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DEVELOPMENT IN THE JUDICIAL BRANCH

CONTROVERSY REEMERGES OVER HIRING, REVIEW OF IMMIGRATION JUDGES

Nearly two years after former Attorney General Alberto R. Gonzales proposed a slate of reforms to quell growing discontent over the quality of decisions from Immigration Judges and the Board of Immigration Appeals (BIA), a series of critical reports this summer thrust the nation's immigration courts back in the national spotlight. In July, a Justice Department internal investigation into politicized hiring found systematic abuse dating back to 2004 in the screening and selection of Immigration Judges and members of the BIA. In addition to violating civil service rules, the process also reportedly prevented the Executive Office of Immigration Review (EOIR) from filling numerous vacant positions. Two months later, an academic organization found the Justice Department had largely failed to implement key improvement measures Gonzales had originally proposed. At the start of the fall, the two reports were the focus of the first oversight hearing to address the nation's immigration courts by the House Judiciary Committee in more than a decade.

Gonzales initially called for a comprehensive review of immigration courts in January 2006 following "reports of judges failing to display temperament and produce work that meets the Department's standards."¹ The call for review came shortly after the U.S. Court of Appeals for the Seventh Circuit handed down its decision in *Benslimane v. Gonzales*, in which influential Judge Richard A. Posner excoriated the immigration court system and concluded that "adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice."² The following month, a front-page story in the New York Times noted that federal judges had repeatedly cited a "pattern of biased and incoherent decisions in asylum cases."³

In the wake of this and other criticism, Gonzales announced that he would direct the Justice Department and EOIR to implement twenty-two "key reforms needed to improve the performance and quality of work of the nation's immigration court system."⁴ Among other measures, Gonzales

1. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL ALBERTO R. GONZALES OUTLINES REFORMS FOR IMMIGRATION COURTS AND BOARD OF IMMIGRATION APPEALS (2006), http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html.

2. *Benslimane v. Gonzales*, 430 F.3d 828, 830 (2005).

3. Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, December 26, 2005, at A1, available at <http://www.nytimes.com/2005/12/26/national/26immigration.html>.

4. U.S. DEP'T OF JUSTICE, *supra* note 1.

pledged to: seek additional funding to hire Immigration Judges; implement a qualifying examination for new Immigration Judges; conduct annual performance examinations for existing judges; improve training for new and veteran judges; review asylum grant-rate disparities; expand the BIA; decrease the use of affirmances without opinion and increase the use of three-judge panel decisions at the BIA; and improve technological and support resources for judges.⁵

Even as Gonzales pledged to institute the reforms, however, the Attorney General's office was continuing to take political factors into account in the hiring of Immigration Judges. In July of this year, the Justice Department's Office of Inspector General and Office of Professional Responsibility jointly published the findings of an investigation into political hiring at the Justice Department, including the hiring of Immigration Judges.⁶ The report, precipitated by the testimony of former Department of Justice White House Liaison Monica Goodling,⁷ found that Goodling and other Justice Department political appointees violated both Department policy and federal law by taking political and ideological affiliations into account in soliciting and evaluating candidates.⁸ The process, in place from the spring of 2004 until the end of 2006,⁹ treated the appointment of Immigration Judges, a civil service position,¹⁰ as political appointments. As a result, the report said, the Department was "only considering essentially Republican lawyers for appointment."¹¹

Under the hiring process, implemented by then Counselor to the Attorney General Kyle Sampson,¹² EOIR was generally prohibited from announcing Immigration Judge vacancies.¹³ Instead, EOIR disclosed openings directly to the Attorney General's office, which then solicited names of candidates from the White House, Republican members of Congress, and Justice Department political appointees.¹⁴ Once accepted by Sampson, recommendations were forwarded to EOIR—sometimes without a resume—and treated as a "pre-

5. U.S. DEP'T OF JUSTICE, MEASURES TO IMPROVE THE IMMIGRATION COURTS AND THE BOARD OF IMMIGRATION APPEALS (2006), <http://trac.syr.edu/immigration/reports/194/include/Gonzales22ImprovementMeasures.pdf>.

6. OFFICE OF INSPECTOR GENERAL & OFFICE OF PROFESSIONAL RESPONSIBILITY, DEPARTMENT OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (2008), <http://www.usdoj.gov/oig/special/s0807/final.pdf> [hereinafter OIG].

7. *Continuing Investigation into the U.S. Attorneys Controversy and Related Matters: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Monica Goodling, White House Liaison, Department of Justice, pursuant to a grant of immunity).

8. OIG at 115.

9. *Id.* at 116.

10. Immigration Judge positions are categorized by statute as "an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review." 8 U.S.C. § 1101(b)(4) (2006). Career attorney positions are categorized as "Schedule A," or non-political appointee positions, by the Office of Personnel Management. 5 C.F.R. § 213.3102 (2008); see also OIG at 70.

11. OIG at 116.

12. *Id.* at 73.

13. *Id.* at 81.

14. *Id.*

sumptive hire.”¹⁵ In some cases, the Attorney General’s office extended offers to candidates whose names had yet to be transmitted to EOIR.¹⁶

In April 2006, after Monica Goodling assumed responsibility for recommending candidates to Immigration Judge positions, the screening began to include more aggressive examinations of candidates’ political leanings.¹⁷ In many cases, Goodling searched internet databases for associations between candidates’ names and politically-charged search terms.¹⁸ During interviews, Goodling reportedly asked candidates about their voting record, views on immigration, and other social issues.¹⁹ On top of violating civil service rules, the screening process also reportedly left numerous vacancies unfilled—even as EOIR told the Attorney General’s office that the shortage compromised the agency’s mission.²⁰ At the time of publication, the report stated that twenty-seven positions remained unfilled.²¹

Revelations about the politicized hiring process attracted widespread media attention, and prompted condemnations from immigration stakeholders,²² members of Congress,²³ and outside critics.²⁴ A New York Times article found that a total of thirty-one Immigration Judges were hired through the politicized process.²⁵ The article also concluded that the sixteen politically appointed judges who had decided enough asylum cases to allow meaningful statistical comparison had “ruled against asylum-seekers significantly more often than colleagues who were appointed, as the law requires, under politically neutral rules.”²⁶ Some commentators, such as the American Immigration Lawyers Association, called for politically-appointed judges either to be removed—or to remove themselves—at the end of the current

15. *Id.* at 92.

16. *Id.* at 81.

17. *Id.* at 113.

18. *Id.* at 113. According to the report, Goodlings used search-terms such as “bush or gore or republican! or democrat!” and “abortion! or gay! or homosexual!”

19. *Id.* at 104.

20. *Id.* at 116.

21. *Id.* at 114. Such concerns were confirmed by the Transactional Records Access Clearinghouse (TRAC), which, in a study that was coincidentally released the same day as the OIG report, disclosed that the number of Immigration Judges had declined since Gonzales first issued his directive (from 218 to 210). In addition, although the Justice Department had sought, but did not receive, additional funding for Judges in fiscal year 2008, it did not seek funding for judges in fiscal year 2009. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, EFFORT TO HIRE MORE JUDGES FALLS SHORT (2008), <http://trac.syr.edu/immigration/reports/189/>.

22. Posting of Patrick Young to Long Island Wins, How Politicizing Judges Shipwrecked Immigration Courts http://www.longislandwins.com/blog/in_the_news/how_politicizing_judges_shipwr.php (July 30, 2008 10:15 EST). Young is an attorney and program director for CARECEN Central American Resource Center.

23. POLITICIZED HIRING AT THE DEPARTMENT OF JUSTICE, HEARING BEFORE THE S. COMMITTEE ON THE JUDICIARY, 110th Cong. (2008) (transcript by Congressional Quarterly).

24. Editorial, *A Judicial Outrage*, LA OPINION, July 30, 2008, available at <http://www.impre.com/laopinion/opinion/editorial/2008/7/30/a-judicial-outrage-71019-1.html>; Young *supra* note 22.

25. Charlie Savage, *Vetted Judges More Likely To Reject Asylum Bids*, N.Y. TIMES, August 23, 2008, available at <http://www.nytimes.com/2008/08/24/washington/24judges.html>.

26. *Id.*

Administration.”²⁷ In response, current Attorney General Michael B. Mukasey²⁸ stated that “people hired in an improper way did not, themselves, do anything wrong. It therefore would be unfair—and quite possibly illegal given their civil service protections—to fire them or to reassign them without individual cause.”²⁹

The release of the OIG report also renewed scrutiny about the prior appointment of Garry Malphrus to the Board of Immigration Appeals.³⁰ According to the report, Malphrus, who was working in the White House at the time,³¹ contacted Sampson in November 2004 to express an interest in serving as an Immigration Judge and to “speak with someone to learn what IJs do.”³² Following his appointment in March of the following year, Malphrus later played a role in the hiring of other Immigration Judges. According to the report, Malphrus recommended a candidate for Chief Immigration Judge due, in part, to his “loyalty to the Bush Administration.”³³ In May of this year, Mukasey appointed Malphrus as one of five new members to the BIA.³⁴ In reaction to the appointment, Daniel M. Kowalski, editor-in-chief of the widely read *Bender’s Immigration Bulletin*, published an editorial asking why “hundreds of immigration attorneys, academics, sitting and former IJs and former Board members who have decades of experience” were rejected “in favor of Malphrus, a relative novice?”³⁵

Meanwhile, in early September, the Transactional Records Access Clear-

27. AMERICAN IMMIGRATION LAWYERS ASSOCIATION, POLITICIZED HIRING OF IMMIGRATION JUDGES AND BIA: NOT THE END OF THE STORY, AILA InfoNet Doc. No. 08073068 (2008), available at <http://www.aila.org/content/default.aspx?docid=26091>.

28. Gonzales resigned from office after intense pressure from Congressional lawmakers in reaction to the broader issue of politicized hiring and firing. Mukasey was nominated by President Bush to replace Gonzales on September 17, 2007 and confirmed as Attorney General by the U.S. Senate on November 8, 2007. Dan Eggen and Michael A. Fletcher, *Embattled Gonzales Resigns*, WASH. POST, August 28, 2007, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/08/27/AR2007082700372_pf.html.

29. U.S. DEP’T OF JUSTICE, PREPARED REMARKS OF ATTORNEY GENERAL MICHAEL B. MUKASEY BEFORE THE AMERICAN BAR ASSOCIATION, NEW YORK (Aug. 12, 2008), <http://www.usdoj.gov/ag/speeches/2008/ag-speech-0808121.html>.

30. *A review of the Executive Office for Immigration Review: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security and International Law of the H. Comm. on the Judiciary*, 110th Cong. (2008) (Statement of Rep. Lofgren, Chairman, House Subcomm. on Immigration, Citizenship, Refugees, Border Security and International Law) (“Was the fact that Mr. Malphrus was originally hired through the politicized process and, according to the I.G., participated in this illegal scheme of appointment taken into consideration when he was appointed?”) (transcript by Congressional Quarterly).

31. According to the report, Malphrus served as associate director of the White House Domestic Policy Council, and his resume included his experience in Republican political campaigns, such as “Bush-Cheney Florida Recount Team, Miami Legal Group, 2000.” OIG at 88.

32. OIG at 88.

33. *Id.* at 88, n.68.

34. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL MUKASEY APPOINTS FIVE NEW MEMBERS TO THE BOARD OF IMMIGRATION APPEALS (2008), <http://www.usdoj.gov/eoir/press/08/AG-BIA-appointments.pdf>.

35. DANIEL M. KOWALSKI, *BENDERS IMMIGRATION BULLETIN*, DAILY EDITION, EDITOR’S CORNER - FROM “BROOKS BROTHERS RIOTER” TO IMMIGRATION JUDGE TO BIA MEMBER: A SHORT, FAST TRIP (2008), <http://www.bibdailly.com/pdfs/BBRioter%206-2-08.pdf>.

inghouse (TRAC) released a separate study analyzing the status of the improvement measures proposed by Gonzales in 2006.³⁶ While finding the Justice Department had met a number of benchmarks, the study concluded the Department and EOIR had largely failed to accomplish the primary objectives of the proposals.³⁷ Specifically, TRAC found that EOIR failed to conduct any annual performance evaluations, implement a judicial code of conduct, or finalize rules to reduce the number of single-member affirmances without opinion at the BIA.³⁸ The study did find the Justice Department and EOIR had completed some of the improvement measures, such as appointing Assistant Chief Immigration Judges to supervise each court; implementing a new immigration court practice manual; increasing the size of the BIA from eleven to fifteen members,³⁹ and implementing a new policy requiring all EOIR staff members to refer apparent instances of fraud and abuse.⁴⁰

In many cases, however, the study found changes were only “partially implemented” or implemented “in an opaque and unmonitored way that limits their potential to meaningfully improve the Immigration Courts.” For example, while the agency had assigned Assistant Chief Immigration Judges to handle complaints against judges, it did not publish information about how the process worked or provide data on how many complaints had been processed.⁴¹ The Department disputed TRAC’s overall findings in newspaper reports, with a spokesperson stating that EOIR had “made significant progress in implementing the 22 measures, as nearly all of them are completed or near completion.”⁴² In some cases, TRAC found that slow progress on reforms represented a dispute between the Justice Department and the union representing Immigration Judges whether they should be classified as attorney-employees or as independent judges.

The political hiring scandal, the shortage of Immigration Judges, and lagging improvement measures were all discussed during a hearing on September 23 before the House Judiciary Committee—the first such over-

36. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, BUSH ADMINISTRATION PLAN TO IMPROVE IMMIGRATION COURTS LAGS (2008), <http://trac.syr.edu/immigration/reports/194/>. TRAC is a neutral data provider and analysis organization affiliated with Syracuse University. The author is a legal intern with TRAC’s Immigration Courts Project.

37. According to the report, the Department of Justice and EOIR had “failed to complete key improvement measures that go to the heart of ensuring that the Immigration Courts are staffed by capable, skilled judges that have sufficient time and resources to accurately do their job.” *Id.*

38. *Id.*

39. Although DOJ has finalized a rule increasing the BIA from eleven to fifteen members, there are currently two vacancies on the BIA. *Id.* See also Fact Sheet, Board of Immigration Appeals, <http://www.usdoj.gov/eoir/fs/biabios.htm> (last visited Oct. 17, 2008).

40. *Id.*

41. *Id.*

42. Pamela A. MacLean, *DOJ Falls Short on Promised Immigration Judge Reform, Report Says*, NAT’L LAW JOURNAL, Sept. 17, 2008, available at <http://www.law.com/jsp/article.jsp?id=1202424569699>. EOIR also published a “backgrounder” listing steps taken and claiming that “nearly all of these measures have now been implemented or are near completion.” EXECUTIVE OFFICE OF IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, EOIR’S IMPROVEMENT MEASURES: PROGRESS OVERVIEW (2008), <http://www.usdoj.gov/eoir/press/08/EOIRs22ImprovementsProgressOverview090508v2.pdf>.

sight hearing reportedly held by that committee in at least fourteen years.⁴³ Despite reassurances from EOIR director Kevin Ohlson that a new, impartial hiring process had been implemented that placed primary responsibility for selecting Immigration Judges with career EOIR officials, Democratic lawmakers remained skeptical. Democratic Representatives Zoe Lofgren, Linda T. Sanchez, and John Conyers, Jr., also pressed as to why the Justice Department and EOIR had not requested money for additional Immigration Judges in FY 2009; whether any politically hired judges were currently involved in the hiring process; and why outside groups had not had an opportunity to provide input into a new judicial benchbook. Going forward, Conyers told Ohlson, “we’re going to be watching [you] carefully.”⁴⁴

In contrast, Republican Ranking Committee Member Steve King urged the committee not to overreact to the political hiring disclosures, comparing the scandal to alleged discrimination against white males in Immigration Judge candidates during the Clinton Administration.⁴⁵ King also criticized aspects of the current legal structure that he said favored undocumented aliens, such as the inability of the government to appeal BIA decisions to the federal courts and the Ninth Circuit’s liberal practice of granting stays of removal during appeal.⁴⁶ Notably, one area where Democratic and Republic committee members agreed was in the need for increased resources. King—motivated by hopes of increased immigration enforcement—joined Democrats in saying that Immigration Judges and the BIA “should be provided with the resources needed to perform their jobs effectively.”⁴⁷

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43. *A review of the Executive Office for Immigration Review, Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security and International Law of H. Comm. on the Judiciary*, 110TH CONG. (2008) (Statement of Rep. Lofgren, Chairman, House Subcomm. on Immigration, Citizenship, Refugees, Border Security and International Law) (“I’ve been a member of the Judiciary Committee for almost 14 years, and this is the first time we’ve ever had any oversight of this activity. So I think that merits a second round of questions.”) (transcript by Congressional Quarterly).

44. *Id.*

45. In 2004 the Department of Justice settled a class action for \$11.5 million by as many as 550 white Immigration Judge applicants who claimed they were not hired because they were white males in 1994 and 1995. The settlement agreement was not an admission of discrimination on the part of the agency. *Durnford v. Ashcroft*, EEOC Case No. 100-2000-07059X (2004), available at <http://www.katorparks.com/Durnford%20Order%20settlement.pdf> (final approval of settlement agreement).

46. *A review of the Executive Office for Immigration Review*, *supra* note 43.

47. *Id.*