

Opinion

Wanted: independent immigration judges

By ROBERT M. MORGENTHAU
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Immigration court needs impartial jurists. (Mary Altaffer / AP)

In immigration courts all over the country, thousands of individuals make their case for asylum every year. This number includes people who have fled some of our civilization's greatest horrors: sectarian violence, gang violence, political persecution, starvation and natural disaster.

Though many migrants carry with them stories of past tragedy, not all of these stories are sufficient grounds for asylum under our laws. The life-altering determination of whether an applicant's experience meets the criteria for asylum (or other forms of immigration

relief) is made by an immigration judge, and, if appealed, is reviewed by the Board of Immigration Appeals (BIA).

Despite their role in adjudicating complicated and highly sensitive cases, immigration judges and judges on the BIA are not members of the judicial branch. They neither undergo a Senate confirmation process, nor are they afforded life tenure — the traditional means of ensuring judicial independence and of guarding against the politicization of the judicial process. Instead, these judges are part of the Executive Office for Immigration Review (EOIR), an agency within the Department of Justice (DOJ); they are attorneys appointed to their posts by the attorney general.

Put another way, judges selected unilaterally by a political appointee are responsible for the weighty decision of whether someone is permitted to stay in the United States or whether he or she will be deported to the same conditions — sometimes life-threatening — that he or she fled.

This method of appointing immigration judges is wrong.

While there can be no doubt that many qualified individuals serve on our nation's immigration courts and that these individuals strive to be neutral arbiters of the law, it is obvious that the current system is vulnerable to abuse. Immigration judges are charged with implementing immigration laws reflecting the will of Congress, but may be hired or evaluated based on how well they comport with the agenda of the attorney general or the President.

As the executive branch ramps up the hiring of immigration judges, questions have naturally surfaced concerning how personnel decisions within the DOJ will affect the fairness of immigration adjudications.

These questions are not unsubstantiated. After all, a little more than a decade ago, the inspector general of the DOJ found "that the most systematic use of improper political or ideological affiliations in screening candidates for career positions occurred in the selection of immigration judges, who are career employees who work in the [EOIR]." This finding demonstrates that the threat of politics creeping into what should be neutral immigration proceedings is not a bare possibility; it has already happened. Today, this threat is only exacerbated by the highly politicized nature of immigration in the United States.

Among other proposals, Congress should consider creating an Article I court dedicated to immigration. These, also known as legislative courts, are established by Congress pursuant to its power under Article I of the Constitution.

The U.S. Tax Court and the U.S. Bankruptcy Court, each Article I tribunals, are helpful prototypes. Tax Court judges are nominated by the President, confirmed by the Senate and serve lengthy terms of 15 years.

The idea of an Article I immigration court is hardly new and, over the years, has drawn the support of important stakeholders. The National Association of Immigration Judges has advocated for such an independent court for the last 20 years. The American Bar Association and other bar associations have endorsed the idea. Sen. Kirsten Gillibrand and others have drafted legislation that would create such a court.

The decision of whether someone is able to find a new life in America should not be based on the political whims of any particular administration: it should be the result of an independent adjudication on the merits.

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