be completed by each immigration judge, but on average judges are currently not even able to complete 500.²⁵ When working under massive pressure to meet their impossible deadlines some judges may not rely on all the evidence and information presented for a person's case and may use their implicit bias to speed up the process.

The stressful caseload and demanding requirements for immigration judges also leads to low levels of motivation. The work of an immigration judge is also emotionally draining because of the level of importance these decisions have on respondents and their families, and judges are not always able to provide their best input because of the stress involved. When judges are exhausted and burned out from the high volume of cases this will lead to a higher likelihood of implicit bias. Immigration law itself is also very complex and always changing, so when judges have been overwhelmed by their caseload they may refer to heuristics to speed up a court case, but these can also lead to several errors. Fears an immigration judge may expect in court are fraud, which may impact whether or not a judge will believe the credibility of a respondent's

²⁵ Lu, D., & Watkins, D. (2019, January 24). Court Backlog May Prove Bigger Barrier for Migrants Than Any Wall. Retrieved from <https://www.nytimes.com/interactive/2019/01/24/us/migrants-border-immigration-court.html>

claims. Determining the credibility of an immigrant's case is very difficult and in an asylum proceeding this is crucial to whether asylum or deportation will be granted. Judges may overestimate a respondent's claims as fraud if during their career, for example, they have noticed fraud appear in greater numbers from a particular ethnic group, so they are more likely to assume it in the future and utilize their implicit bias. Lastly, immigration judges are at risk of using their implicit bias because they are limited in terms of how much judicial review they will be tried for. "In 2010, only 8% of respondents appealed decisions by immigration judges to the BIA, 146 and about 25% of BIA decisions were appealed to the federal court, 147 which means that the chance of an IJ's decision being reviewed by a federal judge was just 2%"²⁶. When the level of judicial review is this low the probability of a judge using their implicit bias in cases to complete their caseload requirements is greater. The BIA is also susceptible to implicit bias as they have an even higher caseload and a small number of staff to decide appeals. BIA members do not need to elaborate on their final decision when deciding appeals either creating a streamlined procedure of deliberation for responses.

Along with the lottery of getting a more favorable judge, there is also the asylum grant rate disparity between different immigration courts. The disparity is so wide that in some circumstances immigration attorneys encourage their clients to move to locations where their probability is more favorable. However, for asylees seeking refuge at a port of entry and are detained by federal immigration authorities, they do not have this option and have a court chosen at random. The immigration courts in Houston, Charlotte, Atlanta, Dallas and Vegas have been widely referred to as "asylum free zones" because of their extremely low asylum grant rates (see Figure 2). According to a study by Reuters analyzing EOIR data, there are gross disparities

²⁶ Marouf, F. (2011). Implicit Bias and Immigration Courts. Retrieved from <https://scholars.law.unlv.edu/facpub/787/>

between immigration courts where some can have judges with an asylum denial rate over 90 percent while other courts have judges with approval rates over 90 percent.²⁷ Although federal appellate court decisions can influence the approval rates of immigration courts in its jurisdiction, Reuters also confirmed that the judge and court an immigrant is assigned are the best indicators for determining how a case will be decided. There are also several other factors that can have an impact on an immigrant's asylum case such as country of origin because some countries have more favorable results than compared to most migration from Latin America. Many immigrants from the Northern Triangle (El Salvador, Honduras, Guatemala) face constant gang persecution, but their case is less favorable than an immigrant coming from China that has been affected by the country's one-child policy.

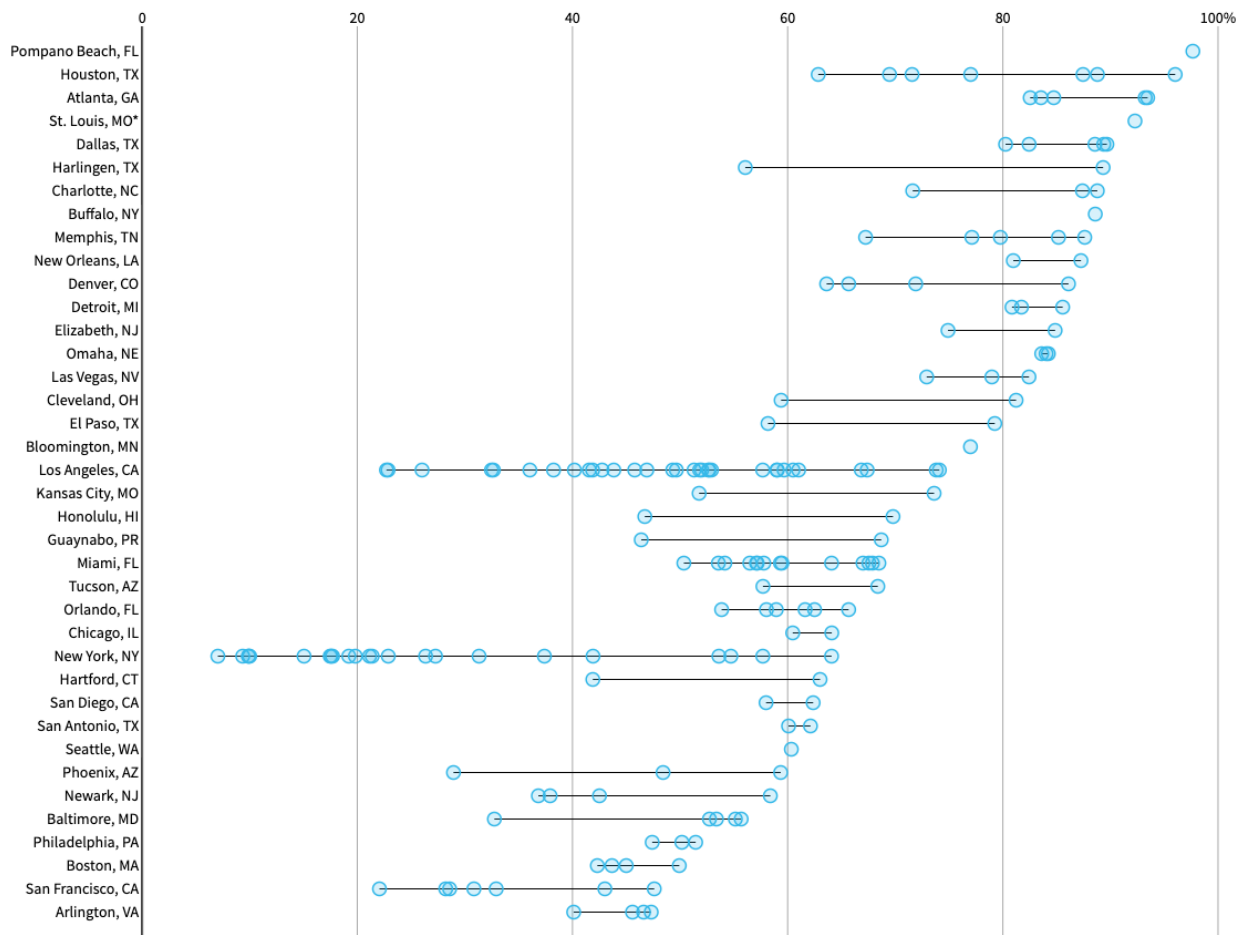
Figure 2

Spectrum of Deportation Order Rates by Judge in Immigration Courts Across the Country

²⁷ Rosenberg, M., Levinson, R., & McNeill, R. (2017, October 17). For U.S. asylum seekers, some judges are a better bet than others. Retrieved from <https://www.reuters.com/investigates/special-report/usa-immigration-asylum/>

The U.S. Immigration Court System

DEPORTATION ORDER RATES, BY JUDGE



Note: information regarding these rates is provided by Reuters. This figure shows the spectrum of rates at different courts across the country, with some courts having judges with deportation order rates less than 10% and other courts with judges higher than 90%.

When taking a closer look at the disparities between judges in the same court, the situation becomes even more frightening. Syracuse University's Transactional Records Access Clearinghouse (TRAC) research organization has provided data that shows the percentage point range of most immigration courts in the country for asylum denial rates. In the Newark and San Francisco courts the variation in denial rates between judges can differ as much as 90%. When the different denial rates are compared across the country, the probability of having asylum granted can be as high as 90 percent or as low as 3 percent depending on the immigration judge

and court one was assigned.²⁸ Interestingly, out of the 67 immigration courts across the country only five account for half of the country’s asylum court cases: New York, Los Angeles, San Francisco, Houston and Miami. Out of the five immigration courts, three of them have an asylum denial rate over 70 percent and well over a quarter of all immigration judges sit in one of these courts.²⁹ This highlights an unequal distribution of asylum cases across the country, and despite the denial rates being quite high for three of the top five courts, twelve immigration courts had denial rates above 90% (see Figure 3).

Figure 3

Five Largest Immigration Courts in the Country With The Most Asylum Cases

Table 1. Immigration Courts With The Most Asylum Cases

Immigration Court	Completed Cases	Denial Rate	Number of Judges
New York	39,140	26.10%	46
Los Angeles	12,343	71.30%	44
San Francisco	12,110	29.50%	36
Houston	11,243	91.90%	15
Miami	11,001	86.10%	25
	85,837 (total)	49.4% (average)	166 (total)

Note: information regarding this figure is provided by TRAC, Syracuse University. Just five immigration courts in the country control a majority of the country’s asylum cases and house a large portion of the country’s judges too.

These disparities unfortunately prove to have tremendous consequences for thousands of immigrants trying to navigate the immigration court system. Two Honduran women who had nearly identical asylum claims received completely different results in immigration court because they were tried by different courts and judges. Both women were elected to their local school board in an effort to combat the gang violence targeting the campus, but they were both

²⁸ Asylum Outcome Continues to Depend on the Judge Assigned. (2017, November 20). Retrieved from <https://trac.syr.edu/immigration/reports/490/>

²⁹ Asylum Decisions Vary Widely Across Judges and Courts - Latest Results. (2020, January 13). Retrieved from <https://trac.syr.edu/immigration/reports/590/>

eventually targeted by gang members and threatened with death of their family members and themselves. One of these women had their case tried in the San Francisco, California immigration court while the other one was assigned court in Charlotte, North Carolina. The woman who had her case assigned in San Francisco was granted asylum while the woman assigned in Charlotte was denied asylum, and when the immigration judge cited his reasoning he stated that he was not convinced she had a well-founded fear of persecution because of her political position. But how can an immigration judge or USCIS officer expect someone fleeing their home country for their life to possibly recount every single detail of an incident after surviving such a traumatic experience? The last thing trauma survivors want to do is remember in detail the event that altered the course of their life.

Another asylum seeker was also required to recount explicit details from torture he suffered at the hands of government officials back in his home country. Despite his testimony, the judge he was assigned completely failed to provide him with a fair trial. The immigration judge improperly excluded evidence and witness testimony while also appointing a translator that provided incorrect translations of the respondent's statements. If the respondent in this case did not have the necessary resources to appeal his case all the way to a federal appellate court he would certainly have been ordered removed from the United States.³⁰ Unfortunately, these two examples are not outliers or rare circumstances but happen very often and the immigration judges in question are rarely held accountable.

Immigration Court Observations

When I visited the Arlington immigration court I was shocked to witness the immigration court system faults in effect. There is a certain image most people have of U.S. courtrooms that

³⁰ Benedetto, M. (2008). Crisis on the immigration bench: An ethical perspective. *Journal of the National Association of Administrative Law Judiciary*, 28(2), 471-532.

are associated with ideas of grandeur, formality, and professionalism. However, immigration courts do not live up to this standard. Most immigration courts are housed in corporate buildings and are completely disguised from the outside to the point where a person driving by would not even be able to recognize it as an immigration court, let alone as any courthouse. Upon entering the Arlington immigration court, the main lobby was also unmarked of anything that would identify the building as a courthouse and it is not until you take the elevator to the designated floor that you are greeted with a metal detector and a couple of immigration officers. When comparing an immigration court to a U.S. District Court in terms of superficial qualities, the environment feels more discreet rather than professional. Visiting an immigration court to view a hearing is allowed according to the EOIR's official website, but without having any connections with immigration attorneys who are aware of the court's schedule it can be difficult to obtain this information beforehand.³¹ Immigration courtrooms are also quite small and unless you arrive early the benches will fill up and you will be forced to wait outside until space opens up. I was able to have the opportunity to sit in on Judge Roxanne C. Hladylowycz for a series of MCHs. Between 2014 and 2019 Judge Hladylowycz had an asylum grant rate of 70%.³² For the MCHs I sat in, the majority of respondents were facing bond proceedings while others were just follow up hearings, and some were called in via VTC while others were present in the courtroom. About a dozen MCHs were reviewed that day. Judge Hladylowycz had a stern demeanor during the hearings and a strict tone when addressing the respondents. For detained immigrants who were still in a detention center and had their MCH scheduled, they would be called in via VTC from the detention center.

³¹ Observing Immigration Court Hearings. (2017, February 24). Retrieved from <https://www.justice.gov/eoir/observing-immigration-court-hearings>

³² Judge Roxanne C. Hladylowycz. (2019). Retrieved from <https://trac.syr.edu/immigration/reports/judgereports/00073WAS/index.html>

The most striking hearing I witnessed that day was where a detained immigrant was called in via VTC and the distress and frustration in his tone was clearly evident. He stated that his attorney had withdrawn from the case and that he was not able to find anyone else at the moment to represent him. Judge Hladylowycz continued with the case since representation is not required for immigration court hearings and denied the man bond citing his personal record of having been charged with two DUIs and not paying taxes. After having denied his bond, the man said that he was tired of having been in detention for so long and felt helpless, so he asked to be deported immediately rather than wait to see how his case will play out or try to find another attorney and continue to be in detention. Judge Hladylowycz granted his request and ordered him to be deported. Several other people had their bonds denied that day and the lowest bond granted was set at \$5000 dollars.

When I tried to attend a hearing at the Los Angeles immigration court later that year it was difficult to obtain any information after calling the court to see when would be the most appropriate time for me to view a hearing. The court employees would not provide any information over the phone and oftentimes when showing up to an immigration court an immigration officer will ask you which judge you are there to see or if you have a scheduled court date. It was not until I was able to come into contact with a local immigration attorney in Los Angeles that they were able to give me information as to finding the court's schedule and when would be the best times to visit the court. I was also only able to be aware of the Arlington immigration court's hearings because I was working with a nonprofit organization that provided representation for detained immigrants. The Los Angeles immigration court is much larger than the Arlington immigration court as it is the second largest court in the country after New York's

in terms of the total number of judges. I sat in on another series of MCHs under Judge Jeannette L. Park.

The biggest differences between the Los Angeles and Arlington immigration courts are the number of judges and cases held and how well organized the court was. The Los Angeles immigration court had their docket very cluttered on the cork board in the main hallway and there were certainly more people in attendance. If the hearings had not started late and the immigration attorney who was assisting me did not save me a seat, I would not have been able to view all the cases because I had to wait outside for a while until the attorney brought me in despite arriving several minutes early. While sitting in on Judge Park I also noticed that she had no clerk to assist her in handling the cases. Judge Hladylowycz did have a clerk to assist her in handling the cases and note taking which made the cases proceed much smoother. Judge Park had to handle the order of the cases herself and was not able to do much notetaking either. There were just over half as many MCHs reviewed by Judge Park when compared to Judge Hladylowycz. Her asylum denial rate was also higher at 80% for the cases she decided between 2014-2019.³³ Judge Park had a more nondiscriminatory demeanor and appeared to be much more neutral when addressing the respondents. However, the majority of hearings she reviewed had no large impact as many were set to be rescheduled for a future MCH. The average follow-up date given for a respondent's next MCH was about 3 months. No webcam calls were made to respondents in detention, and surprisingly nearly every client that day had an attorney representing them. The only person who did not have an attorney was given a follow-up date to provide them with more time to find one.

³³ Judge Jeannette L. Park. (2019). Retrieved from <https://trac.syr.edu/immigration/reports/judgereports/00462LOS/index.html>

The disparities within the immigration courts are real and significant, but more media attention has been provided to issues at the southern border. In order to reform the immigration courts serious measures must be taken. Nonetheless, simply reforming the structure of the immigration courts will not be enough as the entire immigration system needs to be addressed, but implementing structures targeted for the courts will help reduce the disastrous rise in cases in recent years along with the large disparities between judges and courts. The major changes needed in the immigration courts stem from a lack of judicial independence, due process and resources.

The way cases are handled have a lot to do with the administration that is in office. Because the Department of Justice, a federal executive department, is what directly controls the immigration courts, the Attorney General and President have a lot of influence over the direction of the courts. “As one immigration judge lamented, ‘the shifting political priorities of various administrations have turned our courts into dog and pony shows for each administration, focusing the court’s scant resources on the case ‘du jour,’ — e.g., children or recent border crossers — instead of cases that were ripe for adjudication’”³⁴. President Trump has issued several executive orders throughout his time in office that has altered the priorities of the court towards his political agenda. For example, in 2018 the situation for the immigration courts became more complicated after President Trump issued an executive order cancelling his previous executive order because the policies previously advocated led to public backlash due to massive amounts of families being separated at the border. An inherent conflict thus arises when the Department of Justice’s purpose of law enforcement is controlling a judicial body that should be impartial and independent from all other entities. Immigration courts need to be separate from

³⁴ Reforming The Immigration System. (2019, March). Retrieved from https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf

the Department of Justice in order to achieve full neutrality. With presidential administrations changing every 4-8 years and immigration policies switching between individual administrations as well, immigration courts should be moved under the judicial branch for more impartiality.

I also recommend a substantial increase in funding and resources provided to immigration courts because of the extreme underfunding. This includes the hiring of at least 100 more judges and more clerks to help bring down the caseload and decrease the length of a case. It is absurd to see the funding differences for EOIR compared to ICE and U.S. Customs and Border Protection. With ICE and U.S. Customs and Border Protection currently receiving nearly 40 and over 15 times more funding than EOIR it is easy to see why immigration judges are currently unable to handle the caseload. EOIR funding has to increase to at least 5 billion dollars to be close to the U.S. Customs and Border Protection. More and more money has been appropriated that adds to the total caseload, while hardly any funds are being given to the immigration courts. More training should also be given to immigration judges to help further reduce caseload worries as well as improve final decisions. Training for immigration court judges should focus on “(1) making credibility determinations across cultural divides; (2) identifying fraud; (3) changes in U.S. asylum law; and (4) cultural sensitivity”³⁵. An increase in the total number of judge training sessions covering these topics will help judges make more careful decisions and not give in to their implicit biases that may cloud their judgement on a particular person or group. If the addition of more funds, staff, and trainings do not improve the number of cases completed then the current annual quota should be dropped to a more realistic number between 500 and 600 cases.

³⁵ Reforming The Immigration System. (2019, March). Retrieved from https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf

The hiring process for judges needs to be changed as well with more criteria relevant to more culturally sensitive candidates. Judge resumes should also be balanced throughout the country to reduce the significant disparities between immigration courts. To this effect, the hiring process should also include public input from professional organizations and the general public to prevent candidates that are not impartial from being able to hold a judgeship. Judges who are also currently in immigration courts must also face more accountability. More attention should be given to complaints made against immigration judges and stricter repercussions should be made aside from warnings and training sessions where judges face a real threat of losing their job. If more fair judges with better records are brought into immigration courts then this will hopefully eliminate judges with extreme grant rates. Nevertheless, although some judge grant rates may be lopsided, each case is different and they should always have a decision made based on their individual merits. Lastly, universal representation and better translators should be prioritized for all respondents to create better cases that more accurately represent a respondent's claims. Immigrants are more than often left clueless on how to proceed with representing themselves in a foreign court that mostly, if not completely, proceeds in a language that is not understandable to them. Providing them with these resources, whether they qualify for relief or not, at least allows them to have a fairer trial.

CONCLUSION

The time for comprehensive immigration reform is now, and a special emphasis should be placed on reforming the immigration courts. This work provided an overview of the immigration court system and utilized in-person court observations to depict a realistic detail of how they operate. In addition, by analyzing the impact a judge and immigration judge have on an individual case further highlights the disparities in immigration court decisions. Although federal

immigration law desperately needs to be revised, state laws across the country vary and impact immigrants significantly so they cannot be overlooked. Reforms are necessary in several different areas, as explained above, and with current timeframes for cases it is also important that reforms do not just increase the timeliness of cases but provide more unbiased and nondiscriminatory decisions too.

While not much focus has been placed on immigration courts as opposed to the southern border wall or federal immigration authorities and detention centers, they are just as important and in need of reform as other areas in the immigration system. Judges are overworked, courts have an overflow of cases, and immigrants are not receiving the fair due process they should be granted. I wanted to break down the immigration court system and its faults because why should the general public be kept unaware of its inner workings when people who have never been exposed to the U.S. court system whatsoever, not able to understand the legal terminologies, and not fluent in English are forced to navigate it every day. This work provides a brief introduction to the immigration court system and hopes to pave the way for more observations to be made on immigration court hearings to draw attention to their faults most in need of reform.

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