Immigration Courts Struggling to Keep Up

By Karoun Demirjian, CQ Staff

Two weeks after federal agents conducted the largest-ever raid of illegal immigrants, in the small town of Laurel, Miss., the episode has largely washed out of the news cycle. The raid — which pulled in nearly 600 illegal immigrants working at a plant for Howard Industries, a manufacturer of electric transformers — sent a strong message that the Department of Homeland Security was cracking down on border enforcement.

But in legal terms, the fallout from the Laurel raid is just beginning, and it makes for a much more complicated story. The apprehended workers are on a path toward proceedings in federal immigration courts that will determine whether they can be granted asylum or will be deported to their home countries.

Depending on how cases are handled, immigration courts can tie up deportation rulings for months, and sometimes years. But in recent years, a shortage of judges on the immigration bench has made the backlog worse. The net effect, critics say, is something of a vicious circle: More raids strain court caseloads, making it harder to recruit and retain immigration judges. And as courts are swamped with higher per-judge caseloads, immigration advocates say, harried judges can process mass raids in ways that threaten basic due-process protections.

Since the Department of Homeland Security took over border enforcement, it has spurred Immigration and Customs Enforcement (ICE) to step up mass immigration raids. In fiscal 2007, nearly 335,000 immigrants were brought into the immigration court system; when Homeland took over ICE operations in 2003, that number was just shy of 300,000.

That may not look like a huge leap, but the number of judges serving on the federal immigration bench has not grown apace. Indeed, that number now stands at the same point as it did five years ago: Two hundred seventeen jurists handle claims in 51 jurisdictions.

Enforcement hawks and immigration advocates don’t agree on much, but they all say that unless the judge shortage is remedied soon, the system could reach a crisis point. Backlogs are already straining detention capacities, enforcement hardliners say, and the crush of caseloads from raids could tempt courts to cut judicial corners.

Advocates for immigrants say that is already happening. “Clearly the courts don’t have the resources to cover the number of people that are being picked up,” said Nancy Kelly, an immigration attorney based in Boston who represented several of the nearly 350 immigrants detained in a 2007 raid in New Bedford, Mass. “People don’t get representation, and they get herded through court without much opportunity to present their case.”
A Backward-Moving Fix

The court crisis hasn’t suffered from official neglect. In August 2006, Attorney General Alberto R. Gonzales outlined a 22-point strategy to improve the immigration system under the direction of the Justice Department’s Executive Office of Immigration Review (EOIR). The previous year had seen a record number of intakes — together with reports of slipping performance from the overtaxed bench. Gonzales targeted fiscal 2008 to bring on 20 new field judges and got the positions funded under both the 2006 war supplemental and the fiscal 2007 appropriations process.

But the immigration courts soon got caught up in the scandal over alleged politicized hiring practices in Justice. A 2005 gender-and-national-origin discrimination suit alleged that two political appointees ascended to the immigration bench ahead of a more qualified candidate – and resulted in a system-wide hiring freeze. The immigration bench is now six judges shy of the head count it had in 2006, when Gonzales pronounced it in need of reinforcement.

By the end of last month, 26 judgeships were vacant, with no imminent plans to fill the slots or fund new ones. Justice officials say they have identified some candidates to fill a handful of the vacancies — but the agency appears to have laid aside Gonzales’ plan to expand the system. Without any explanation, a $12 million line for immigration judge positions got struck from the final fiscal 2008 budget, while the White House didn’t include money for the slots in the following year’s budget — on the mistaken calculation, EOIR officials say, that they’d be covered in fiscal 2008. As a result, when the House Appropriations Subcommittee on Commerce, Justice and Science reported on the judge shortage, it took note of “the immigration workload that is initiated by the activities of the Department of Homeland Security,” but went on to conclude that “the need has not been sufficiently quantified.”

So the caseload of the individual immigration judge is set to spiral upward. In fiscal 2003, according to figures compiled by EOIR, the average judge in the system took on 1,379 new cases; in fiscal 2005 — the year before Gonzales outlined his plan to bolster the system — that number rose to 1,737. The figure tapered down to 1,571 last year, but with raids bringing in masses of undocumented workers, the average is likely to nudge back up this year. Judges who have served in the system agree that 1,000 cases a year, on average, is approaching an excessive workload.

What’s more, the average figures don’t tell the whole story, immigration specialists say. A judge in Fishkill, N.Y., for example, would have heard about 400 cases in fiscal 2007. Meanwhile, the Lancaster, Calif., district has 10 times the number of cases on the Fishkill docket.

EOIR administrators say they’re coping with the growing caseload by rotating judges and using teleconferencing to aid hard-pressed jurisdictions. But individual judges are under pressure to streamline cases moving through the overburdened system — especially since Attorney General Michael B. Mukasey has pledged to include case-clearing timelines in judges’ performance evaluations.

“What would happen if you don’t meet your aspirational goals is a little uncertain,” said Dana Marks, a San Francisco immigration judge who stipulated that she was speaking only in her capacity as president of the National Association of Immigration Judges.
Marks also pointed out that as administrative judges, immigration court judges do not receive lifetime appointments like their counterparts in the federal circuit and district courts — making for higher turnover on the immigration bench, especially as caseloads grow. Mukasey’s directive on docket-clearing performance creates “an irreconcilable tension with judicial independence,” in the view of her union, Marks said. “If there’s a problem with a case not being handled quickly enough, there’s an established legal resource that people have: You appeal.”

But ICE officials, citing taxpayer cost concerns and a tight allocation of detention facilities — presently 32,000 beds that are “near or at capacity daily,” according to ICE spokesman Brandon Alvarez-Montgomery — say that the system can’t afford not to streamline its handling of immigration claims. “We don’t want any person to have their judicial process belabored,” Alvarez-Montgomery said. “We are looking at different methods in which to repatriate at a faster rate, to help ensure that we don’t have such a backlog of detainees sitting in detention facilities or in overflow.”

**Life in the Fast Track**

There’s a simple method of speeding up the flow of immigration cases, one that immigration law specialists call “fast-tracking.” This practice permits illegal immigrants to sign a contract agreeing to waive their right to a judicial hearing and comply with an expedited deportation schedule.

According to data collected by the National Immigrant Justice Center, a Chicago-based advocacy group, fast-track orders have skyrocketed; in fiscal 2004, they numbered about 5,500, and three years later topped 31,000.

The new wave of mass ICE raids on workplaces such as Laurel and the May raid of a slaughterhouse in Postville, Iowa, make fast-tracking especially attractive to prosecutors, immigration advocates say. Since detainees in immigration law cases are not guaranteed a right to counsel and are often at a loss to produce vital supporting documentation for asylum claims, these cases can be fearsomely complicated and time-consuming. So prosecutors offer fast-track agreements as easy fixes for apprehended immigrants. Detained immigrants are signing agreements “without understanding that they’ve waiving their rights,” said Mary McCarthy, director of the National Immigrant Justice Center. “When individuals waive their right to ever even see an immigration judge, I would argue that’s a fundamental due-process violation.”

Fast-tracking came under fire in the Postville raid, when immigration advocates accused ICE agents of coercing more than 400 detained immigrant workers into signing deportation orders within seven days of their arrest. Erik Camayd-Freixas, a translator who witnessed the aftermath of the raid, contends that prosecutors brought the detained immigrants before a federal magistrate instead of an immigration court, where they threatened to arraign the detainees on charges of aggravated identity theft, a felony that, in Camayd-Freixas’ view, had dubious relevance to their cases, since the immigrants being charged didn’t know the people holding the Social Security numbers they used.

“It was leverage to get a plea on a lesser charge and aid the fast-tracking process,” he said. “That’s not a legal decision; it’s a policy decision.” He also reports that detainees came before the magistrate in batches of 10 or more. “There was no meaningful presumption of innocence,” he contended, “and individual circumstances of their cases were excluded.”
ICE’s Alvarez-Montgomery denies the charges. They are “absolutely false,” he said. “ICE presents the evidence found during the course of our investigation that supports the criminal charges against the individuals.”

Denise Slavin, the vice president of the immigration judges’ union and a judge in the Krome Processing Center in Miami, says that she makes a point of conducting one-on-one hearings. But she also says that many judges within the system resort to group-session hearings, despite the potential risks of due-process and other abrogations, simply because it would be impossible to process cases otherwise.

“There can be subtle things that you can miss from an individual,” she said of the course of immigration hearings. “There have even been times when I’ve learned that people are citizens. It’s frustrating to see someone give up an application because they don’t want to wait that long in court, but . . . people will more frequently say, ‘I want to be deported’ — sometimes even when they have a valid application to stay.”

‘Life and Death’

Critics on all sides of the immigration question acknowledge the high-risk character of the mass prosecutions. “The implication can be life and death,” said Democratic California Rep. Zoe Lofgren, a former immigration attorney and a vocal critic of ICE’s enforcement tactics. “I question whether you can have meaningful access to counsel with 17 defendants per lawyer. Anybody who has been involved knows you can’t just keep shoving in more cases. They’re spending a fortune holding people in detention for months and months; it would be a lot cheaper just to make sure there are judges to deal with the cases in a timely fashion.”

Lofgren’s congressional counterparts who support more aggressive border enforcement are no less chagrined.

“I am highly concerned that the administration increases funding for the enforcement side of immigration while they continually decrease the budget for immigration courts,” said Sen. Richard C. Shelby, R-Ala., a supporter of enforcement crackdowns and the ranking member of the subcommittee that appropriates funds to the Justice Department. “This disparity in funding increases the pressure on the Justice Department to do more with less . . . and the inevitable result has been numerous enforcement difficulties for law enforcement agencies at every level.”

However, the present pattern of neglect can worsen, legal experts say — unless immigration judges are able to step up efforts to bolster their staffing and resource support and claim greater independence from oft-politicized executive branch budget calls.

“The courts are a more invisible part of the system,” said David Martin, a University of Virginia law professor who served as general counsel of the Immigration and Naturalization Service from 1995 to 1998. “People who go into the immigration court, they’re by definition not voters. It’s just a little bit easier to overlook that part of it.”

But such lapses can be legally disastrous, warns Bruce Einhorn, a former immigration judge in Los Angeles who now teaches at Pepperdine University Law School. “If you want a good court, you
want good judges. And if you can’t retain good judges, the court will be less productive — unless you want to get rid of due process.”


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