



Releasing Further Information Will Not Lead to Clarity and Will Compound the Harms and Unfair Process: The Problematic Context of AILA's FOIA Suit

The recent decision of the DC Circuit reversing the district court's ruling protecting the names of Immigration Judges (IJs) from disclosure on an across the board basis, while an understandable effort to provide transparency for the public we serve, will instead reveal a distorted system, incapable of providing true clarity. Without correcting the discipline system under which we are reviewed, and assuring due process for these judges, the information released will be as misleading and flawed as the system which produced it.

AILA had made a request under the Freedom of Information Act seeking disclosure of disciplinary records of Immigration Judges. The government response redacted names of judges and other identifying information, asserting the judges' privacy interest outweighed the public's interest in learning the judges' names. AILA then filed suit in district court arguing that disclosure was required. The DC Circuit Court of Appeals late last week found that the judges' names could not be categorically withheld, and remanded to the lower court for it make specific findings as to the reasons striking the transparency-privacy balance in each instance.

Most people, lawyers included, fail to understand that the position of Immigration Judges is a legal anomaly. The law under which we serve describes us as attorneys appointed to serve as judges. We are called judges and held to standards of conduct that apply to judges, yet IJs are considered attorneys by the U.S. Department of Justice. This classification means we are subjected to the orders of supervisors, and like any employee, are at risk of discipline for failure to follow the instructions of our supervisors. Immigration Judges are viewed by DOJ as low level employees. Rather than treating misconduct from a judicial perspective where discipline generally is limited to serious misbehavior, Immigration Judges can be disciplined for mere insubordination or failing to follow a supervisor's instructions outside the courtroom, even if their courtroom performance is flawless.

What is even worse is the star chamber manner in which Immigration Judge discipline is meted out. Not infrequently, Immigration Judges have been investigated and discipline proposed without even advising the Judge that a complaint has been filed, let alone asking the Judge to provide his or her side of the story. Even when the Judge filed a response, it frequently was not released by the Agency in these materials. So the public is seeing only the Agency's side of these matters.

For example, in AILA FOIA Complaint Number 82, the supervisory Assistant Chief Immigration Judge (ACIJ) issued a letter of written counselling to an Immigration Judge based on descriptions of the Judge's behavior from other parties, without giving the Judge the chance to say whether these descriptions were accurate. The ACIJ refused a request from the Judge and the union to discuss the matter, even to talk about what steps could be taken to avoid potentially problematic behavior in the future.

In AILA FOIA Complaint Number 589, while reference is made to the Immigration Judge's response to the complaint in the decision to suspend, the response itself was not released. In addition, the emails released in Complaint Number 589 show that the ACIJ was affirmatively seeking out in order to discipline the Judge. The December 13 email from a DHS attorney to the ACIJ starts, "If you're looking for a case which demonstrates [redacted] incompetence and inefficiency [redacted] may be it." Clearly this ACIJ and this DHS Attorney had been in discussion for quite some time on how to bring charges against this Judge, as other statements in the email chain also show.

Frequently, the Office of the Chief Immigration Judge fails to advise the Immigration Judge of a complaint when it is not considered meritorious, although its inclusion in the data leads to a skewed view of the number of complaints lodged against that Judge. Even more frequently, the Chief Judge's office records that a Judge has been "counselled" about his/her behavior, when all that happened was a short, seemingly informal, conversation between the ACIJ and the Judge. Occasionally, Judges who have been "counselled" were unaware that they were being counselled.

Perhaps the most problematic aspect of the data as currently compiled is the extremely high number of referrals from the Board of Immigration Appeals (BIA) which are misleadingly characterized as complaints. Such referrals are not disciplinary matters, although EOIR has chosen to treat them as indistinguishable from discipline in the context of these records. BIA referrals include matters that can implicate administrative policies or mere errors that would warrant an ACIJ deciding if additional training would be helpful. These are internal matters that do not involve actual misconduct, but rather simply involve supervisory oversight. Unfortunately, the manner in which these records are kept conflates low level discipline with serious, problematic issues and therefore leads to highly misleading information if relied upon to show actual misconduct

The ultimate outcome and true impact of the ruling remains to be seen because the Circuit Court remanded the case to the district court. Now the Executive Office for Immigration Review (EOIR) must decide if they are going to continue to withhold the identity of any Immigration Judges, and if so, must state a particular reason specific to that situation for doing so. Nevertheless, even if some Judges' names are released, the result will not be truly transparent and helpful to the public because of fatal flaws in the EOIR discipline system. We need EOIR to reform the existing complaint process to make it conform to a judicial model, commensurate with the actual judicial duties of Immigration Judges. In the meantime, revealing the identities of Immigration Judges is unwarranted and likely damaging to their reputation, while serving no real benefit to the public because of the highly unreliable nature of this data.

August 3, 2016

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