FEATURE

Whose Court Is This Anyway? Immigration judges accuse executive branch of politicizing their courts

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Photo Illustration by Sara Wadford, Shutterstock

There was no reason to think that the relatively routine immigration case of Reynaldo Castro-Tum would make headlines.

Castro-Tum, a Guatemalan national who entered the United States at 17, was one of thousands who were part of 2014's "surge" of unaccompanied minors. Like most of those minors, he was eventually released to the custody of a relative—in this case, a brother-in-law who lived outside Pittsburgh. The government repeatedly sent notices to appear at immigration court hearings to that address, but Castro-Tum never showed up.

Normally, that's the end of the story, since failure to appear in immigration court generally results in a deportation. But Judge Steven Morley of the Philadelphia immigration court suspected the address on file for Castro-Tum was not correct, in part because that's a common problem with addresses provided for unaccompanied minors. So Morley administratively closed the case, essentially pausing it to look into the address problem. The government appealed it, along with about 200 similar cases, and the Board of Immigration Appeals, the court of next resort in immigration cases, instructed Morley to deport Castro-Tum.

But before he could do that, then-Attorney General Jeff Sessions assigned the case to himself, a power the attorney general has as the head of the federal agency that controls the immigration courts. His opinion in *Matter of Castro-Tum*, issued in May 2018, says immigration judges have no legal authority to administratively close cases. That alone would have been a big deal in the immigration law world because it took away a well-established tool for managing the already overwhelmed immigration court dockets.

Photo of Former Attorney General Jeff Sessions by Shutterstock.

But what came next drew widespread attention among immigration lawyers as well as the national media, catapulting the otherwise unknown case of a single teenage immigrant into the spotlight. On remand, Morley continued the case to resolve the address problem—and immigration court leadership promptly took it away from him, reassigning it to an administrative judge. Then they reassigned 86 more of his cases. According to a grievance filed by the National Association of Immigration Judges, the union that represents Morley, a supervisor told him that he had been expected to order Castro-Tum deported if he didn't appear.

NAIJ President A. Ashley Tabaddor says that's not actually in Sessions' opinion—and if it were, it would violate federal regulations on immigration judges' independence. (Morley, like most sitting immigration judges, could not comment on the case per Justice Department policy. Tabaddor, who is also a sitting judge, stresses that she is speaking only in her role as union president.)

"We think that is a clear, clear violation of a judge's decisional independence," says Tabaddor, who presides in Los Angeles. "When you tell a judge how the process … should be handled, by definition, that is going to have an impact, and a significant

impact, on the outcome."

The Executive Office for Immigration Review, the DOJ agency that controls the immigration courts, declined to comment, citing pending litigation. Tabaddor said in January that she was unaware of litigation related to the matter.

Before Sessions' opinion, the ABA had urged in an amicus brief to the DOJ that the attorney general continue to allow administrative closure in immigration cases, citing it as a "practical necessity" for judges to deal with the courts' huge backlog.

Immigration courts have always been susceptible to politics; presidents have, for example, rearranged dockets to suit their political needs. But the NAIJ and others are concerned that the Trump administration has moved from reprioritizing cases to deliberately trying to affect case outcomes. Changes that have caused concern include unilateral changes to case law, like the one Sessions made in Castro-Tum; pressure on judges to rule faster; and even allegations that the DOJ is considering political affiliation in hiring new immigration judges.

"It's all part of what our association has referred to as 'the deportation machine,' " says Jeremy McKinney, treasurer of the American Immigration Lawyers Association. "In other words, transforming a court that is supposed to be an independent and neutral trier of law and fact into an arm of law enforcement."

A TROUBLED HOME

For critics, a major problem with the immigration courts is where they're housed: within the Department of Justice, an executive-branch department headed by a politically appointed leader. That's unlike the Article III federal courts or most of the federal administrative law courts.

Immigration law observers have long worried that this exposes the courts to political interference—and recent history supports that. In 2008, the Justice Department's Office of the Inspector General found that political appointees had hired only politically connected Republicans as immigration judges between 2004 and 2006, despite knowing judges were part of the civil service system. Over the past 30 years, several attorneys general have referred themselves cases in order to overturn the decisions of predecessors from a different party. Presidents of both parties have reprioritized dockets for political reasons.

Most of that is perfectly legal and within the political leadership's powers—and to some observers, that's a problem. Take the fact that attorneys general may certify Board of Immigration Appeals cases to themselves. There's no requirement that they follow precedent or consult anyone else. This permits an attorney general to change case law unilaterally.

“Just allowing that kind of interference compromises the integrity of the court,” Tabaddor says. “Because that’s not how a court is supposed to run. That’s not how law is supposed to be developed.”

Asked for comment on the matter, Justice Department speechwriter Steven Stafford noted that the attorney general’s legal authority to refer himself cases, and authority to control the immigration courts and their judges, is clear under the Immigration and Nationality Act.

“Further, the acting attorney general’s exercise of this authority has been entirely appropriate in each particular case,” Stafford said in an emailed statement. “Those who oppose the use of this authority have a problem not with the acting attorney general, but with the INA.”

If this power of the attorney general is obscure, that might be because most—from both parties—have used it sparingly. Using DOJ archives of agency decisions, the ABA Journal determined that over three eight-year presidencies, former President Barack Obama’s two attorneys general referred themselves a total of four cases; George W. Bush’s three AGs referred themselves 10 cases; and Bill Clinton’s one AG referred herself one case. The ABA Journal found no record of any self-referrals during new Attorney General William Barr’s first time in the job, from 1991 to 1993.

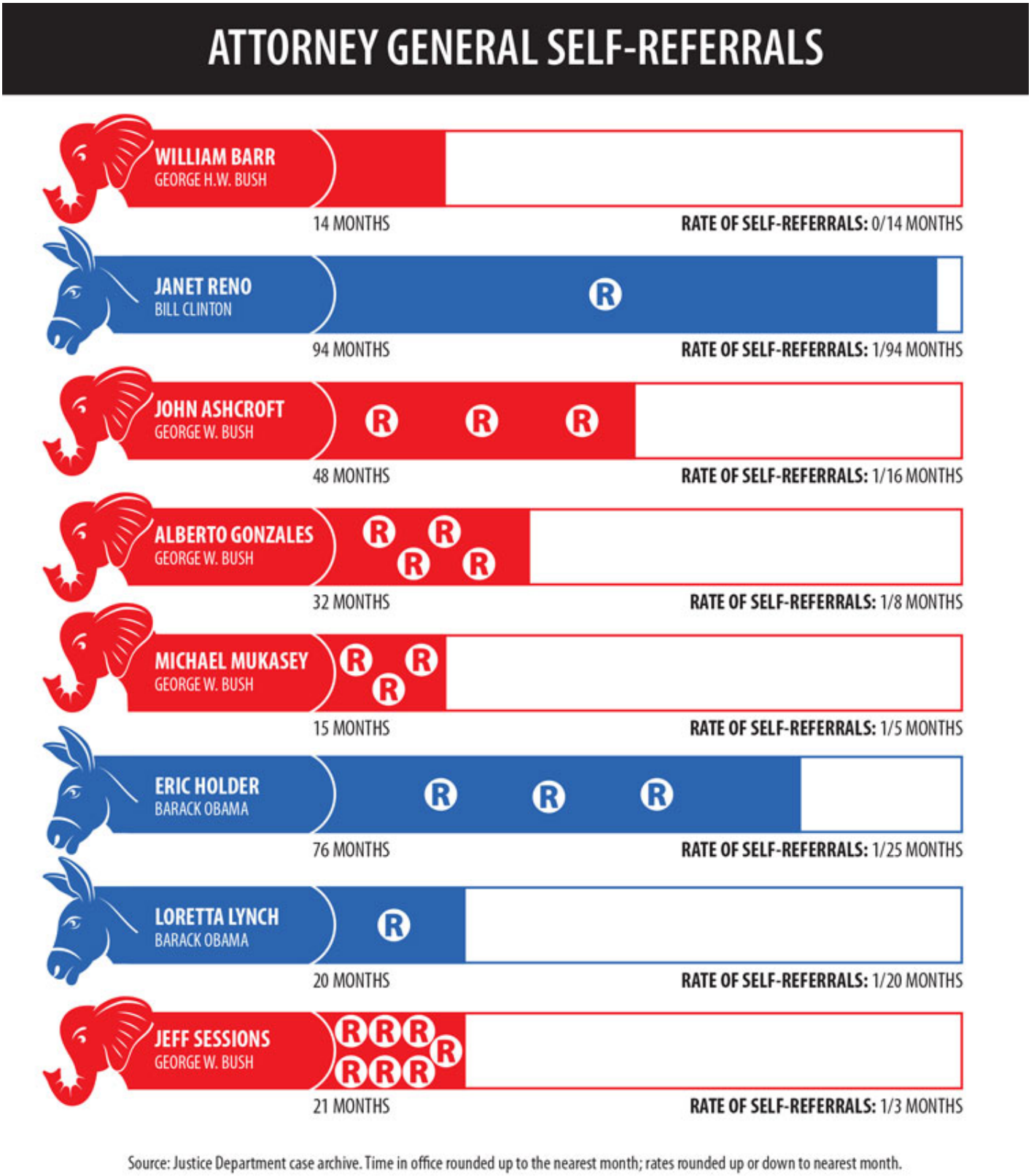
By contrast, Sessions referred himself seven cases during 21 months in office, though he was able to publish decisions on only five before President Donald Trump asked him to resign.

Any hope that former Acting Attorney General Matthew Whitaker would take a lighter touch were dashed in December, when Whitaker certified two cases to himself: *Matter of Castillo-Perez*, concerning intoxicated driving and the good moral character standard in immigration law, and *Matter of LEA*, on whether a family connection can be the basis of an asylum claim. The cases were waiting for Barr after he was sworn in.

And the decisions Sessions handed down are not small tweaks. Take *Matter of AB*, in which Sessions decided that asylum should only rarely be available to people fleeing serious crimes not sponsored by a government. (“AB” are the initials of a woman who said she suffered prolonged domestic violence in El Salvador.) Essentially, Sessions ruled that when the persecution doesn’t come from the government itself, asylum claimants must work harder to show that the home government couldn’t or wouldn’t protect them.

“In practice, [nongovernmental violence] claims are unlikely to satisfy the statutory grounds for proving group persecution that the government is unable or unwilling to address,” Sessions wrote. “The mere fact that a country may have problems effectively

policing certain crimes—such as domestic violence or gang violence—or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim."



Infographic by Sara Wadford

In making that ruling, Sessions swept away precedents set by the Board of Immigration Appeals and the federal appeals courts on what constitutes a “particular social group” under asylum law.

“The attorney general did not rewrite the underlying test for who qualifies for asylum and who does not,” says McKinney, who also runs McKinney Immigration Law in Greensboro, North Carolina. “He just announced that he would have applied the test differently, and his result would have been different. It’s a very, very strange way to issue sweeping precedent decisions.”

Photo of Jeremy McKinney by Shelli Craig Photography

The ruling also removed the basis for asylum claims from thousands of Central Americans who arrived in the United States in recent years to flee uncontrolled domestic abuse or gang violence in their home countries. Retired immigration Judge Paul Wickham Schmidt does not believe that’s a coincidence.

“The grounds that some people have been succeeding on are domestic violence and family-based claims,” says Schmidt, who belongs to the ABA Judicial Division’s National Conference of the Administrative Law Judiciary.” So it’s basically in my view a race-based attack on Central American asylum seekers.”

Because of this, *Matter of AB* attracted substantial attention. Sessions invited amicus briefs, and the ABA was one of many organizations that filed one, urging the attorney general to let the case law stand. That brief argues that federal appeals courts and the board of appeals have repeatedly found non-state-sponsored crimes—organized crime, “honor killings,” female genital mutilation—adequate for granting asylum. It also pointed

out that the attorney general may not unilaterally overturn decisions of the federal appeals courts; the American Civil Liberties Union later cited this theory when it sued the federal government over *AB*. It won an injunction in that case in December.

It's still possible to grant asylum on gang or domestic violence grounds, says retired immigration Judge Carol King, also part of the National Conference of the Administrative Law Judiciary, but everyone doesn't see it that way.

"The danger is that the agency has been now encouraging judges not even to hold hearings if the cases are based on domestic violence," says King, now a Berkeley, California-based consultant to immigration lawyers.

GUMMING UP THE WORKS

And that's just asylum. For the immigration court system as a whole—and especially for working immigration judges—bigger problems have emerged from three decisions from Sessions that constrain judges' ability to end or pause cases. That could worsen the already substantial backlog of cases in immigration court, which totaled more than 829,000 pending cases as of February, according to Syracuse University's Transactional Records Access Clearinghouse.

Chief among these is *Castro-Tum*, the administrative closure case. Administrative closure ends a case without a decision, which permits judges to take cases off their dockets if they're not ready to go forward. This was Morley's intention in *Castro-Tum*, where the judge was concerned that the young man's address was unreliable. Indeed, Tabaddor says the notice to appear was returned to the court after Castro-Tum was ordered deported; immigrant advocates suspect he may have returned to Guatemala.

There are multiple reasons why a pause might be desirable, McKinney explains. Many immigration cases depend on outside agencies' actions; the State Department issues visas, and U.S. Citizenship and Immigration Services confers green cards and citizenship. Some benefits are also available through state courts, and cases may hinge on a decision from a police agency or an expert of some kind.

For example, McKinney cites special immigrant juvenile status. That's an immigration status granted to minors who were abandoned, abused or neglected by one or both parents, and recipients must get a court order saying so.

"You go through state court, and then you submit an application to USCIS," McKinney says. "So what we would see generally is these cases would be either administratively closed or given extended continuances, and then the person would pursue the status. Those kids are now being ordered deported."

Continuances could have helped, but three months after *Castro-Tum*, Sessions handed down another decision, *Matter of LABR*, that requires judges to write a full decision every time they grant a continuance.

“I probably got five to 40 requests for continuances daily when I was on the bench,” King says. “It discourages granting continuances because they’re not requiring the same sort of diligence if a judge denies the continuance.”

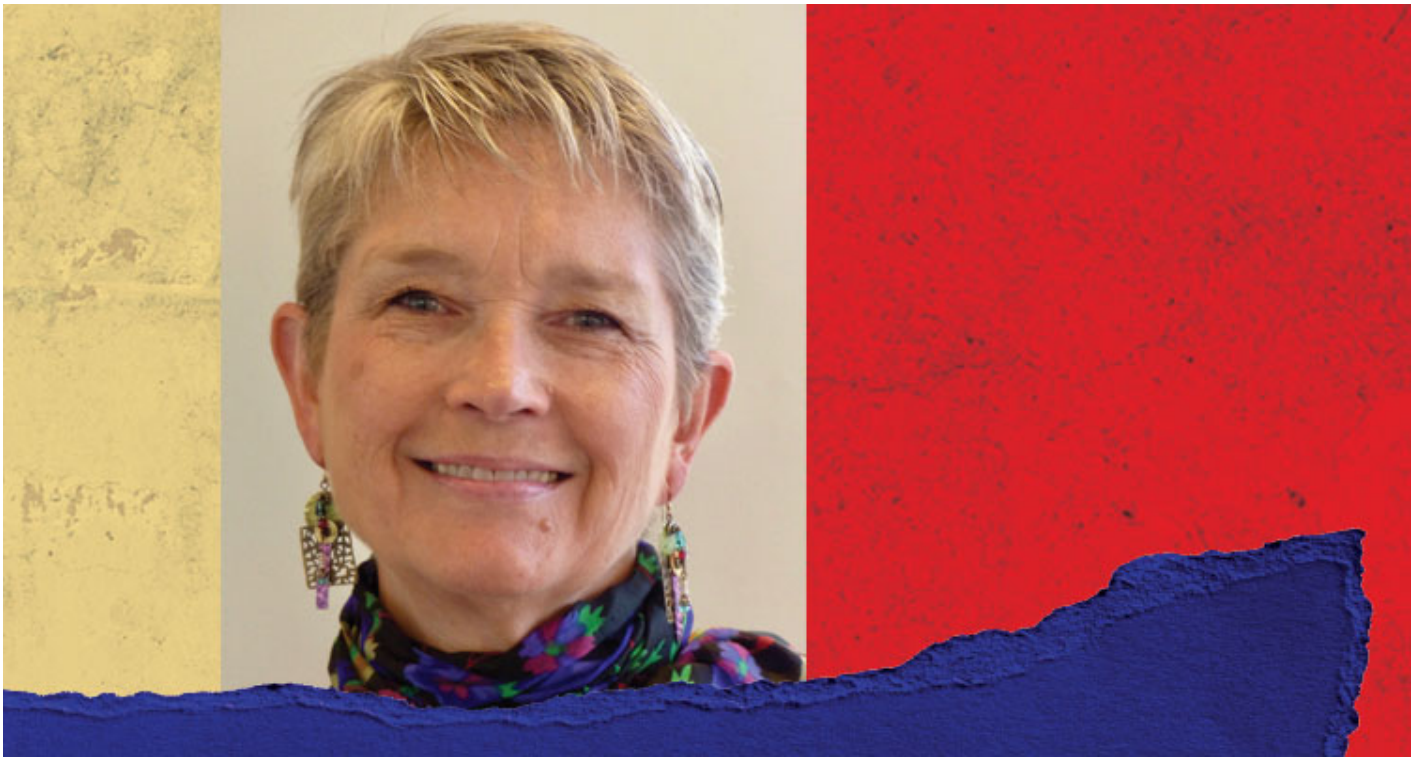


Photo of Carol King by Allan Brill

That’s why King believes LABR weighs the decision-making in favor of deportation. It’s also likely to drastically limit judges’ ability to end or postpone cases, along with *Castro-Tum* and a third decision from Sessions—*Matter of SOG and FDB*, which limits judges’ ability to terminate or dismiss deportation cases. In addition to making it harder for judges to manage their workloads, King says it’s bad for the system as a whole.

“It means that every case has to come into court, and if it’s not ready to go for some reason, it has to be reset in court,” she says. “It encourages double-booking of cases … which means that parties are not encouraged to be prepared.”

For clients and practitioners, McKinney says the end result is likely to be a flood of appeals.

“We had a 10-year-old ordered deported [while waiting for a USCIS decision],” he says. “Do you think we just said, ‘OK, judge,’ with the 10-year-old and then just took our order of deportation? No, we appealed!” After the Board of Immigration Appeals, litigants can take their cases to the federal appeals court for their circuits, and McKinney believes many will. Thus, he predicts that much of the immigration court backlog will filter up to the appeals courts in a few years.

CARROT OR STICK?

The DOJ is well aware of the backlog and has hired judges aggressively to address it. Several of the actions Sessions took on immigration were announced as ways to address that backlog.

That includes another of his controversial decisions: imposing quotas on immigration judges. Starting with the 2019 fiscal year, judges who want to be rated "satisfactory" on their performance reviews must complete at least 700 cases per year. No more than 15 percent of those cases should be overturned on appeal. There are also completion requirements for specific types of cases. A software dashboard allows judges to check their progress daily.

Asked about this in December, Executive Office for Immigration Review spokeswoman Kathryn Mattingly pointed the ABA Journal to a public conversation that agency Director James McHenry had in May 2018 with Andrew Arthur, executive director of the restrictionist Center for Immigration Studies. McHenry told Arthur that EOIR plans to take circumstances into account when evaluating judges under the new standards—most likely in fall 2019. However, McHenry said EOIR believes that the numbers chosen are reasonable expectations for experienced and properly trained judges.

The NAIJ and some retired judges don't agree, in part because two judges may handle very different kinds of dockets. Cases involving serious criminal convictions, for example, might be quicker than asylum cases involving unaccompanied minors.

McHenry also testified about the changes before Congress, where he said the performance measures were "neither novel nor unique to EOIR," and in line with measures recommended by the ABA and used by other federal administrative law systems.

Tabaddor sees that differently.

"The numbers are used as what I would say a carrot in many courts; it's used to evaluate whether [changes] are needed," she says. "But no legitimate court uses quotas and deadlines as a stick to put a judge's job on the line, which directly interferes with their ability to sit impartially on a case."

The ABA Judicial Division's 2005 Guidelines for the Evaluation of Judicial Performance (https://www.americanbar.org/content/dam/aba/publications/judicial_division/jpec_final.pdf) do not mention case completions. They say judges should be evaluated on legal ability, integrity, communication, professionalism and administrative ability. They also say evaluations shouldn't compromise judicial independence and "should be free from political, ideological and issue-oriented considerations."

King doesn't think that's the case here.

“To have judges evaluated on how quickly they’re pushing cases through the system is a really, really dangerous thing to do,” she says. “Because you’re basically tying the judges’ job security to whether they’re pushing cases through, and it’s clear from this administration that their idea with pushing cases through the system is to deny as many as possible.”

Tabaddor sees this as another encroachment on immigration judges’ independence.

“It’s basically psychological warfare with judges, [creating] a constant reminder of their numbers through this dashboard and a constant pressure to reach these unreasonable goals,” she says.

McKinney says he has seen this play out in practice. In one case, he discovered that his client’s minor child had been sexually assaulted in their home country, which became important to the family’s asylum application. The minor had not spoken to a mental health counselor, so McKinney moved for a continuance to allow her to do that. The judge denied it, in part because the evidence for the assault was not from a mental health professional.

“So what we got was … only half-baked consideration, because obviously in the motion we are asking for the time to talk to the precise professional that the judge wanted the minor child to talk to,” he says. “That is the pressure these judges are under.”

JOB OFFERS RESCINDED

The Justice Department actions raised earlier in this story may be concerning to some people, but they’re perfectly legal. However, there are also allegations that the Justice Department is taking politics into account in hiring immigration judges, who are part of the civil service system. The allegations have not been proved—but if true, they might break the law.

Washington, D.C., labor law attorney Zachary Henige says he has been approached by several people who were offered jobs as immigration judges or members of the Board of Immigration Appeals but had those offers rescinded after the 2016 election for what they believe are political reasons. The ABA Journal spoke to Henige about Dorothea Lay, the only client who has authorized him to discuss her case.

Photo of Zachary Henige courtesy of Kalijarvi, Chuzi, Newman & Fitch.

Lay has spent 25 years in the federal government's immigration services agencies, and she is currently at USCIS. She was offered a job at the appeals board in October 2016. This required a fresh background check (she already has clearance at her existing job), so she understood that she would have to wait to finalize the job.

In late February 2017, Lay did hear back—but only via a two-sentence letter. It said that during the time it had taken to complete the background check, the needs of the agency had evolved, so EOIR was withdrawing the offer. However, the letter was postmarked on the same day that EOIR announced it would expand the number of seats on the board from 17 to 21—requiring four new hires. That's one reason Lay was not convinced the agency's needs had changed.

Another was that two of Lay's recommenders were political appointees of Democrats. Her application also showed that she had worked on issues the Trump administration strongly opposed, including domestic violence as a basis for asylum, the issue in AB. Thus, it would have been easy to guess her politics. Asked about the allegations, EOIR spokeswoman Mattingly did not address them specifically, instead redirecting her comments about others who were hired.

Lay is pursuing a complaint through the federal government's Office of Special Counsel, an independent agency that investigates alleged violations of the merit system for federal employees. Henige says he has been approached by others who had job offers rescinded after the election, not all of whom retained him.

Members of Congress have also gotten involved. In April 2018, Democratic Reps. Elijah Cummings of Maryland, Don Beyer of Virginia and Lloyd Doggett and Joaquin Castro of Texas wrote a letter to the Justice Department, saying multiple people had approached their offices after having job offers suspended or withdrawn for suspected political reasons.

Six people were hired not long after the letter, according to a statement from Cummings and Doggett. The DOJ did not make its response public, but that response was apparently leaked to Fox News, which said the DOJ acknowledged that 14 people were no longer under consideration for jobs, and gave nonpolitical explanations for all of those decisions.

Henige notes that there's precedent for improperly politicized hiring, including the 2008 inspector general report from the DOJ. After that became a scandal in 2007, then-Attorney General Alberto Gonzales implemented a hiring process intend-ed to insulate the immigration courts from political considerations, with final candidate recommendation duties shared by the EOIR director, a senior career employee and a senior political appointee.

In 2017, however, Sessions authorized substantial changes to that process, according to a memo uncovered by Human Rights First, a New York-based nonprofit that advocates for human rights and the rule of law, through the Freedom of Information Act. Those changes removed the EOIR director or his designee from the final recommendation stage and removed the chief immigration judge from an earlier stage. The effect is less direct oversight from the agency that will actually employ the judges, and a greater proportion of responsibility to the political appointee.

HIT THE ROAD, JUDGE

Immigration judges aren't on the edge of revolt. Not every judge agrees with the NAIJ or the retired judges quoted for this article. Arthur, for example—a retired immigration judge—has praised both the use of self-certifications and some of the decisions Sessions made that way.

Perhaps more importantly, immigration judges have limited recourse. As career federal employees, they aren't legally permitted to strike, Tabaddor says, and lawsuits are limited to cases of individual judges with specific grievances. She says labor union negotiations have been minimally helpful. The grievance filed after the cases were taken from Morley was denied by EOIR last fall on the grounds that EOIR's actions were lawful, and the NAIJ has merely filed formal correspondences on other matters.

Photo of Ashley Tabaddor by Melodi Miremadi

That's why Tabaddor wants a more permanent solution: Take the immigration courts out of the Justice Department and put them into an independent agency.

"It's been done with the bankruptcy courts, it's been done with the Court of Federal Claims, it's been done with Tax Court," she says. "Having a court within the same agency that basically has a law enforcement mandate cannot be defended."

Mattingly says EOIR believes this is unnecessary and would take substantial resources. But it's a long-standing goal—not just for NAIJ, but for the ABA House of Delegates, which called for independent immigration courts in 2010's Resolution 114F. More recently, former ABA President Hilarie Bass testified before the Senate Judiciary Committee's Subcommittee on Border Security and Immigration in 2018 in favor of independent immigration courts, as did Tabaddor. Arthur testified against it, citing constitutional concerns. Immigration court independence has also long been on the wish lists of AILA and the Federal Bar Association.

The four organizations have been working on legislation to make that a reality, McKinney says, though the coalition differs on details of how best to structure the agency. But the goal is the same: insulating the immigration courts from politics by moving them into an independent agency.

McKinney, who is actively involved in the effort through AILA, notes that major agency reforms don't happen overnight—but he's bullish about the possibilities.

“We have seen some genuine interest, and now that the Democrats are taking control of the House, we will see if that can turn into actual legislation,” McKinney says. “My heart goes out to the literally thousands of people who are going to be victims of this flawed system until the day comes that we can get it fixed. But I believe that we can get it fixed.”

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