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Reforming the Selection Process for Immigration Judges and the Board of Immigration Appeals to Promote Impartiality

John Adams urged that judges should be as “impartial and independent as the lot of humanity will admit.” Removing the Immigration Court system from the Department of Justice would help promote independence, but independence alone does not ensure impartiality. As the American Bar Association Commission on the 21st Century Judiciary has recognized, “a judge can be entirely independent but nonetheless biased and closed-minded.” Regrettably, stories of bias and closed-mindedness laced our interviews. Overcoming bias—and the appearance of bias—among Immigration Judges and BIA members must be a top priority.

The Immigration Courts and the BIA had never enjoyed a stellar reputation for impartiality. But that reputation fell to a new low after a deliberate effort to stack the Immigration Courts and BIA in favor of the government between 2004 and 2006. Immigration Judge and BIA positions are, by law, career civil service appointments. Nonetheless, a 2008 report by the DOJ Inspector General and Office of Professional Responsibility found a systematic campaign by members of the previous Administration to pack the Immigration Courts with “good Republicans” who were “completely on the team.” The report found that “all of the people who applied in response to vacancy announcements for IJs were ignored,” and instead Immigration Judges appointed between 2004 and 2006 were “screened for their political or ideological affiliations.” Many of these illegally appointed judges remain on the Immigration Court today.

Even putting aside this episode, a recent study entitled *Refugee Roulette: Disparities in Asylum Adjudication* makes clear that a large number of Immigration Judges are imposing their own personal views on the cases that come before

them. Indeed, data indicate that the fate of those who come before America’s Immigration Courts is largely determined by the particular Immigration Judge to whom the case is assigned. An interviewee suggested that many Immigration Judges have their own “nemesis countries,” of which they are particularly skeptical when it comes to asylum claims. Taking one example from the study, of the 18 Immigration Judges in the San Francisco court who handled more than 50 asylum requests by Indian immigrants, one of those judges granted only three percent of those asylum requests, despite a mean approval rate of 52 percent in that court for Indian immigrants. An Indian asylum seeker who is unfortunate enough to come before that particular judge would appear to have lost even before setting foot in the courtroom because of the judge’s personal views.

The Immigration Court Lottery

“There is definitely a sense of the lottery in the immigration system.”

“Success depends on the judge you get.”

“Half the battle is which judge you get assigned to.”

“The bias in Immigration Courts is ridiculous. There is no reward for judges who care.”

Moreover, the composition of the Immigration Courts favors the government. The *Refugee Roulette* study shows that the gender and the professional backgrounds of Immigration Judges significantly affect their decisions. The study found that male Immigration Judges

were 44 percent less likely to grant asylum than their female counterparts. Not surprisingly, Immigration Judges are overwhelmingly male—in fact, there are almost twice as many male Immigration Judges as there are female judges. The study was unable to answer why male judges are significantly more skeptical of asylum claims than female judges, but whatever the reason, this huge disparity hurts immigrants.

In addition, the study found that Immigration Judges with prior experience working in positions that were adversarial to immigrants (which the study defines as INS/DHS Trial Attorneys, Office of Immigration Litigation attorneys, special Assistant United States Attorneys, border patrol lawyers, and other similar positions) were 24 percent less likely to grant asylum than Immigration Judges with no such prior work experience. And the longer the judge worked against immigrants, the lower the approval rate—from 11 percent lower approval rates for judges with one year to five years of experience working against immigrants to 35 percent lower approval rates for judges with 11 or more years of such experience. According to the study, 55 percent of Immigration Judges had prior job positions that were adversarial to immigrants.

The study found a similar result for Immigration Judges who had held other non-military government positions, excluding positions that were adversarial to immigrants. These Immigration Judges were 19 percent less likely to grant asylum than Immigration Judges with no prior government experience. Our review of the Transactional Records Access Clearinghouse database of 236 Immigration Judges found that about 24 percent of Immigration Judges had prior government jobs, not counting those who had a prior job that was adversarial to immigrants. Taken together, almost 80 percent of Immigration Judges have professional backgrounds that tend to cause them to find in favor of the government significantly more often than judges without these backgrounds.

The lopsided composition of the BIA also favors the government. Of the 14 BIA members listed on the EOIR website, only three are female. Furthermore, nine of the 14 had positions that

were adversarial to immigrants, while all but one have significant government work experience, mostly at DOJ. According to the *Refugee Roulette* study, Attorney General John Ashcroft “radically changed the composition of the Board” as part of the 2002 “streamlining reforms” by removing five members “who had come from the practice of immigration law, advocacy and law teaching” and were widely viewed as pro-immigrant. Not surprisingly, the success rate of asylum seekers at the BIA plunged by 70 percent in the wake of this streamlining.

Appleseed recommends the following action items to improve the impartiality of the Immigration Courts and the BIA.

Ensure that the hiring process for Immigration Judges and BIA members has been fully de-politicized.

In 2008 testimony before Congress, the director of EOIR stated that EOIR “now ha[s] in place a recruitment, screening, interviewing, recommendation, and selection process that, although time-consuming, is a premiere system for identifying and appointing the very best candidates to serve as Immigration Judges.” Indeed, the 2008 DOJ Inspector General’s report found that the responsibility for evaluating and selecting Immigration Judges has returned to EOIR after being hijacked by members of the former Administration. While we applaud EOIR’s efforts to reform the hiring process for Immigration Judges and the BIA in light of the DOJ Inspector General’s findings, it appears that shortcomings remain.

At least one BIA member appointed under the new hiring process is light on immigration experience but heavy on political connections. The Inspector General’s report chronicles how this person was appointed to the Immigration Court despite never interviewing for the position or submitting an application. In fact, shortly before his appointment, he needed an informational interview to learn what an Immigration Judge does. Once appointed to the Immigration Court, he “offered ‘to be of any assistance’ to Monica

Goodling in identifying IJ candidates.” He even recommended that a particular Immigration Judge be appointed as the Chief Immigration Judge, a career position, based in part on the judge’s “loyalty to the Bush Administration.” After less than two years on the bench, he was selected by Monica Goodling for a position on the BIA. He got his BIA seat in August 2008 under the new hiring process, leaving the distinct impression that his nomination amounted to a political appointment. Based on this episode, we believe that the new Administration should review the revamped hiring process with fresh eyes to ensure it has in fact been entirely de-politicized.

Broaden the candidate pool of Immigration Judges and BIA members.

There is almost an assumption within the Immigration Court system that the pool of DHS Trial Attorneys serves as the farm team for the Immigration Judge corps. This attitude was highlighted by one of our interviewees, recounting an incident when an immigrant mistakenly addressed a Trial Attorney as “Your Honor.” After the Trial Attorney laughed, the Immigration Judge commented—in open court—that in a few years the Trial Attorney would be a judge, adding for good measure that the attorney “certainly had the temperament for it.”

“In certain courtrooms it is like there are two prosecutors in the government—DHS counsel and the Immigration Judge.”

While 55 percent of Immigration Judges worked in positions that were adversarial to immigrants (the vast majority of whom were Trial Attorneys), only 14 percent have worked in a non-governmental organization and two percent have significant academic experience. Given these numbers, it is not surprising that some interviewees feel that the system is rigged, “like there are two prosecutors” in the courtroom. To address this fundamental problem, EOIR should more aggressively recruit candidates

for Immigration Judge positions from the ranks of experienced private immigration attorneys, academics and non-governmental lawyers who possess the appropriate judicial temperament. EOIR should also achieve greater gender balance on the immigration bench. In light of findings that those judges with an enforcement background and male judges are more likely to find in favor of the government, only with such a broadening of the pool of Immigration Judges will the system be viewed as balanced. In addition, a more diverse bench may promote cross-learning among the judges, leading judges to achieve more accurate results.

The same holds true for BIA members, 79 percent of whom are male. And with almost two-thirds of the BIA consisting of former immigrant adversaries and 93 percent having worked for the government (mostly DOJ), EOIR must look beyond its usual candidate pool and appoint new members from the best among the nation’s private immigration lawyers, academics and non-governmental lawyers, while also achieving greater gender parity. By selecting members from a diverse candidate pool, the BIA will gain some much-needed balance, ultimately allowing it to make more accurate decisions.

Increase the transparency of the BIA candidate nomination process.

Repairing the BIA’s severely damaged credibility after the 2002 “streamlining reforms” will require more transparency in the selection process. EOIR should provide interested groups, such as the American Immigration Lawyers Association, an opportunity to comment on proposed BIA candidates for 60 days prior to their appointment. A more open appointment process will help ensure that the public recognizes that those appointed to the BIA have the ability to be fair and impartial, which will increase confidence in the BIA as an appellate body.

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