Blog

Jeffrey S. Chase

Aug 17

Aug 17 The Need For an Independent Immigration Court

On August 8, the Department of Justice issued a highly unusual press release that inadvertently illustrated the need for an independent Article I immigration court. Titled "Return to Rule of Law Under Trump Administration Marked by Increase in Key Immigration Statistics," the release proudly cited a 30 percent increase in the number of people ordered deported by immigration judges since the present administration took office (which of course corresponded with a marked decrease in the number of individuals granted relief and allowed to remain legally in the country). The press release was posted on the public website of the Executive Office for Immigration Review, the agency which includes both the immigration courts and the Board of Immigration Appeals.

On his blog immigrationcourtside.com, former BIA chairman Paul Schmidt drew some apt analogies, imagining what the reaction would be if the Supreme Court were to proudly announce that in support of Donald Trump's deregulaton initiative, it had struck down 30 percent more regulations since he took office? Or if a circuit court released a self-congratulatory statement that in support of the president's war on drugs, it issued 30 percent more convictions and 40 percent longer sentences for drug crimes than under the previous administration? Such statements would be unthinkable, and

would trigger a strong backlash. But not so for the August 8 announcement. Fortunately, EOIR itself did not sink to issuing such a statement. Unfortunately, EOIR felt the need to post the release in a prominent place on its website (either because it was instructed to do so, or was afraid not to).

The National Association of Immigration Judges (the immigration judges' union) has for years made a strong argument for the creation of an independent Article I immigration court. The 334 immigration judges are the only judges among the Department of Justice's 112,000 total employees. The concept of the judges' independence and political neutrality never really took within DOJ. When both the former INS and EOIR were housed within Justice (prior to the former being moved to the Department of Homeland Security after the reorganization that followed the 9/11 tragedy), INS higher-ups would make complaints about immigration judges known to the Deputy Attorney General's office, which oversaw EOIR's director, a process that would be highly improper in other courts. When 1996 legislation provided immigration judges with contempt power over attorneys appearing in their courts, INS managed to indefinitely block implementing DOJ regulations because the agency did not wish to afford immigration judges such authority over their fellow DOJ attorneys within INS; as a result, the judges still lack such contempt power 21 years later.

The Office of the Chief Immigration Judge has to my knowledge always allowed immigration judges the independence to decide cases as they see fit. I am not aware of any case in which an immigration judge was directed to reach a particular result. That having been said, it should be noted that the BIA "streamlining" along political grounds that occurred under former Attorney General John Ashcroft had a severely chilling effect on that tribunal's decision making; furthermore, EOIR has never acknowledged the practical implications of case completion pressures which sometimes force a judge to choose between pleasing his higher-ups and serving due process interests. Still, until August 8, I had never seen the agency or the Department publicize orders of removal as a positive result indicative of adherence to the rule of law.

It is a cornerstone of our justice system that judges not only be impartial, but that they also avoid the appearance of impartiality. 28 U.S.C. § 455(a) requires federal judges to recuse themselves in any proceeding in which their impartiality might reasonably be questioned. How can the impartiality of an immigration judge not be questioned when the agency that employs him or her releases statements celebrating the increase in the percentage of cases in which deportations are ordered as a "return to the rule of law?"

The partisan pronouncement raises questions not only as to the independence of the judges in their decision making. It also casts a cloud over hiring and policy decisions by EOIR's management. In hiring new judges and Board members, will EOIR's higher-ups feel pressured to choose candidates likely to have higher deportation rates? Are they likely to implement policies aimed at increasing fairness or expediency? As an example, let's use what Paul Schmidt aptly refers to as "aimless docket reshuffling," in which immigration judges are detailed away from their home courts to hear cases elsewhere. Of course, this means that the individuals scheduled for hearing in the home court (who have likely been waiting two years for their hearing) need to have their cases adjourned due to the judge's absence. I have no information as to what factors go into making these detailing decisions. But hypothetically, if EOIR's managers feel pressure to produce more deportations, might they consider shifting judges in high-volume courts in large cities such as New York or Los Angeles, where the respondents are likely to be represented by counsel, have adequate time to prepare and gather evidence, and have access to call witnesses (including experts), to instead hear cases of detained, recently-arrived respondents in remote areas where they have less access to counsel, community support, evidence, or witnesses? In which of those two scenarios might the judge "accomplish" more deportations in the same amount of time?

There is some irony in the use of the term "rule of law" in the Aug. 8 press release, because rules of law take a great deal of time to develop properly. In a 2013 article titled "Let Judges Be Judges," , Hon. Dana Leigh Marks, the president of the National

Association of Immigration Judges, stated that allowing "immigration judges to consider the individual circumstances unique to each case" in an independent Article I court setting "would create a fine-tuned tool...instead of the blunt instrument that now exists." A "fine-tuned tool" is needed, as many of the claims presently being heard involve very complex legal issues. Many cases involve those fleeing an epic humanitarian crisis in Central America. Case law continues to develop, as leading asylum attorneys and scholars have spent years crafting nuanced theories to clarify the nexus between the serious harm suffered or feared and one of the five protected grounds required for a grant of asylum. In other claims from countries such as Albania or the former Soviet republics, highly detailed testimony from country condition experts is required to educate judges as to specific dangers not mentioned in the generalized State Department country reports. This type of painstaking development of the record cannot be accomplished under conditions termed in a 2009 report of the Appleseed Foundation as "assembly line injustice."

In summary, a Department of Justice which chooses to publicly celebrate accelerated hearings resulting in orders of deportation as a positive development cannot oversee an immigration court system which aspires to provide "due process and fair treatment for all parties involved."

For more on this topic, see Dana Leigh Marks, "Immigration Courts Need Independence to Work Fairly and Efficiently," Newsday, July 16, 2017

http://www.newsday.com/opinion/commentary/want-to-boost-immigration-courts-1.13801499

Paul W. Schmidt, "We Need an Article I United States Immigration Court -- NOW, immigrationcourtside.com

http://immigrationcourtside.com/we-need-an-article-i-united-states-immigration-court-now/

Also see the website of the National Association for Immigration Judges:

www.naij-usa.org/publications

JEFF CHASE

Jeffrey S. Chase is an immigration lawyer in New York City. Jeffrey is a former Immigration Judge, senior legal advisor at the Board of Immigration Appeals, and volunteer staff attorney at Human Rights First. He is a past recipient of AILA's annual Pro Bono Award, and previously chaired AILA's Asylum Reform Task Force.

https://www.jeffreyschase.com/blog/2017/8/17/the-need-for-an-independent-immigration-court