Expanding the Toolkit: Giving Immigration Judges Authority to Summarily Dispose of Meritless Cases

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KEY TAKEAWAYS

Immigration law judges should have the ability to dismiss a case for failure to state a claim and the ability to render final adjudications at the pleading stage.

This would provide the immigration judiciary the ability to manage their dockets that their robed brothers and sisters have in other courts.

It would also help eliminate the backlog of cases and prune the docket going forward—a win for those whose cases have genuine merit.

Introduction

America is at a political inflection point with respect to immigration policy in the United States. Then-candidate Donald Trump ran, in part, on securing our Southern border by building a wall, and once elected President, touched off another national debate on immigration. From the travel ban,\(^1\) to family separation policies,\(^2\) to the surge at the border, to the clogged immigration courts, to the Administration’s new merit-based immigration plan,\(^3\) the issue of immigration has been a thorny topic.

This is, to some extent, to be expected, as immigration policy has been, more or less, a challenge for every United States President in the modern era.\(^4\) Congress has legislated on the issue 238 times in the 20th century,\(^5\) passing sweeping reforms to our nation’s immigration laws in 1952, 1965, 1996, and 2012.\(^6\)
In the past two decades, since the Simpson–Mazzoli Act of 1986, major immigration policy issues have included how best to secure the border, whether to grant amnesty for illegal aliens living in the United States, birthright citizenship, whether to keep the visa lottery, what to do about visa overstays, chain migration, the economic impact of lawful and illegal immigration, whether states and businesses have a role in enforcing federal immigration law, the impact of illegal immigration on crime, the degree to which local law enforcement can or should cooperate with federal immigration authorities, the benefits illegal immigrants should be entitled to, and more.

Some states have allowed illegal immigrants to have state driver's licenses. They defend those laws arguing that since illegal immigrants will drive with or without a license, allowing them to have driver's licenses enhances public safety and increases state and federal revenue. Despite a federal law that prohibits state colleges and universities from giving in-state tuition to illegal aliens (unless they offer in-state tuition to everyone), some states have defied federal law and offer in-state tuition to illegal immigrants.

Today, over 170 cities and counties across the United States have passed sanctuary city laws that protect illegal immigrants from Immigration and Customs Enforcement (ICE). California and seven other states are now sanctuary states, meaning that they prohibit local law enforcement from cooperating with ICE. Some cities in those sanctuary states have pushed back, vowing to defy state law and cooperate with federal immigration authorities as they (and their state) had for decades.

Yet, as our national immigration debate rages on, we remain an immigrant-friendly country, giving legal status to more foreigners every year than any other country. The United States offers lawful permanent residency (LPR) to over a million people a year, even as the estimated number of illegal aliens in this country has climbed from 2 million in 1984 to 12 million in 2015. The number of asylum claims has jumped from 48,321 in 2012 to 65,218 in 2018.

Overseeing the adjudication of asylum and other immigration-related cases are federal immigration judges. Appointed by the Attorney General of the United States, immigration judges serve within the executive branch, and, unlike Article III federal judges, do not require Senate confirmation. Like state and federal judges, immigration judges sit in courtrooms, handle cases, rule on motions, and adjudicate the merits of cases. They, too, are required to follow Supreme Court and federal Circuit Court precedent.

But immigration judges lack the tools that all federal and most state judges have—that is, the ability to effectively and efficiently manage their
dockets. Immigration judges cannot dismiss a case for failure to state a claim, nor can they render a judgment on the pleadings, even in patently frivolous cases. As a result, the immigration court caseload has exploded in size, from no cases in 1984 to 260,000 in 2011—to a whopping 876,552 today.\textsuperscript{29} Cases with merit, which deserve the court’s time and attention, are lumped in with meritless cases, creating a chaotic and unmanageable docket. This inures to the benefit of those whose cases lack merit (as their cases drag on for years) and delays justice for those whose cases have merit.

Giving immigration law judges the ability to dismiss a case for failure to state a claim and the ability to render final adjudications at the pleading stage—like their robed brothers and sisters have in other courts—would provide the immigration judiciary with the ability to effectively and efficiently manage their dockets, help eliminate the backlog of cases, and prune the docket going forward.

\section*{Overview of the Immigration Courts}

The immigration courts are part of the Department of Justice’s Executive Office for Immigration Review (EOIR).\textsuperscript{30} As such, they are part of the executive branch and do not fall under Article III of the Constitution. The EOIR oversees the immigration courts through the Office of the Chief Immigration Judge.\textsuperscript{31} The EOIR also oversees the Board of Immigration Appeals (BIA), which hears appeals from the immigration courts.\textsuperscript{32} Appeals of BIA decisions are taken up by the Federal Circuit Courts of Appeals, and appeals of their opinions can be made to the United States Supreme Court.\textsuperscript{33}

The immigration courts have jurisdiction to determine removal and deportation, adjudicate asylum applications, adjust status, review credible fear determinations\textsuperscript{34} made by the Department of Homeland Security, and conduct removal proceedings initiated by the Office of Special Investigation, among other related activities.\textsuperscript{35}

Unlike the federal courts, the immigration courts do not have a flexible set of procedural rules designed to “secure the just, speedy, and inexpensive determination of every action and proceeding.”\textsuperscript{36} The Immigration Court Practice Manual is the closest analog, but it does little more than provide a set of standardized practices for a procedure that is strictly governed by regulations. Unlike the Federal Rules of Civil Procedure, the Practice Manual gives immigration judges almost no authority to independently manage a case.\textsuperscript{37}
Crippled Courts: The Numbers

The immigration courts are inundated with more cases than they can effectively handle. In 1984, they had no case backlog, but by 2011 their backlog exceeded 260,000 cases. Today, they are drowning under 876,552 pending cases. Meanwhile, the average length of time that a migrant spends waiting for a final decision has more than doubled from 324 days in 1998 to 726 days in 2019.

Despite the immigration courts’ limited subject matter, their caseload far surpasses the caseload of all the federal district courts in the country. And yet, the number of federal district judges far surpasses the number of immigration judges. There are only 424 immigration judges managing the 876,552 pending immigration cases. By comparison, 677 federal district judges manage 458,988 cases. Put another way, the average immigration judge has 2,067 pending cases while the average federal district court judge (who also benefits from a staff of several full-time law clerks and the support of magistrate judges) has 678.

The majority of claims or defenses raised by migrants in the 876,552 pending immigration cases are not meritorious. In the second quarter of 2019, 68 percent of removal and deportation cases resulted in removal orders. And, notably, 60 percent of asylum petitions were denied.

Unfortunately, there is little the immigration judges can do to eliminate meritless cases early on in the process. Immigration judges are limited to two rulings for most cases: relief or removal, and these decisions are made only at the end of proceedings. With few exceptions, an immigration judge cannot dispose of a meritless or procedurally defective case.

This allows immigration judges no room to meet special circumstances with the flexibility that federal judges can. Additionally, the Department of Justice (DOJ) has never promulgated a regulation in the Immigration and Nationality Act that would give immigration judges control over a disorderly courtroom. Nor do they have a mechanism to dismiss meritless cases or summarily grant judgment based on stipulated facts or meritless pleadings like other courts. Immigration judges must hear cases from start to finish—regardless of whether or not a case has any legal merit. Predictably, the docket is clogged with meritless cases.

These failures are widespread and harmful to aliens and citizens alike. Aliens are not permitted a speedy trial in any reasonable sense of the word given the exorbitant number of pending cases. Another concern involves the large percentage of aliens who file for relief but support their application with meritless claims. Immigrants who file meritless claims prevent aliens who have legitimate cases from receiving speedy relief.
Attempts to mitigate the backlog of immigration cases include performance guidelines for immigration judges that were set in October 2018 by the EOIR and calling on Congress to hire more judges. These efforts, however, are not proportional to the immensity of the problem. This is not a problem that the DOJ can hire its way out of.

**The Fix: Grant Immigration Courts Two Tools Common to the State and Federal Courts**

It is a bedrock principle of civil litigation in both federal and state courts that a plaintiff must plead a viable legal claim. Not so in immigration court. Whereas all state and federal courts have tools to dispose of meritless cases at the early stages of litigation, the immigration courts, with one minor exception (when an alien admits that he or she is subject to removal), do not.

Federal and state court judges have two tools to dismiss meritless cases soon after they are filed: dismissal for failure to state a claim and judgment on the pleadings. These two tools ensure that legally deficient cases do not waste scarce judicial resources. These tools are not, however, available to immigration judges who must manage thousands of meritless cases from filing to final judgment.

By contrast, federal judges are empowered by Federal Rule of Civil Procedure 12(b)(6) to dismiss claims that are inadequately pleaded or legally baseless. The courts of all 50 states also have this authority. To determine whether a claim is legally baseless, the court assumes that the facts alleged are true. The court then considers whether those facts satisfy the elements of a viable claim. If the facts as pleaded do not give rise to a viable claim, then the court must dismiss the case. Courts need not wait for a motion to dismiss a meritless claim, but in most cases, they must give the party whose claims are dismissed an opportunity to be heard.

The federal and all but three of the states’ courts have another tool to eliminate meritless cases early in the judicial process: judgment on the pleadings. Federal Rule of Civil Procedure 12(c) gives federal district courts the power to grant judgment to a party based solely on the pleadings. Typically, this tool is used when the parties agree on the underlying facts of a case but disagree about their legal effect. Alternatively, as with a dismissal under 12(b)(6), a court may assume that the facts alleged are true and consider whether they give rise to a viable claim. The court then applies the law to those facts to determine if a party is entitled to early judgment. Typically, a party must move for judgment on the pleadings before a
court can enter an early judgment, but one Circuit Court of Appeals permits district courts to grant judgment on the pleadings without a motion if one party is plainly assured of victory as a matter of law.\textsuperscript{59}

Immigration judges lack both of these tools. That means that when a plainly meritless case comes before them, they have no choice but to retain it, manage it, hold hearings in it, and enter the inevitable judgment only after the judicial process is exhausted. The result is judicial gridlock. Meritorious cases stall behind a backlog of baseless ones.

Giving immigration courts these two tools—which are ubiquitous and unexceptional in federal and state courts—would help to alleviate the gridlock. Asylum petitions provide a clear example. The law precisely sets out the elements of a valid claim to asylum.\textsuperscript{60} An applicant for asylum must demonstrate that he is unwilling to return to his home country because of persecution, or fear of persecution, on account of race, religion, nationality, membership in a particular social group, political opinion, or other special circumstances as the President may specify.\textsuperscript{61} Nothing else provides a basis for asylum. Thus, if an applicant appears before an immigration judge and applies for asylum on the grounds that he fears gang violence in his home country, he is ineligible for asylum, unless the fear is based on a protected ground. Nevertheless, the immigration judge cannot deny asylum until the applicant has filled out the appropriate forms and had a hearing. The time and effort the judge must spend on that plainly meritless case is time the judge cannot spend on a potentially meritorious one.

The federal courts have long recognized that “judicial resources better spent on meritorious claims [are] wasted on frivolous ones.”\textsuperscript{62} It is time to give immigration courts the powers employed by the federal and state courts to prioritize meritorious cases and quickly dispose of meritless ones.

**Implementation: Amendments to the Regulations Governing the Immigration Courts**

To effect this change, the regulations should be amended to grant immigration judges the ability to dispose of petitions that do not rise to the pleading standards required by Federal Rules of Civil Procedure 12(b)(6) and 12(c). The proposed changes are set forth below; additions are italicized and removals are stricken through.

First, 8 C.F.R. § 1240.11(c)(1) should be amended as follows:

(1) If the alien expresses fear of persecution or harm on account of a protected statutory basis under section 208 of the Act upon return to any of the
countries to which the alien might be removed pursuant to § 1240.10(f), and the alien has not previously filed an application for asylum or withholding of removal that has been referred to the immigration judge by an asylum officer in accordance with § 1208.14 of this chapter, the immigration judge shall:

(i) Advise the alien that he or she may apply for asylum in the United States or withholding of removal to those countries;

(ii) Make available the appropriate application forms; and

(iii) Advise the alien of the privilege of being represented by counsel at no expense to the government and of the consequences, pursuant to section 208(d)(6) of the Act, of knowingly filing a frivolous application for asylum. The immigration judge shall provide to the alien a list of persons who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis.

Additionally, 8 C.F.R § 1240.11(c)(3) should be amended as follows:

(3) Applications for asylum and withholding of removal so filed will be decided by the immigration judge pursuant to the requirements and standards established in 8 CFR part 1208 of this chapter after an evidentiary hearing to resolve factual issues in dispute unless the factual matter is accepted as true. An evidentiary hearing extending beyond issues related to the basis for a mandatory denial of the application pursuant to § 1208.14 or § 1208.16 of this chapter is not necessary once the immigration judge has determined that such a denial is required.

Furthermore, 8 C.F.R. § 1208.14 should be amended as follows:

(a) By an immigration judge. Unless otherwise prohibited in § 1208.13(c), an immigration judge may grant or deny asylum in the exercise of discretion to an applicant who qualifies as a refugee under section 101(a)(42) of the Act. In no case shall an immigration judge grant asylum without compliance with the requirements of § 1003.47 concerning identity, law enforcement, or security investigations or examinations. An immigration judge may deny any application for relief if it lacks legal basis or sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.

(d) Applicability of § 103.2(b) of this chapter. No application for asylum or withholding of deportation shall be subject to denial pursuant to § 103.2(b) of this chapter.
Lastly, 8 C.F.R. § 1240.12(b) should be amended as follows:

(b) Summary decision. Notwithstanding the provisions of paragraph (a) of this section, in any case where inadmissibility or deportability is determined on the pleadings pursuant to § 1240.10(b) and the respondent does not make an application under § 1240.11, the alien is statutorily, factually, or legally ineligible for relief, or the respondent applies for voluntary departure only and the immigration judge grants the application, the immigration judge may enter a summary decision or, if voluntary departure is granted, a summary decision with an alternate order of removal. An immigration judge may deny any application for relief if it lacks legal basis or sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.

Conclusion

Giving immigration judges these tools is not a partisan or political act, it is a matter of fairness and common sense. If they had these common judicial management tools, immigration judges would be able to focus on cases of merit, dispose of meritless cases, and thus trim their dockets.

These proposals are also not unique; every federal district court judge in the country has these tools, as does nearly every state and local judge across the land.

The issue of how best to solve immigration policy in the United States is complex. Regardless of whether you endorse comprehensive immigration reform or a commonsense step-by-step approach, these tools are needed now. Furthermore, they can be put into place immediately if Congress decides to put aside partisan differences and focus on commonsense apolitical solutions to at least one aspect of immigration reform.

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Endnotes


6. These are just the major federal acts passed since 1900. There have been scores of amendments to each of these laws, notably including the 1990 Immigration Act, the INA Amendments, and the Immigration Reform and Control Act of 1986.


31. Id.

32. Id.


34. A credible fear determination requires the judge to determine whether an asylum applicant has a credible fear of persecution or torture upon returning to his or her home country. See 8 C.F.R. § 208.31.

35. IMMIGRATION COURT PRACTICE MANUAL, supra note 30.

Although the baffling growth in the case backlog can primarily be credited to the ineffective court system, prior to 2017 the Executive Office for Immigration Review (EOIR) unlawfully closed over 500,000 cases, which the Trump Administration added back into the backlog queue. See TrACImmigration Report 536, Immigration Court Backlog Surpasses One Million Cases (Nov. 6, 2018), https://trac.syr.edu/immigration/reports/536/.


AL ST RCP Rule 12; ALASKA R. CIV. P. 12; ARIZ. R. CIV. P. 12; ARK. R. CIV. P. 12; AZ RCP Rule 12; CA CIV PRO § 430.50; CO ST RCP Rule 12; CT ST § 52-91; DE R SUPER CT RCP Rule 12; FL ST RCP RULE 1.10; GA ST § 9-11-12; HI R RCP RULE 12; ID R SUPER CT RCP RULE 12; IL ST CH 735 § 5/2-615; IN ST TRIAL P RULE 12; IA R 1421; KS ST 60-212; KY ST RCP RULE 12.02; LA C.C.P. ART. 927; ME R RCP RULE 12; MD R RCP CR CL RULE 2-322; MA ST RCP RULE 12; MI R RCP MCR 2.166; MN ST RCP RULE 12.02; MS R RCP RULE 12; MO R RCP RULE 55.27; MT R RCP RULE 12; NE R PLDG § 6-1112; NV ST RCP RULE 12; NH R SUPER CT CIV RULE 9; NJ R SUPER TAX SURRENS CIV. R. 46-2; NM R DIST CT RCP RULE 1-012; NY CPLR RULE 3211; NC ST RCP § 1A-1, RULE 12; ND R RCP RULE 12; OH ST RCP RULE 12; OK ST 1. 12 § 2012; OR R ORCP RULE 21; PA ST RCP RULE 1032; RI R RCP RULE 12; SC R RCP RULE 12; SD ST § 15-6-12(b); TN R RCP RULE 12.02; TX R RCP RULE 91a; UT R RCP RULE 12; VT R RCP RULE 12; VA ST § 8.01-273; WA R SUPER CT CIV CR 12; WV R RCP RULE 12; WI ST 802.06; WY R RCP RULE 12.


See also AL ST RCP Rule 12; ALASKA R. CIV. P. 12; ARIZ. R. CIV. P. 12; ARK. R. CIV. P. 12; AZ RCP Rule 12; CA CIV PRO § 439; CO ST RCP RULE 12; DelVecchio v. DelVecchio, 146 Conn. 188, 148 A.2d 554 (Conn. 1959) (recognizing a motion for judgment on the pleadings even though Connecticut’s rules do not provide for it); DE R SUPER CT RCP RULE 12; FL ST RCP RULE 1.10; GA ST § 9-11-12; HI R RCP RULE 12; ID R RCP RULE 12; IL ST CH 735 § 5/2-615; IN ST TRIAL P RULE 12; IA R 1421; KS ST 60-212; KY ST RCP RULE 12.02; LA C.C.P. ART. 927; ME R RCP RULE 12; MD R RCP CR CL RULE 2-322; MA ST RCP RULE 12; MI R RCP MCR 2.166; MN ST RCP RULE 12.02; MS R RCP RULE 12; MO R RCP RULE 55.27; MT R RCP RULE 12; NE R PLDG § 6-1112; NV ST RCP RULE 12; NH R SUPER CT CIV RULE 9; NJ R SUPER TAX SURRENS CIV. R. 46-2; NM R DIST CT RCP RULE 1-012; NY CPLR RULE 3211; NC ST RCP § 1A-1, RULE 12; ND R RCP RULE 12; OH ST RCP RULE 12; OK ST 1. 12 § 2012; OR R ORCP RULE 21; PA ST RCP RULE 1032; RI R RCP RULE 12; SC R RCP RULE 12; SD ST § 15-6-12(b); TN R RCP RULE 12.02; TX R RCP RULE 91a; UT R RCP RULE 12; VT R RCP RULE 12; VA ST § 8.01-273; WA R SUPER CT CIV CR 12; WV R RCP RULE 12; WI ST 802.06; WY R RCP RULE 12.
57. *Id.*
58. *Id.*