



‘Fatally Flawed’ Immigration Court System Should Be Taken Out of Its Misery

Veterans of the immigration court system describe “a big mess” that can’t be fixed by simply hiring more judges.

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As the immigration court system strains under the weight of its biggest case backlog in history, the Biden administration is racing to fix it before it breaks entirely.

But breaking the system might be the only way to save it.

On the campaign trail, Joe Biden repeatedly vowed to create a “fair and humane immigration system,” replacing a faltering and faceless bureaucracy with swift due process. The Biden administration has since announced measures intended to alleviate the increasing pressure on a strained system once deemed “death penalty cases in a traffic court setting.”

But the sweeping, by government standards, tactics announced by the administration last month—which include adding as many as 100 new immigration court judges to the bench under Biden’s latest budget proposal, allowing asylum officers to evaluate some cases instead of those same overburdened judges, and encouraging Immigration and Customs Enforcement attorneys to clear “low priority” cases—may still not be enough to make a real dent in the backlog of cases that has reached its highest point ever.

“Trial dates that used to be scheduled out two, three, even five years sometimes, now don’t even get a hearing or a judge assigned,” said Michael Wildes, a second-generation immigration attorney who has represented high-profile clients from Pelé to Melania Trump. “My litigation team leader was in court this past Monday in Newark, where a judge there advised that she has cases open from the ’90s!”

One hundred new judges, Wildes said, “will be a drop in the bucket compared to the problem.”

“The current structure of the system is fatally flawed,” said Judge Dana Leigh Marks, the former president of the National Association of Immigration Judges who served for 35 years on the bench. “In the immigration removal system, any violation of law, no matter how minor and no matter how strong counterbalancing equities are, has resulted in placing people in removal proceedings. As long as that situation persists, it would be reasonable to anticipate that the court will be unable to clear its backlog or stay current.”

Marks, who coined the “traffic court” description of the immigration legal system, joined nearly a dozen other leading figures in the immigration law space in telling *The Daily Beast* that the long-term solution to the backlog of cases pending before immigration courts lies not in hiring more judges, but in removing the courts from the Department of Justice’s jurisdiction entirely.

“The cases are growing in complexity, the average judge is less experienced than ever, and every new surge of filings results in a new prioritization system imposed on the courts,” said David Bier, a research fellow with a focus on immigration at the Cato Institute and an expert on the immigration legal system, who said that even doubling the number of judges, as Biden once promised, wouldn’t be sufficient to stop the growth in the backlog.

“Staffing matters,” Bier said, “but the courts need structural reforms to improve their efficiency.”

With a little more than six weeks until the end of Title 42, the much-maligned public health order that has effectively barred asylum admissions at the U.S. southern border since the beginning of the coronavirus pandemic in March 2020, the administration is bracing for a massive uptick of crossings at the U.S. southern border.

That surge—estimated by the Department of Homeland Security to reach as many as 18,000 people apprehended at the U.S.-Mexico border a day—will further heap cases on top of the largest backlog in immigration cases in history, now at 1.7 million cases and counting. That’s more than double the number of pending cases half a decade ago.

The Biden administration has taken steps to reduce the pressure on immigration judges to reduce the backlog at the expense of due process, eliminating a Trump-era requirement that judges clear at least 700 cases per year and requesting that more than 80 percent of a requested budget increase for U.S. Citizenship and Immigration Services go towards caseload and backlog reductions.

But increasing the number of immigration judges by 15 percent, as Biden did in his first year in office, has yet to change the stalled pace of case clearance. The estimated processing time for asylum cases—which make up roughly one in four cases in the backlog—is now at longer than 63 months, according to U.S. Citizenship and Immigration Services.

“It’s basically a big mess,” summed up Jason Dzubow, an immigration attorney in Washington, D.C., “and so far, throwing more immigration judges at the problem has not reduced the backlog.”

The administration has had more than a year to prepare for this moment, as activists angry about the slow pace of Title 42’s repeal have taken pains to point out, and has described efforts to streamline the processing of asylum cases as fundamental changes to the system.

“The Department of Homeland Security [has] put together a preparedness plan to continue addressing irregular migration that involves surging personnel and resources to the border, improving border processing, implementing mitigation measures, and working with other countries in the hemisphere to manage migration,” White House press secretary Jen Psaki told reporters last week. “Those are all steps that they’re working to do in order to implement when we get to that point in time.”

Immigration was one of the animating issues for the previous administration, which enthusiastically embraced the failures of the current system as a political wedge, but for the Biden administration, the issue has been a quagmire.

The president faces lower marks on immigration than nearly every other publicly polled topic, both from liberals frustrated by the collapse of Biden's immigration agenda in Congress and from conservatives who see the years-long wait times for immigration court cases to be cleared as a de facto backdoor into the country. Many of the president's fellow Democrats have publicly broken with him over the impending repeal of Title 42, and Republicans are eager to make the midterm elections a referendum on Biden's immigration record.

According to a Pew Research Center survey conducted last month, nearly 70 percent of Republicans rate immigration as "very important" to them in considering candidates in this November's elections. The same survey found just one in three Democrats feels similarly.

With numbers that dire, there's a lot less to lose in completely reshaping the system, said Marks—specifically by restructuring the immigration court system as an Article 1 court, like tax courts, which operates under the authority of Congress to "constitute tribunals inferior to the Supreme Court," according to Article 1 of the U.S. Constitution.

"This would allow the immigration court system to be insulated from political pressures which have subjected it to constantly changing priorities and impeded its efficiency," Marks said, allowing judges to "control their dockets while assuring due process."

"Until this nonpartisan, good-government reform is implemented, I predict the untenable backlog will never be resolved," Marks said.

A bill that would restructure immigration courts to be Article 1 tribunals, the "Real Courts, Rule of Law Act," was introduced in February by Reps. Zoe Lofgren (D-CA), Jerry Nadler (D-N.Y.) and Hank Johnson (D-GA), and was co-sponsored by more than 40 other Democrats.

"After decades of political whiplash, resulting from the ever-changing policies and priorities of the governing administrations, it is clear that the system is ineffective, inflexible, and far too often, unfair," Lofgren said following the bill's introduction. "This structural overhaul will strengthen due process and restore faith in the system by taking politics out of the immigration courts for good."

But as the U.S. Citizenship Act and the DREAM Act's death-by-Senate has demonstrated, the congressional willpower to change the status quo on immigration may mean that simply increasing the number of immigration judges is the most concrete action available to Biden on immigration.

Even then, however, reform advocates see the president as needing to do more.

"A simple 'hire more judges' approach will not suffice—judges do not function in a vacuum," said Judge Mimi Tsankov, president of the National Association of Immigration Judges. "Each new judge requires file clerks, law clerks, chambers, a courtroom, office space for support staff, and additional resources such as interpreter services to permit judges to function and reduce the backlog."