

# The Outrageous Decision to Decertify the IJ's Union

NOVEMBER 6, 2020

Our attention is understandably focused elsewhere right now. However, it must be mentioned that on the eve of Election Day, a panel decision of the Federal Labor Relations Authority decertified the National Association of Immigration Judges (NAIJ) as a union. While this might seem to be a minor issue at the moment, it is not. At stake is the integrity of the nation's Immigration Courts and the life-changing decisions its judges make.

The NAIJ was formed in 1971, and was certified as the recognized collective bargaining representative of Immigration Judges in 1979, 41 years ago. It weathered a similar decertification effort in 2000. Then as now, the agency argued that Immigration Judges are managers, and thus ineligible to unionize. Under federal labor law, one is classified as a manager if their position "influences policy." 20 years ago, both the initial decision of the Regional Director and the appeal to the FLRA resoundingly dismissed that notion. In its [September 2000 decision](https://www.flra.gov/decisions/v56/56-097.html), (https://www.flra.gov/decisions/v56/56-097.html) the FLRA agreed with the finding below that IJs are not involved in creating agency policy. The FLRA then noted that "unlike decisions of the Board of Immigration Appeals, the decisions of Immigration Judges are not published, do not constitute precedent, are binding only on the parties to the proceedings, and are subject to *de novo* review. The RD accordingly concluded that the decisions of the Judges do not influence and determine the Agency's immigration policy, in contrast to the decisions of the Board."

In two decades, the only change to the above is that while the IJ's findings of law remain subject to *de novo* review, their findings of fact are now reviewed for clear error. Of course, facts are entirely case-specific, and thus have no influence whatsoever on policy. So as before, rather than create or influence policy, IJs implement established policy. Yet EOIR once again sought decertification. At the hearing in January, EOIR stipulated that the judges' duties and responsibilities had not changed since the prior decision. As reported in [an article covering the hearing](https://www.govexec.com/management/2020/01/trump-administration-makes-its-case-break-immigration-judges-union/162288/), (https://www.govexec.com/management/2020/01/trump-administration-makes-its-case-break-immigration-judges-union/162288/) EOIR's Director, James McHenry, testified that Immigration Judges are not supervisors, adding that they "are at the bottom of the org chart so they don't supervise anything," and further noted that "they cannot hire or fire anyone." Nevertheless, he argued that because an Immigration Judge's decision becomes a final ruling binding the agency if not appealed, Immigration Judges influence policy.

The Regional Director dismissed the claim based on the above arguments and testimony. But there was always a sense that the administration had something up its sleeve. That "something" turned out to be two Trump appointees, FLRA Chairperson Colleen Duffy Kiko, and FLRA Member James T. Abbott. They have jointly [issued a series of decision](https://www.govexec.com/management/2020/10/labor-authority-abandons-decades-precedent-episcerates-union-bargaining-rights/168977/) (https://www.govexec.com/management/2020/10/labor-authority-abandons-decades-precedent-episcerates-union-bargaining-rights/168977/)[s](https://www.govexec.com/management/2020/10/labor-authority-abandons-decades-precedent-episcerates-union-bargaining-rights/168977/) overturning decades of precedent to erode the rights of federal employees' unions, a result clearly favored by the administration that appointed them. The two stayed true to form in decertifying the NAIJ. The FLRA's lone Democratic appointee, Ernest DuBester, [issued a scathing opinion](https://www.flra.gov/decisions/v71/71-207.html) (https://www.flra.gov/decisions/v71/71-207.html) in the NAIJ's case, which concluded with the following language:

This is the antithesis of reasoned decision making. Based upon the conclusory nature of the majority's analysis, along with the facetious manner in which it reconciles its decision with Authority precedent precluding collateral attacks on unit certifications, it is abundantly clear that the majority's sole objective is to divest the IJs of their statutory rights. Once again, I refuse to join a decision "so fundamentally adverse to the principles and purposes of our Statute."

By deciding in this matter, the decision violates the FLRA's own rules regarding when such reversals of past holdings are allowed. Moreover, not that it matters to Chairperson Kiko and Member Abbott, but if allowed to stand, their decision ignoring the NAIJ's 41 years as a certified union and reversing its own precedent without any reasoned basis will accomplish the following damage.

First, Immigration Judges would lose their voice, collective bargaining rights, ability to be individually defended by their union representative, and their ability to push back against the relentless attack on their independence, neutrality, and ability to fulfill their proper function as a check against executive branch overreach. Second, NAIJ officers have remained the only Immigration Judges able to allow the public to peek behind the scenes at these tribunals, by speaking at law schools and conferences (with the exception of management level judges who may be permitted to state the party line, sometimes by reading it from index cards). As several leading scholars explained in [an article in Slate](https://slate.com/news-and-politics/2019/10/immigration-judges-gag-rule.html) (https://slate.com/news-and-politics/2019/10/immigration-judges-gag-rule.html)[s](https://slate.com/news-and-politics/2019/10/immigration-judges-gag-rule.html): "Judges and asylum officers are being

instructed to decide cases in ways that many contend are [contrary to law](#) (<https://www.buzzfeednews.com/article/chrisgeidner/sessions-domestic-gang-violence-asylum-decision-illegal-judg>). A virtual gag rule has been placed on them in the context of law schools and the broader public. This denies information to coming generations of lawyers and eliminates public discourse on some of the most critical civil rights issues of our time.”

But of great importance is a point I raised last year in [an article I wrote for Law360](#) (<https://www.law360.com/articles/1191498/doj-s-latest-effort-to-undermine-impartial-immigration-bench>) [Law360](#) (<https://www.law360.com/articles/1191498/doj-s-latest-effort-to-undermine-impartial-immigration-bench>) on the decertification effort: the administration’s citing to a recent decision of the Supreme Court in the case of [Lucia v. SE](#) ([https://scholar.google.com/scholar\\_case?case=1310462815823075880&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholar](https://scholar.google.com/scholar_case?case=1310462815823075880&hl=en&as_sdt=6&as_vis=1&oi=scholar)) [C](#) ([https://scholar.google.com/scholar\\_case?case=1310462815823075880&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholar](https://scholar.google.com/scholar_case?case=1310462815823075880&hl=en&as_sdt=6&as_vis=1&oi=scholar)):

while irrelevant to the management inquiry, the citing of *Lucia* points to another motive of the DOJ. In a leaked internal memo, the Justice Department indicated its interpretation of the decision as a basis to bypass the Merit System Protection Board, allowing the Administration to more easily terminate ALJs whose decisions don’t align with its political views. Such actions would constitute a troubling attempt by the executive branch to influence case outcomes. Similarly, decertifying the NAIJ would simplify the removal of IJs whose decisions are at odds with the administration’s stated immigration goals by eliminating the present collective bargaining agreement’s right to an independent arbitrator in matters concerning IJ discipline and termination.

Just prior to the FLRA’s decision, an executive order (<https://www.whitehouse.gov/presidential-actions/executive-order-creating-schedule-f-excepted-service/>) was issued creating a schedule of career federal employees who can be more easily fired for purely political reasons (such as issuing decisions not in line with the administration’s views). By ruling that IJs influence agency policy (contrary to its prior decision), the FLRA has put the Immigration Judges squarely in the crosshairs of the new executive order. To be clear: Immigration Judges whose neutral and independent application of the law would lead them to issue decisions the administration doesn’t like would be subject to easy termination. And of course, having just lost their union, those judges will have lost their best means of challenging such termination. Then, the hiring of their replacements would become even more nakedly partisan.

While it seems as I write this there will be a new administration come January, that doesn’t render this issue irrelevant. First, the earlier decertification effort in 2000 occurred under a Democratic administration. Second, leaving the above ruling in place would allow it be used as a weapon in the ways described by any subsequent administration. Whatever one’s political leanings or views on immigration, we should all be able to agree that decisions of such importance should be rendered by fair, neutral judges by applying law to facts, protected from rank political pressures.

The creation of an Article I Immigration Court is ultimately the most durable way to guarantee the independence of these vital tribunals, but the evisceration or protections caused by allowing this decision to stand is too egregious to ignore even in the short term. It is therefore hoped that readers will amplify the news of the decision and all it means. It is hoped those with the capacity to do so will provide amicus or other legal support for further actions by the NAIJ to legally challenge the FLRA decision. And the decision must be brought to the attention of an incoming Biden administration, which has so much damage to correct

There also needs to be consequences for those who abandoned their obligation of fairness and neutrality under the present administration. FLRA Member DuBester is to be applauded for continuing to strongly voice his defense of justice in the dissent. But perhaps a Biden administration can assess whether Kiko and Abbott might be better suited for other work.

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