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The Courts & Litigation

IMMIGRATION JUDGES SEEK ARTICLE I STATUS

DRIVING FORCE BEHIND MOVEMENT TO GET OUT FROM UNDER DOJ IS THE NEED TO ENSURE
INDEPENDENT DECISION-MAKING

Marcia Coyle

The nation's immigration judges, struggling with too few resources, too many cases, the appearance of bias and little relief in sight, are laying the groundwork for a major push to get out from under the umbrella of the Department of Justice.

The judges' union -- the National Association of Immigration Judges -- along with legal groups, academic experts and some federal appellate judges, contend that it is time for fundamental changes in the way immigration courts operate. And, for a number of those supporters, the most effective reform would be for Congress to change their current status as administrative bodies to federal courts under Article I of the Constitution.

Serving on Article I courts, immigration judges, like U.S. Tax Court judges, would have independence from the executive branch but not the full benefits, such as lifetime tenure, enjoyed by Article III judges.

'There is a great deal of work going on behind the scenes that will come out in early September,' said Andrew Schoenholtz, deputy director of the Georgetown University Institute for the Study of International Migration. 'There is definitely interest on [Capitol] Hill.'

Next month, the American Bar Association's Commission on Immigration is expected to release an in-depth study of immigration courts that will 'set the framework' for a serious analysis of the Article I court alternative, said Schoenholtz, who is working with the ABA and who endorses the Article I solution.

When released, the ABA study would be the second in just three months to suggest Article I as a viable remedy for the court system's many problems.

In June, Appleseed, a nonprofit network of 16 public interest justice centers, aided by Latham & Watkins attorneys, concluded a 15-month study of the immigration court system and produced a series of recommendations, including a major restructuring of the system under Article I as the only means of achieving true judicial independence.

'Can we make a lot of suggestions and cure some very, very important justice issues here?' asked Betsy Cavendish, Appleseed's executive director. 'Yes, but when we added up all those changes, did they really address the full problem? We said no. We believe we need a more thorough change here.'

INDEPENDENT DECISIONS

The problems or issues have been documented thoroughly by independent studies and congressional oversight hearings: 238 judges with an average caseload per judge of 1,200 cases, compared to 380 cases per federal district judge; four to six judges sharing one law clerk; translators too few in number and often unqualified; antiquated recording equipment (judges issue oral decisions that they personally tape record); insufficient time off the bench to study and research foreign-country developments to aid in asylum and removal decisions; huge backlog of cases; inconsistent rulings; political interference; and high level of stress and burnout.

But the driving force behind proposals for major structural change is the need to ensure independent decision-making, according to immigration law scholars, practitioners and others.

Seriously undermining that independence, they said, were past instances in which Attorney General John Ashcroft fired members of the Board of Immigration Appeals (BIA) for reasons other than misconduct, and the ideologically tainted hiring of immigration judges by Monica Goodling and other DOJ officials, as documented by the department's Office of Inspector General and Office of Professional Responsibility in a 2008 report.

Also damaging, they said, are current policies that allow government attorneys to seek ex parte communications with immigration judges and give only government attorneys and not noncitizens and their attorneys the right to file in-house complaints about 'poor quality' decisions by those judges. 'The time is right for some reform that gives immigration judges and the BIA far greater independence than they have today,' said Stephen H. Legomsky of Washington University School of Law in St. Louis.

Article I status has been 'our crusade for many, many years,' said Dana Leigh Marks, president of the immigration judges' union. And that status or other structural change has not been without some heavyweight support.

In 1981, the Select Commission on Immigration and Refugee Policy, headed by former Notre Dame President Theodore Hesburgh, recommended Article I status in its final report. In 1997, the U.S. Commission on Immigration Reform, established by the Immigration Act of 1990, also recommended that the immigration court system be removed from the Justice Department, suggesting that Article I status was a viable option, but ultimately recommending the creation of a new independent agency.

Immigration courts are administrative bodies, creatures of congressionally delegated authority to the Justice Department and the department's regulations. Their judges do not fall under the Administrative Procedure Act and its requirements for competitive selection and secure tenure.

Immigration enforcement and immigration courts reside in the executive branch because immigration issues were viewed as involving sensitive political functions that implicate questions of foreign relations -- more the province of the executive than of the judicial branch. The attorney general sets the qualifications and terms of office for immigration judges, whose salaries range from \$110,000 to \$150,000, and also has the power to reverse decisions by the judges and the BIA.

Although no clear opposition to Article I status has emerged yet, the Justice Department and others argued in the past that more coherent policy results from having adjudication done in the same department that makes the policy; immigration issues are still essentially political questions more appropriately within the scope of the executive branch; and changing to Article 1 status will cost more and create greater inefficiencies.

Russell Wheeler, president of the Brookings Institution's governance institute, in a recent paper on immigration courts, also suggested, 'Article I status might not help the courts' resource problems. They may be better off in the Justice Department -- if the Department is willing to fight for resources in Congress -- than cast free to swim on their own in hostile, anti-immigrant legislative waters.'

ON THE HILL

But none of those reasons persuade union president Marks and other Article I proponents. 'The Justice Department is still primarily a law enforcement agency and doesn't know how to handle neutral adjudication,' Marks said. 'We are very, very small and have a very different mission from the rest of the department.'

Article I status would bring greater transparency to the courts, she added, and eliminate certain conflicts and ambivalence fostered by life within DOJ. For example, she said, 13 years after Congress mandated contempt authority for immigration judges, the department has authorized its use only against private attorneys, but not government attorneys.

'Because of the development of immigration law by Congress and the courts, we have transcended the administrative model started back in the New Deal,' Marks said. Washington University's Legomsky agreed, saying their function is judicial 'in every sense': Finding facts, interpreting law and applying it to cases.

Proponents say Article I immigration courts, whether in the executive branch like the U.S. Tax Court, or in the judicial branch like bankruptcy courts, will achieve independent decision-making and legal uniformity, improve professionalism and resources, and attract a wider pool of qualified candidates for judgeships.

'Will there be some financial costs?' asked Georgetown's Schoenholtz. 'Yes. Even if it were to remain in Justice, there are significant reforms that should take place involving significant costs. What's the tradeoff here? Do we want a system that protects the public and provides due process? I think so.'

Schoenholtz, Marks, Cavendish, Legomsky and others believe there is more momentum now for a move out of DOJ than in recent years. House and Senate staffers on relevant committees said their members are discussing it and it could be part of comprehensive immigration reform in the new year.

'It would be a very big leap,' said one staffer, referring to Article I status. 'DOJ is just getting its feet wet. I know they're talking about it, but I don't know if they're ready yet. We don't want to pick a battle we can't win.'

Marks said DOJ has not supported the proposal in the past. But a DOJ spokesman, Charles Miller, told The National Law Journal, 'We have not taken a position on this matter.'

Judge Mary Schroeder of the U.S. Court of Appeals for the 9th Circuit also has been working with the circuit courts, House and Senate committees and DOJ on immigration court problems, said Hill staffers. Last fall, Schroeder urged a House subcommittee to establish those courts and the BIA by statute as permanent bodies with tenure and standards for those judges.

'It's not an ambitious plan, but a good step,' said one committee staffer, adding that Schroeder and other circuit judges could be 'powerful' help as the reform effort moves ahead.

'We're talking to people on the Hill, at DOJ, the ABA, and trying to harness the voices of attorneys at the big law firms with significant pro bono practices devoted to individual representation so all can say this system is broken,' said Appleseed's Cavendish. 'Fixes can range from small gauge to big picture. I think both kinds of change are in the air.'

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