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LAW AND ORDER

Trump Sent Judges to the Border. Many Had Nothing to Do.

The administration's plan to speed up deportations and reduce the immigration court backlog might be making things worse.

By MEREDITH HOFFMAN | September 27, 2017

On September 4, immigration judge Denise Slavin followed orders from the Department of Justice to drop everything and travel to the U.S.-Mexico border. She would be leaving behind an overwhelming docket in Baltimore, but she was needed at "ground zero," as Attorney General Jeff Sessions called it—the "sliver of land" where Americans take a stand against machete-wielding, poison-smuggling criminal gangs and drug cartels.

As part of a new Trump administration program to send justices on short-term missions to the border to speed up deportations and, Sessions pledged, reduce "significant backlogs in our immigration courts," Slavin was to spend two weeks at New Mexico's Otero County Processing Center.

But when Slavin arrived at Otero, she found her caseload was nearly half empty. The problem was so widespread that, according to internal Justice Department memos, nearly half the 13 courts charged with implementing Sessions' directive could not keep their visiting judges busy in the first two months of the new program.

"Judges were reading the newspaper," says Slavin, the executive vice president of the National Immigration Judges Association and an immigration judge since 1995. One, she told POLITICO Magazine, "spent a day helping them stock the supply room because she had nothing else to do."

Slavin ended up leaving Otero early because she had no cases her last day. "One clerk said it was so great, it was like being on vacation," she recalls.

In January, President Donald Trump signed an executive order directing the DOJ to deploy U.S. immigration judges to U.S. detention facilities—most of which are located on or near the U.S.-Mexico border. The temporary reassignments were intended to lead to more and faster deportations, as well as take some pressure off the currently overloaded immigration court system. But, according to interviews and internal DOJ memos, since the new policy went into effect in March, it seems to have had the opposite result: Judges have frequently had to cancel cases on their overloaded home dockets only to find barely any work at their assigned courts—exacerbating the U.S. immigration court backlog that now exceeds 600,000 cases.

According to internal memos sent by the DOJ's Executive Office of Immigration Review (EOIR) and obtained by the National Immigrant Justice Center (NIJC) via a Freedom of Information Act request, judges delayed more than 20,000 home court hearings for their details to the border from March to May.

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"I canceled about 100 cases in my home court to hear 20," says Slavin, who was forced to postpone those Baltimore hearings by a year since her court schedule was already booked through most of 2018. In Otero, she had no more than 50 hours of work over the course of two weeks (she typically clocks 50 hours per week in Baltimore). But she couldn't catch up on her work at home because she had no access to her files.

Her three colleagues at the facility who had also been ordered there by the DOJ were no busier. One who had been sent to Otero previously told her the empty caseloads were normal.

"Sending judges to the border has made the backlog in the interior of the country grow," says Slavin, "It's done exactly the opposite of what they hoped to accomplish."

On April 11 in Nogales, Arizona, Sessions formally rolled out the DOJ's judge relocation program. "I am also pleased to announce a series of reforms regarding immigration judges to reduce the significant backlogs in our immigration courts," he told the crowd of Customs and Border Protection personnel gathered to hear him. "Pursuant to the president's executive order, we will now be detaining all adults who are apprehended at the border. To support this mission, we have already surged 25 immigration judges to detention centers along the border."

The idea was to send U.S. immigration court judges currently handling "non-detained" immigration cases—cases such as final asylum decisions and immigrants' applications for legal status—to centers where they would only adjudicate cases of those detained crossing the U.S.-Mexico border, along with others who had been picked up by ICE for possible deportation. More judges would follow, the attorney general said.

But as Sessions spoke, nearly half of those 25 "surge" judges—whose deployments typically last two weeks or a month—were largely unoccupied. One week before the attorney general's Nogales announcement, EOIR—the Justice Department office that handles immigration cases—published an internal memo identifying six of 13 detention centers as offering inadequate work for their visiting justices.

"There are not enough cases to fill one immigration judge's docket, let alone five," the DOJ wrote of Texas' T. Don Hutto facility, which had been assigned five Miami judges to hold hearings via video teleconference with the women detained there.

One judge sent to the South Texas Residential Center, a family detention facility, had no cases at all; a judge at another family facility, Karnes Residential Center, had a "light" docket; and Texas' Prairieland Detention Center, which had received a judge, also was "not receiving enough cases to fill a docket or even come close to it," the memo stated.

The two judges assigned to New Mexico's Cibola Detention Facility also had barely any work to do, and Louisiana's La Salle Detention Center—not on the border but treated as such in its receipt of five "surge" judges—had similarly been overstaffed. "There is not enough work for five judges," said one DOJ memo. "There is enough work for a reasonable docket and three judges."

The Justice Department documents also revealed a number of logistical issues with the border courts, including a lack of phone lines or internet connectivity, and noise infiltrating the courtroom from the detention facility. "The courtrooms at Imperial Regional Detention Facility are not suitable for in-person hearings because security is wholly inadequate," said one memo of the California facility. "The court cannot do

telephonic interpreters and the request for in-person interpreters remains pending.... Last week an immigration judge was left in the courtroom without a bailiff."

Meanwhile, the judges sent to the border were forced to abandon thousands of home court cases—which the DOJ was aware could increase pressure on the U.S. immigration court system, where a specialized cadre of judges handles questions over whether people can remain in the country or face deportation. "It is likely that the backlog will increase for the locations from which a judge is assigned," predicted one March 29 document, which also projected the deployments would cost \$21 million per fiscal year.

Within the first three months of the program, judges postponed about 22,000 cases around the country, including 2,774 in New York City alone, according to the DOJ memos. (The delays added to an already clogged system: New York City's immigration court backlog stood at 81,842 as of July, according to the immigration data tracker TRAC Immigration.)

When asked about these FOIA documents, and why the DOJ had deployed judges where they were not needed, a Justice Department spokesman responded that the program had improved in recent months. "After the initial deployment, an assessment was done to determine appropriate locations to increase the adjudication of immigration court cases without compromising due process," he said.

Immigration judges and advocates acknowledge that the program has slightly improved since May—but many say that's largely because the DOJ is sending fewer judges on temporary missions. "Some of the least productive assignments have either been discontinued or converted to video teleconferencing hearings, and it seems that fewer judges are being sent overall," says National Association of Immigration Judges President Dana Marks, who serves as an immigration judge in San Francisco. But, she says, "the basic problem still persists."

More than 100 total judges have been reassigned since March, but Politico was not able to obtain data on whether deployments are declining or increasing, or how many judges are still facing empty caseloads.

The spokesperson declined to comment on Slavin's experience at Otero. But the DOJ discontinued deployments to Otero this month, as soon as Slavin completed her assignment there.

The U.S. immigration court backlog has increased under Trump, moving from 540,000 in January to 600,000 in July. But the DOJ spokesperson denied that the deployments were responsible for the bump, instead blaming the overloaded system on the Obama administration's policies. He noted that the first six months of the Trump

administration had seen a 14.5 percent increase in final immigration court rulings from the previous year, and that more than 90 percent of cases by "surge" judges had led to deportation orders.

But just because judges have ruled on more cases doesn't mean the Trump administration hasn't worsened the backlog, NIJC communications director Tara Tidwell Cullen says. In fact, it could likely mean the opposite. Trump's first six months in power saw 40 percent more immigration arrests in the country's interior than the year before, adding more cases to already overloaded dockets.

"The 'home' courts where judges are sent from continue to be understaffed and their caseloads are adversely impacted as judges are sent to temporary assignments," adds Marks, the San Francisco judge. Adding to the problem, she points out, is the administration's decision to detain immigrants without allowing the Department of Homeland Security to grant them bonds. Now, detainees have to go to immigration court to get a bond, creating extra work for those justices.

Not everyone thinks sending judges to the border is a bad idea.

"The best use of resources is to throw them all at detention," says Leon Fresco, who served as deputy assistant attorney general under President Barack Obama. Judges typically release individuals detained for more than 90 days with no trial on habeas corpus, he explains, in which case the government has "wasted money in detaining them" to start. Better, then, to hear all the detained cases quickly.

Any administration will have to make tough calls, says Fresco. "You have just about 300 judges to hear more than 500,000 cases, so you have to prioritize." Under Obama, the DOJ—while it hadn't sent judges to the border—had also prioritized recent border crossers in order to send a message that the U.S. would immediately hear their cases, rather than allow them to "wait eight years to be adjudicated" while staying in the country, Fresco says. Trump's priorities similarly send a message to potential border crossers that "we do have quick justice."

The problem, Fresco adds, is that the Trump administration has been clumsy in its border deployments—sending judges to places where they aren't needed. "There are ways to do this, but they need to be more flexible and nimble, and they're not being as nimble as they can be," he says. "EOIR is an agency badly in need of some sort of consulting firm.... There's still too little rhyme or reason about how case assignments work—you shouldn't have weeks with judges with hours of idle time."

Chicago immigration judge Robert D. Vinikoor says his deployment went smoothly. He had a full caseload in his two-week detail at Otay Mesa Detention Center in San Diego this April, and he maintains that the reassigned judges were necessary to get immigrants out of detention as expeditiously as possible. "DHS is detaining more and more people and keeping them in custody, so that's the need for the judges," says Vinikoor, who retired in June after serving 33 years as an immigration judge. "The question is: Are they over-detailing? In some cases they put the cart before the horse."

But Marks, who has been an immigration judge for 30 years, disagrees. Even if the DOJ gets deployments right, she says, the surge policy shows the administration has the wrong priorities. She says the administration's biggest mistake was making a "politically motivated decision" and not consulting immigration judges. "The judges weren't asked and that's always been our big frustration," she says. "The judges are the ones who are the experts in handling their cases."

Marks notes that her union had similar frustrations with the Obama administration's prioritization of recent border crossers—predominantly Central American women and children seeking asylum—to send a message they would be deported quickly if they could not prove they qualified for asylum. That decision, she says, worsened the backlog, too.

The overloaded system jeopardizes due process for immigrants, says NIJC's policy director Heidi Altman, who filed the FOIA for EOIR's memos after hearing about "chaos" in the courts when the border details began.

"When the backlog is exacerbated it makes it exponentially harder for us and other legal services to take on clients," says Altman, whose NIJC organizes pro-bono attorneys handling immigration cases, which do not guarantee legal representation. Without a lawyer handling a case, she says, it is less likely to proceed fairly.

But there's another reason that Trump might want to reconsider the border surge, says John Sandweg, former acting director of ICE under the Obama administration: It takes the pressure off the undocumented immigrants who have lived in the country for years and may be fighting to prevent an order of deportation. "They're basically giving amnesty ironically to the non-detained docket."

"By shifting the judges away they'll never have their hearing so they'll never be ordered deported," he says. "You're letting them stay."

