



POSITION STATEMENT

MISCHARACTERIZATION OF IMMIGRATION JUDGES BY THE UNITED STATES DEPARTMENT OF JUSTICE

May 5, 2016

In oral arguments before the D.C. Circuit Court of Appeals on February 16, 2016, the United States Department of Justice (DOJ) argued that Immigration Judges are “low-level employees” similar to FBI agents, or so-called “line” Assistant U.S. Attorneys. This characterization was made in order to justify the refusal by the government to make public the names of Immigration Judges accused of misconduct either on or off the job in the lawsuit brought by the American Immigration Lawyers Association. (*AILA v. EOIR*, No. 15-5201 (D.C. Circuit)). The National Association of Immigration Judges (NAIJ), on behalf of the Immigration Judges, feels compelled to comment on this inaccurate assertion.

The NAIJ is the recognized collective bargaining unit for all United States Immigration Judges. NAIJ is dedicated to promoting independence and enhancing the professionalism, dignity and efficiency of the Immigration Court. We work to improve our court system through testimony at congressional oversight hearings, educating the public, legal community and media, and lobbying for immigration court reform. We protect the interests of our members, collectively and individually, through dynamic liaison activities with Department of Justice’s Executive Office for Immigration Review management, formal and informal grievances, and collective bargaining

Despite the fact that Immigration Judges are the category of persons most affected by the outcome of the litigation, NAIJ has not taken a position in the FOIA litigation between AILA and the Department of Justice (DOJ) and continues not to endorse either party. However, the DOJ’s description of the role of immigration judges as “akin to lower level DOJ employees, such as a

Federal Agent, a Drug Enforcement Agent or a line assistant United States Attorney”, is a mischaracterization of the role, duties, responsibilities and the level of discretion exercised by Immigration Judges. It undermines the efforts of DOJ in training Immigration Judges’ on adherence to the Code of Judicial Conduct and the emphasis placed on selecting Immigration Judges who will maintain a proper judicial temperament. This mischaracterization is also contrary to the portrayal of the role and duties of an Immigration Judge to the media and to the public.

Immigration Judges adjudicate litigation between foreign nationals and the Department of Homeland Security when the Department is acting in its prosecutorial function. Immigration Judges are neutral adjudicators; we are attorneys appointed to serve as judges. At all times Immigration Judges’ must maintain the neutral and detached demeanor of judicial adjudicators. On occasion the litigation is heated; it is the Immigration Judges’ responsibility to make certain that proper courtroom demeanor is maintained without favoring either party.

Our responsibilities, among many, include finding facts and applying the law. As neutral adjudicators Immigration Judges exercise judgment in the interpretation and application of the law, and in the exercise of discretion. The Immigration Judges’ fact finding is subject to a clearly erroneous standard of review by the Board of Immigration Appeals (BIA). 8 CFR 1003.1(d)(3)(i). This regulation gives the Immigration Judge the authority to make significant fact and credibility determinations, with only limited review of those decisions. The Immigration Judge must apply the appropriate law as found in statutes, regulations, decisions of the Board of Immigration Appeals and controlling precedent of the respective Circuit Courts of Appeal and the United States Supreme Court. However, when those sources of law do not provide an answer to the legal issue presented, it is incumbent upon the Immigration Judge to fashion a resolution by interpreting the law to reach a judicial determination supported by that Immigration Judge’s interpretation of the extant body of law.

Immigration Judges are subject to supervision by an Assistant Chief Immigration Judge. However, the regulations prohibit interference with judicial independence in decision-making. Decisions made by Immigration Judges are subject to review on questions of law and discretionary findings by the BIA, if the case is appealed. On appeal to the BIA the factual findings are rarely disturbed. These are impactful decisions made by Immigration Judges without supervision of the content of their resolution. While the BIA retains jurisdiction over discretionary determinations - the weighing of factors that is the heart of a discretionary finding- it is the Immigration Judge who makes that determination in the first instance, finds the facts that support the decision, and does so guided by case law and the Immigration Judges’ independent judgment. If further appeal is taken to the appropriate U.S. Circuit Court of Appeals, the Immigration Judges’ independent fact finding and credibility determinations are almost never disturbed.

Immigration Judges adjudicate relief applications including asylum, cancellation of removal for both permanent and non-permanent residents, waivers and adjustment of status. These decisions are made by the Immigration Judge in his or her sound discretion and independent judgment. The decision of the Immigration Judge can have a profound impact upon the Respondent and his or her family with regard to remaining legally in the United States, being afforded asylum protection by the United States, to bringing family members to the United States. The Immigration Judges' decisions can, in some cases, permanently bar the Respondent from the United States. Immigration Judges adjudicate bond hearings and the Immigration Judges' decisions impact the Respondent's liberty interests as well as the safety of the community and public interest.

Immigration Judges work at a high level of independent fact-finding and decision making, like other trial judges in courts across the United States. To label them as lower level DOJ employees is a gross mischaracterization of the independent functioning and decision making of an Immigration Judge.

In addition, NAIJ is concerned about the release of disciplinary information. The current process of discipline meted out by the Executive Office for Immigration Review (EOIR) and the way it is reported lacks basic due process protections that are inherent in judicial conduct boards. The EOIR process of who gets disciplined, why, and the "appropriate" punishment is opaque. The decider is part of the EOIR management team and it is essentially an employer management tool, subject to being used as a way to show control over Immigration Judges, to bring Judges into conformance with EOIR and DOJ priorities and to enforce the political objectives of a given administration. In addition, the way complaints and their disposition are recorded does not accurately reflect reality. Sometimes Judges are not even aware that a complaint was filed or that they were "counseled," and the Judge's response to the complaint is not recorded in the records kept by EOIR that have been released in the litigation. The disciplinary information revealed in this litigation may not be accurate as to the events that led to the discipline and issued without the benefit of an explanation by the Immigration Judge as to the circumstances of the incident.

Immigration Judges' reputations can be damaged by the release of inaccurate information to the public that has not been properly scrutinized. As Immigration Judges, we understand that we hold special and public positions of trust. We would endorse a fully public complaint process, where Immigration Judges are provided the same due process as the litigants who appear before us. So long as the discipline process remains deeply flawed without formal, procedurally sound criteria for disciplinary actions and outcomes, and is devoid of any due process protections for Immigration Judges, NAIJ has deep concerns and reservation about the release of this information.

The author is the President of the National Association of Immigration Judges. The views expressed here do not necessarily represent the official position of the United States Department of Justice, the Attorney General, or the Executive Office for Immigration Review. The views represent the author's personal opinions, which were formed after extensive consultation with the membership of NAIJ.

For additional information about NAIJ, please visit our website, www.naij-usa.org or contact President Dana Leigh Marks at danamarks@pobox.com