DOJ's Latest Effort To Undermine Impartial Immigration Bench

By **Jeffrey Chase**

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On Aug. 9, the U.S. Department of Justice filed a petition to decertify the National Association of Immigration Judges on the grounds that its members are "management officials" who should thus be precluded from unionizing. Formed in 1971, the NAIJ has been certified as the national immigration judges' union since 1979.

The Department of Justice unsuccessfully took the same action some 20 years ago, under then-U.S. Attorney General Janet Reno. In September 2000, the Federal Labor Relations Authority upheld a determination that immigration judges are not managers.

The present petition cites to a few minor legal developments in the 19 years since, none of which would alter the FLRA's prior finding. Now as then, immigration judges do not formulate, determine, or influence the policies of the agency." They cannot hire, fire, promote or issue performance reviews for any employees, including their own law clerks and administrative assistants.

Immigration judges are not asked for their input or analysis of pending legislation or regulations that impact their work. At present, they are not even allowed to speak at conferences or law schools, because the administration does not consider them qualified to speak on behalf of the agency or its policies.

Also, the judges' decisions do not create binding precedent. Such decisions are reviewed on appeal by the Board of Immigration Appeals, and in some instances, by the attorney general. San Francisco Immigration Judge Dana Marks, president emeritus of the NAIJ, recently told me in an email that she is not authorized to order pencils to use in her courtroom.

The department's move is the latest escalation of its efforts to curb judicial independence. The administration has criticized decisions of Article III judges hampering some of its attempts to impose new immigration restrictions.

For example, in response to a recent decision in Padilla v. U.S. Immigration and Customs Enforcement,[1] blocking a decision by Attorney General WIlliam Barr to deny certain categories of asylum seekers bond hearings, the White House press secretary decried the fact that "a single, unelected district judge" could impose "her open border views on the country." Such statement conveniently overlooked the fact that such decision was in response to an attempt by the attorney general, a single, unelected official who is not a judge, to impose his closed border views on the country.

Unlike Article III judges, the immigration judges are under the direct control of the attorney general. Former Deputy Attorney General Rod Rosenstein instructed a group of newly hired immigration judges in March that they are "not only judges," but also employees of the Department of Justice, and members of the executive branch. As such, Rosenstein stated, IJs must "follow lawful instructions from the Attorney General [our nation's chief federal prosecutor], and ... share a duty to enforce the law."[2]

According to former Immigration Judge Rebecca Jamil, addressing a group of former immigration judges, new immigration judges have been told in their training that they are not really judges, but Department of Justice employees first and foremost. At the Federal Bar Association Immigration Law Conference in May, Immigration Judge Lawrence Burman described to me how a newly hired judge observing in his courtroom reacted with surprise when the former granted relief. The two weeks of headquarters training left the new judge with the belief that such claims could only be denied.

An attorney who declined to be named in this article told me she witnessed another new judge, sworn in on March 15, state in open court that she has to deny gang violence-based asylum claims because of the attorney general's "specifically stated language about gangs" in his precedent decision Matter of A-B-,[3] and as the attorney general is her boss, she has to follow what he says.

Through such indoctrination, the agency seeks to compel immigration judges to become enforcers of the administration's politically biased views on immigration, and to quickly deny cases that the attorney general deems unworthy.

The immigration judge's union has been an effective and vocal force in the effort to preserve judicial independence. The NAIJ has testified before Congress and issued press statements about how the recent imposition of quotas and deadlines has compromised immigration judges' independence by forcing judges to at times choose between due process and preserving their own jobs.

The NAIJ has been particularly effective at arguing how such actions support the need for an independent Article I immigration court, outside of the control of the executive branch. The idea has been endorsed by numerous law groups, including the American Bar Association and the Federal Bar Association, and is now a common talking point among members of Congress. The move to decertify the NAIJ is clearly an effort to end such efforts.

A statement issued by Reps. Jerrold Nadler, D-N.Y., and Zoe Lofgren, D-Calif., chairs of the House Judiciary Committee and its Subcommittee on Immigration and Citizenship, recognized the decertification petition as "blatant retaliation for this opposition and an obvious attempt to shield immigration court operations from public view."

The congressional leaders continued that "the Administration's attempt to silence immigration judges by engaging in frivolous union busting tactics underscores why we need an immigration court system that is separate and independent from the Executive Branch. In the coming months, the Judiciary Committee will hold hearings to explore the current state of the U.S. immigration court system and develop a foundation for legislation to create an independent immigration court."

In seeking decertification, the DOJ cites to five developments since the FLRA's 2000 decision. The first is a 2002 regulatory change requiring the BIA to review an immigration judge's findings of fact only under a "clear error" standard, while continuing to review questions of law de novo. Questions of fact are specific to an individual case, and therefore do not constitute the type of legal determination that might be construed as a policy matter. Nevertheless, the changed standard only accords increased deference to the immigration judge's findings, but in no way imbues them with precedential status.

The second and third points raised by DOJ are essentially the same: that the BIA by regulation may increasingly affirm IJ decisions without opinion. Ironically, this argument

validates the critics of the DOJ who argue that practices such as affirmances without opinion are nothing short of a "rubber stamp" position of the BIA.

Again, such practice in no way makes the individual IJ decisions precedential or a statement of agency policy. Furthermore, new regulations allow the attorney general to certify to himself and rewrite IJ decisions in which he disagrees with the outcome, something that was previously limited to BIA decisions.

The fourth point raised by the DOJ is that IJs presently hear a greater number of credible fear and reasonable fear reviews than they did in 2000, and that such cases may not be further appealed to the BIA. Such cases do not involve full hearings — an episode of "Last Week Tonight" played the audio of one such hearing in its entirety, clocking it at a minute and a half and noted that the need for an interpreter had doubled its length. There is no formal testimony and no right to representation by an attorney.

There is no formal decision listing the facts and explaining the legal reasoning. Nothing about such hearings can be even generously construed as setting precedent or agency policy. And the same argument was rejected by the FLRA during the last round of agency attempt to decertify.

This brings us to the DOJ's final point, citing the U.S. Supreme Court's recent decision in Lucia v. U.S. Securities and Exchange Commission. Such argument is a red herring. Lucia involved whether administrative law judges — which IJs are not — are considered "officers" under the Constitution, which relates to the requirements involved in their hiring process, an entirely different question from whether they are managers under the law.

But 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 immigration judges 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.

Jeffrey S. Chase is a former immigration judge in New York City and is the founder of the Round Table of Former Immigration Judges, which was awarded the American Immigration Lawyers Association 2019 Advocacy Award.

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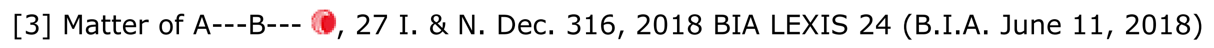
[1] Padilla v United States Immigration & Customs Enf't, 2019 US Dist LEXIS 110755 (WD Wash July 2, 2019, No. C18-928 MJP)

[2] https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-

opening-remarks-investiture-31-newly

[3] Matter of A---B--- , 27 I. & N. Dec. 316, 2018 BIA LEXIS 24 (B.I.A. June 11, 2018)