



## LexisNexis Legal NewsRoom Immigration Law

### Polly A. Webber: Muzzling America's Immigration Judges is a Travesty

[\*Polly A. Webber\*](#), Nov. 19, 2020 - Muzzling America's  
Immigration Judges is a Travesty

"It can't be much of a surprise that I should have deep insight and strong feelings about the current state of our Immigration Courts, after more than forty years working in immigration law, twenty-one of them as an Immigration Judge appointed by Attorney General Janet Reno in 1995. Having retired in 2016, the issues I noted have become radically more pronounced and dire.

What do children in cages, refugee camps in Mexico, TV judges, lengthy delays and erratic scheduling have in common? They are all a part of the new look of the Trump Immigration Court, a shift in style and substance that is extraordinarily dismaying in many of its aspects. The Immigration Court is not an independent judicial tribunal. It is housed in a small agency within the Department of Justice (DOJ). Because of that placement, the Court has been plagued by a conflicted, dual identity, aspiring to be an independent tribunal while housed in law enforcement. It was only a matter of time before this politicized enforcement branch infected the Court.

Immigration Judges were recognized in 1979 as a collective bargaining unit called the National Association of Immigration Judges (NAIJ). Why did the judges feel a need to seek the protection of a labor organization? Quite simply, almost none of the people managing the huge bureaucracy of the Court actually spend any time in courtrooms. These high-level policy makers often have no practical knowledge of how the Court functions, and this defect has persisted through multiple political administrations. The DOJ issues policy and practice memoranda that bind judges without consulting them about their practical impact. Thus, a need arose for collective bargaining to assure input from the judges who implement these edicts.

On November 2nd, in an action by DOJ to decertify NAIJ, the Federal Labor Relations Authority (FLRA), remanded the action back to the Regional Director for a final decision, finding that Immigration Judges influence policy and are thus managers. That notion is laughable. Applying established law to a particular case is not influencing policy. Virtually every decision the judges make is subject to review and reversal by higher courts. Generally, judges are under the thumb of DOJ, ignored or ridiculed by leadership. It has gotten far worse for my colleagues after I left at the end of 2016.

The current finding is indefensible. The FLRA previously rejected nearly identical legal arguments made during the Clinton Administration. This time, with no reasoned basis, the FLRA adopted the government's previously rejected argument, despite even more significant encroachment by the DOJ on Immigration Judges' authority and increased micro-management since 2000. The administration was able to succeed in turning the FLRA because, out of its three current members, it has only one Democrat, and their votes follow party lines these days.

Justice for those who appear before the Court has suffered from the marginalization of Immigration Judges. Respondents have decreasing access to legal representation and continuances to find counsel have been curtailed severely. Moreover, the time allowed in Court to present these complicated and life-altering proceedings has been dramatically limited by DOJ policies, despite the traumatized population served.

How did this happen? With increased politicization, Immigration Judges do not have a voice in the practical logistics that dramatically impact their ability to render fair and impartial decisions. Worse yet, the public has been shielded from the deterioration of due process at the Court. Immigration Judges are not permitted to speak publicly, and only NAIJ officers have been allowed to speak to the press. Sitting Immigration Judges have been stripped of the ability to teach or discuss their work during this administration. Because NAIJ has been highly critical of the administration over the past few years, DOJ is trying to silence NAIJ from letting the world know that atrocities are at work behind the wall surrounding the Immigration Court.

The Trump Administration silenced the judges even as it was oppressing them by taking away normal judicial tools to manage a court calendar. Asylum standards were whittled

away by executive fiat and the judges were told, in no uncertain terms, that they would be punished if they did not toe the line. If NAIJ is decertified, the officers may no longer have authority to speak to the public or the press. A major step has been taken to strip that away.

I am hopeful that in a Biden/Harris Administration, these wrongs can be rectified, and some semblance of normalcy restored. NAIJ needs to be a certified labor organization. The Immigration Judges need to be restored to at least their former status, with discretion and tools to conduct their hearings fairly, efficiently and without political interference.

The only enduring solution, recognized by most stakeholders, is to remove the Court from DOJ and make it an Article I Court, much like Tax and Bankruptcy Courts. Stakeholders agree that serious management and operational problems exist that cannot be cured simply by hiring more judges. Notably, while the judge corps has nearly doubled in the last four years, the backlog has increased dramatically to nearly 1.3 million cases. A drastically modernized court management system with current technology, assured by a move to an Article 1 structure, is the only reliable way to provide consistent and impartial justice which serves all."

*Polly A. Webber is a retired Immigration Judge and a former National President of the American Immigration Lawyers Association. She has over forty years' experience in this field, writing and speaking extensively. [www.pollywebber.com](http://www.pollywebber.com)*