

DUE PROCESS AND DECISIONMAKING IN U.S. IMMIGRATION ADJUDICATION

SUSAN BENESCH*

AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW
WASHINGTON, DC
MARCH 20, 2007

Thank you to the Washington College of Law and to the *Administrative Law Review*, for the invitation to participate here. As the only non-government panelist, I will address immigration adjudication as an academic and also a practitioner. I will do my best to speak, albeit indirectly, from the point of view of the main stakeholders in that system—the people whose cases are decided by it.

It is important to understand the extent of the power the immigration system wields, particularly in the cases of refugees—people who fear persecution if they lose their appeals for relief from expulsion.¹ Expelling a person from the United States disrupts a life. In the worst cases, it destroys one and often many lives. Therefore, courts must make decisions to expel carefully and with adequate due process. With that in mind, I will discuss the recent major administrative changes at the Board of Immigration Appeals (BIA), which are commonly known as “BIA streamlining,” to determine whether the “streamlined” BIA provides adequate due process.

* Clinical Teaching Fellow, Center for Applied Legal Studies, Georgetown University Law Center. I am grateful to Denise Gilman, Jaya Ramji-Nogales, Phil Schrag, and Stephen W. Yale-Loehr for very helpful suggestions and comments.

1. Following the example of John Palmer, Stephen Yale-Loehr, and Elizabeth Cronin in their 2005 study of Board of Immigration Appeals (BIA) streamlining, I use “expulsion” as a shorthand for the terms “deportation,” “exclusion,” and the most recent euphemism, “removal.” See John R.B. Palmer et al., *Why Are So Many People Challenging the Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 10 (2005).

Attorney General Janet Reno adopted the first set of streamlining rules in 1999² to clear the large backlog of cases that had accumulated during the 1990s, when the system saw great increases in both expulsion orders from immigration courts, and appeals of those orders to the BIA.³ In December 2001, after the (first) streamlining rules went into effect, independent auditors hired by the Executive Office for Immigration Review (EOIR) reported that streamlining had been “an unqualified success.”⁴ According to the auditors, the backlog diminished after this first streamlining, with no apparent adverse effect on petitioners.

Nonetheless, in 2002, only a few months after the auditors’ report, then-Attorney General John Ashcroft proposed and quickly implemented much more drastic changes to the BIA.⁵ The 2002 rules sharply restricted the BIA’s traditional use of three-member panels to decide cases and write full opinions, making single-member review the new norm. The rules directed single BIA members to affirm the immigration judge’s decision without opinion in most cases, using two sentences of boilerplate language.⁶ This means that when federal courts attempt to review such BIA decisions, they have no way of knowing on what basis a decision was made.

At the same time, Ashcroft reduced the size of the BIA from twenty-three members (as the judges at the BIA are called) to eleven.⁷ To many of the sixty-eight individuals and organizations that submitted comments on the proposed rules it seemed counterproductive to slash the

2. Executive Office for Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135 (Oct. 18, 1999).

3. See, e.g., Edward R. Grant, *Laws of Intended Consequences: IIRIRA and Other Unsung Contributors to the Current State of Immigration Litigation*, 55 CATH. U. L. REV. 923, 945 (describing how, in the wake of 1996 legislation, enforcement actions increased immediately, with concomitant jumps in cases brought before immigration judges, and appeals to the BIA).

4. U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE OF IMMIGRATION REVIEW (EOIR), BOARD OF IMMIGRATION APPEALS (BIA) STREAMLINING PILOT PROJECT ASSESSMENT REPORT, 1, 5-7 (2001), reprinted in DORSEY & WHITNEY LLP, STUDY CONDUCTED FOR: THE AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION POLICY, PRACTICE AND PRO BONO, RE: BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT app. 21 (2003), <http://www.ilw.com/articles/2003,1126-dorsey.pdf> [hereinafter DORSEY & WHITNEY REPORT].

5. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,879 (Aug. 26, 2002) (to be codified at 8 C.F.R. Part 3) [hereinafter Procedural Reforms]; see also U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, BIA RESTRUCTURING AND STREAMLINING PROCEDURES (rev. 2006), available at www.usdoj.gov/eoir/press/06/BIAStreamliningFactSheet030906.pdf (describing the “final” streamlining regulation issued by the Attorney General on Aug. 23, 2002, which “expanded on the first streamlining procedures” implemented in late 1999).

6. 8 C.F.R. § 1003.1(e)(4)(ii) (2007) (“The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination.”).

7. Procedural Reforms, *supra* note 5, at 54,901 (“[T]he Board shall be reduced to eleven members as designated by the Attorney General.”).

number of judges, in order to clear a backlog of more than 50,000 cases.⁸ Commenters worried, particularly, that the new regime would “eviscerate the due process protections for individuals with Board appeals”⁹ In addition, the proposed changes seemed to be aimed at goals other than clearing the backlog, such as purging adjudicators who seemed to be sympathetic to non-citizens, and making it more difficult to appeal an expulsion order.

The Department of Justice (DOJ) explained, in its written responses to the public comments,¹⁰ that the board’s growth in the 1990s¹¹ had diminished the “cohesiveness and collegiality of the [its] decision making process, and the Department’s perception of the uniformity of its decisions.”¹² Streamlining the Board, in other words, would streamline its jurisprudence—bringing it more into line with the views of the Administration.

Ashcroft’s 2002 streamlining rules also prohibited the BIA from conducting de novo review of factual issues, including immigration judges’ findings with respect to credibility, unless those findings are “clearly erroneous.”

Almost as soon as Ashcroft’s 2002 streamlining rules went into effect, they faced constitutional challenges in eleven federal circuits¹³ as well as an Administrative Procedure Act (APA) suit.¹⁴ In general, the courts noted that they owed tremendous deference to the administrative agencies, especially in the immigration realm, as immigration “officials exercise especially sensitive political functions that implicate questions of foreign

8. See Michael L. Sozan, CAIR Coalition v. DOJ: *A Victory for Standing and Reviewability; A Hurdle for the APA Challenge to BIA “Streamlining,”* 8 BENDER’S IMMIGR. BULL. 1198, 1200 (July 15, 2003) (“The overwhelming majority of commenters supported DOJ’s general goal of creating an efficient adjudicatory process at the Board, but sharply disagreed with the proposed mechanisms to achieve that goal.”).

9. *Id.*

10. The final regulations were published on August 26, 2002, virtually unchanged despite all of the comments. The regulations took effect within thirty days of publication, on September 25, 2002. Procedural Reforms, *supra* note 5, at 54,878.

11. Palmer et al., *supra* note 1, at 18 (describing the growth of the BIA from five members in 1988 to twenty-three authorized positions in 2001).

12. Procedural Reforms, *supra* note 5, at 54,894.

13. See, e.g., Zhang v. U.S. Dep’t of Justice, 362 F.3d 155, 158-59 (2d Cir. 2004); Blanco de Belbruno v. Ashcroft, 362 F.3d 272, 280-283 (4th Cir. 2004); Loulou v. Ashcroft, 354 F.3d 706, 708-09 (8th Cir. 2004); Yuk v. Ashcroft, 355 F.3d 1222, 1229-32 (10th Cir. 2004); Albathani v. INS, 318 F.3d 365, 376-79 (1st Cir. 2003); Dia v. Ashcroft, 353 F.3d 228, 238-45 (3d Cir. 2003). The D.C. Circuit Court of Appeals was not a proper venue because there are no immigration courts in its jurisdiction.

14. Capital Area Immigrants’ Rights’ Coal. v. U.S. Dep’t of Justice, 264 F. Supp. 2d 14 (D.D.C. 2003).

relations.”¹⁵ In addition, the judiciary found it owed extra deference to the executive branch because the Immigration and Nationality Act gives such broad authority to the Attorney General to enforce the immigration law.¹⁶

The Capital Area Immigrants’ Rights (CAIR) Coalition and the American Immigration Lawyers’ Association (AILA) filed the first challenge in the U.S. District Court for the District of Columbia on October 24, 2002, less than a month after the new streamlining rules took effect.¹⁷ Asking the court to vacate the new rules, CAIR and AILA argued that they were arbitrary and capricious, and therefore violated the APA.¹⁸ CAIR and AILA challenged single-member review and summary decisions, asserting that the DOJ had failed to make reasoned administrative decisions in issuing two of the rules.¹⁹ First, CAIR and AILA argued that in order for the DOJ to clear the BIA backlog in six months, it would require the BIA’s members to decide at least one case every fifteen minutes.²⁰ Second, CAIR and AILA argued that the DOJ reduced the number of BIA members from twenty-three members to eleven members pursuant to discretionary and subjective criteria. In its responses to the public comments, DOJ refused to adopt any of the objective criteria suggested by the commenters to reduce the size of the BIA, such as seniority and expertise in immigration law.²¹

Although the court found that DOJ’s decision to adopt streamlining was “not altogether free from doubt,”²² it held that DOJ had provided “substantial evidence” in support of its decision.²³ In negotiations with the plaintiffs, DOJ agreed not to reassign or terminate any BIA members for a few months. Soon afterward, however, the Attorney General reassigned five BIA members. Three other members chose to leave their positions. Most of the departing members had many years of experience at the BIA and the Immigration and Naturalization Service and they were widely seen as “the most immigrant-friendly Board Members.”²⁴

15. *Dia*, 353 F.3d at 236 (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)).

16. *See id.* at 237.

17. *CAIR*, 264 F. Supp. 2d 14; *see also* Sozan, *supra* note 8, at 1200.

18. *CAIR*, 264 F. Supp. 2d at 20.

19. *Id.* at 25.

20. *See id.* at 37; *see also* Human Rights First, *New Justice Department Rules Gut Due Process for Refugees Seeking Asylum in the United States*, ASYLUM PROTECTION NEWS: SPECIAL EDITION, May 13, 2002, http://www.humanrightsfirst.org/asylum/torchlight/newsletter/newslet_si1.htm.

21. *See CAIR*, 264 F. Supp. 2d at 31; *see also* Procedural Reforms, *supra* note 5, at 54893 (“Several commenters have suggested that the Attorney General must appoint individuals to the Board who are expert in immigration law. The Department believes that this argument rests on the faulty premise that immigration law is the only area of the law where Board members must have expertise.”).

22. *CAIR*, 264 F. Supp. 2d at 26.

23. *See id.* at 31.

24. Sozan, *supra* note 8, at 1201 n.14; *see also* Peter J. Levinson, *The Facade of Quasi-Judicial Independence in Immigration Appellate Adjudications* 9-10 (Sept. 2, 2004)

From 2002 to 2004, eleven federal circuit courts decided facial challenges to the 2002 streamlining rules. Most of the challenges focused on Affirmances Without Opinion (AWOs)—the one-line decisions in which the BIA merely states that it agrees with the decision of the immigration judge below. AWOs were a major feature of the new rules, and quickly became predominant among the BIA's decisions. During 2001, AWOs accounted for between 3% and 10% of the BIA's cases, but by the following year, the BIA was issuing AWOs in nearly 60% of its cases.²⁵

Many challenges to BIA "streamlining" argued that the AWOs inherently violated due process. In *Albathani v. INS*,²⁶ for example, the petitioner's lawyers brought a facial due process challenge to the AWO regulations.²⁷ First, the petitioner argued that the BIA ruling was the agency's final decision but did not provide a reasoned basis for review by the appeals court.²⁸ The First Circuit found that under *SEC v. Chenery Corp.*,²⁹ the requisite reasoned basis for an agency's decision need only come from somewhere within the agency, not from a particular part of it. "*Chenery* does not require that this statement come from the BIA rather than the IJ."³⁰ Even though the BIA might have based its AWO on different grounds than the IJ used, the court found that the immigration judge's opinion and the record below were sufficient to permit the federal appeals court "to carry out an intelligent review."³¹

Albathani's second argument was that the AWO procedure's cursory review process violates the BIA's regulations, and federal courts are unable to determine whether the BIA is following those regulations.³² The appeals court noted that the BIA faced an enormous caseload and pressure to clear it in only six months, and mentioned pointedly that "the Board member who denied Albathani's appeal is recorded as having decided over fifty cases on October 31, 2002, a rate of one every ten minutes over the course of a nine-hour day."³³ In *Albathani*, the court observed that not even "the

(unpublished manuscript, presented at the Annual Meeting of the American Political Science Association), http://65.36.162.162/files/peter_article.pdf.

25. DORSEY & WHITNEY REPORT, *supra* note 4, at Appendix 25.

26. *Albathani v. INS*, 318 F.3d 365 (1st Cir. 2003). Albathani, a Maronite Christian from Lebanon, appealed an immigration judge's denial of asylum, withholding of removal, and relief under the United Nations Convention Against Torture (CAT). Albathani asserted that he feared persecution from Hezbollah guerrillas, but the immigration judge found him not credible and denied his claim. A three-judge panel from the First Circuit did not find evidence sufficient to *compel* reversal of the denial. *Id.* at 367.

27. *Id.* at 372.

28. *Id.* at 377.

29. 332 U.S. 194, 196 (1946).

30. *Albathani*, 318 F.3d at 377.

31. *See id.* at 378.

32. *Id.* at 377.

33. *Id.* at 378.

record of the hearing itself” could have been reviewed in ten minutes.³⁴ However, without further evidence of systemic violation by the BIA of its regulations, the First Circuit was not prepared to “infer from these numbers alone that the required review is not taking place.”³⁵ The due process challenge to the AWO failed.

Like several of the cases that followed it, *Albathani* presents a “Catch-22”. The First Circuit found that the AWO procedure did not violate due process, in part because the error in this case was harmless. The Court addressed a due process challenge to the streamlining rules by reverting to the facts in the case at hand; however, the doctrine guarantees a fair process, regardless of the outcome. Moreover, if, as the court held, caseload statistics are insufficient “evidence of systemic violation by the BIA of its regulations,”³⁶ it is difficult to imagine how any plaintiff could prove that the BIA was not reviewing IJ decisions, because the First Circuit was satisfied that the immigration judge below had not erred. This raises questions regarding all AWOs that were never appealed (the high cost of a federal appeal is the main obstacle for many would-be petitioners). The only way for a federal court of appeals to verify that a particular AWO was an adequate review (or an unnecessary one, if the immigration judge’s ruling was correct) is to conduct yet another review. When it does so, the court can assure itself that the petitioner received an adequate review, but not necessarily from the BIA.

This would seem to automatically punt the task of reviewing the immigration judges’ work from the BIA to federal courts in cases where the BIA issues an AWO. The federal court’s review of the immigration judge turns the BIA’s review into a mere stepping-stone on the path from the immigration court to the circuit court. This is precisely what has happened in thousands of cases. Since the dramatic increase in AWOs, there has been a deluge of immigration cases appealed past the BIA to the federal courts of appeals.³⁷

All of the arguments involving AWOs and the adequacy of due process crumbled in the federal courts of appeals on a more fundamental point. As the First Circuit bluntly stated in *Albathani*, “[a]n alien has no constitutional right to any administrative appeal at all.”³⁸ As an unadmitted alien, *Albathani* had even fewer rights than other non-citizens.³⁹ Yet even

34. *Id.*

35. *Id.* at 379.

36. *Id.* at 378.

37. *See generally* Palmer et al., *supra* note 1, at tbl. 20.

38. *See Albathani*, 318 F.3d at 376 (citations omitted).

39. *Albathani* got off a plane in Miami without a U.S. visa and was immediately taken into custody by U.S. immigration officers. Aliens who have not been formally admitted to the United States, like *Albathani*, are legally “inadmissible” and therefore not entitled to

documented immigrants can be denied the right to appeal decisions to expel them, according to statute and U.S. courts' interpretation of the Constitution. For example, in the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Congress explicitly denied the right of judicial appeal (not merely administrative appeal) to certain classes of non-citizens facing expulsion orders.⁴⁰

Immigrants facing expulsion brought challenges to the streamlining regulations in the rest of the federal circuit courts, but none of the courts found that they had a right to an appeal.⁴¹ In *Dia v. Ashcroft*, for example, the Third Circuit was even more blunt than the First Circuit in *Albathani*. The Third Circuit found “[q]uite clearly, an alien has no constitutional right to any administrative appeal at all, and, therefore, no constitutional right to a ‘meaningful’ administrative appeal.”⁴²

However, even as they were noting that the petitioners had no right to an administrative appeal, the federal courts found that some of the petitioners' cases had been wrongly decided, and reversed the immigration courts below. The *Dia* court, after expressing lengthy outrage at the immigration judge's work, vacated the AWO and remanded the case to the BIA.⁴³ For more than six pages, the appeals court attacked the immigration judge's conduct during the hearing and criticized her opinion as flawed, sloppy, and biased against the respondent. The court was “left wondering how the IJ reached the conclusions she ha[d] drawn.”⁴⁴ Her opinion was “an aggregation of empty rationales that devolve[d] into an unsupported finding of adverse credibility.”⁴⁵ Further, the Third Circuit found that the immigration judge had discouraged “if she did not indeed prohibit” *Dia* from presenting corroborating evidence⁴⁶ and she chose to ignore the testimony of a U.S. government-trained expert witness who had testified in other courts more than one hundred times.⁴⁷

U.S. rights even though they are physically present in the United States. See 8 U.S.C. § 1128(a)(6)(A)(i) (2000).

40. John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of INS v. Ventura*, 8 GEO. IMMIGR. L.J. 605, 606 & n.4 (2004).

41. Palmer et al., *supra* note 1, at 29 (“These facial challenges were based on both due process and basic rules of administrative law, but every one of them has now been rejected.”).

42. *Dia v. Ashcroft*, 353 F.3d 228, 242 (2003).

43. *Id.* at 250.

44. *Id.*

45. *Id.* at 251.

46. *Id.* at 253.

47. *See id.* at 258.

In yet another challenge to the AWO procedure, the Seventh Circuit followed *Albathani* and other cases and found that an AWO did not violate the petitioner's due process rights.⁴⁸ As in *Dia*, however, the court also found that the immigration judge's reasoning was poor. It vacated the AWO and remanded the case for further proceedings.⁴⁹ The immigration judge had previously denied Z.H. Georgis asylum mainly because of apparent discrepancies among dates in her application. However, as the Seventh Circuit noted, Ethiopia uses a Julian calendar, not a Gregorian one, leading to confusion about the dates at the hearing.⁵⁰ The appeals court found that the immigration judge had refused to admit corroborating evidence into the record.⁵¹ The Seventh Circuit remanded, censuring the immigration judge with this unusual additional guidance: "Although the choice of a presiding judge is left to the discretion of the BIA, we strongly urge the BIA to assign a different judge to Georgis's case on remand."⁵²

In the very same decisions in which federal courts have held that aliens had no right to an administrative review, they have reviewed the record and reversed the immigration judge below. The judicial review made all the difference in individual cases and this irony has not been lost on the federal appellate judges themselves. Although they have correctly noted the limits on aliens' right to due process *in law*, some of them have inveighed against what seem to be failures of *justice*. The federal courts recognize that, as a matter of law, they must concede great discretion to the executive branch in immigration adjudication. Nevertheless, the judges are not prevented from complaining about how that discretion is used. Streamlining provoked a burst of outrage from federal judges because the surge in appeals has obliged federal judges to read the records of many immigration cases.

In *Benslimane v. Gonzales*, for example, Judge Posner of the Seventh Circuit took the opportunity to begin his opinion with a blistering review of his own court's criticisms of the immigration courts and the BIA:

In the year ending on the date of this argument, different panels of this court reversed the Board of Immigration Appeals in whole or in part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits . . . [O]ur criticisms of the Board and of the immigration judges have frequently been severe.⁵³

48. *Georgis v. Ashcroft*, 328 F.3d 962, 967 (2003).

49. *Id.* at 970.

50. *Id.* at 968 ("The transcript of the hearing reveals that everyone, and not just Georgis, seemed unclear about converting the dates from Ethiopian to Gregorian. Moreover, each time Georgis was asked to clarify a date, she tried to place the event in question in its proper chronology even if she could not calculate the correct date in our calendar system.").

51. *Id.* at 969.

52. *Id.* at 970.

53. *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005).

Judge Posner also quoted seven critical cases, including these two: “The IJ’s opinion is riddled with inappropriate and extraneous comments,”⁵⁴ and “[t]his very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner’s] case”⁵⁵

Federal judges have hardly been alone in their criticism of the decisions produced by the desperately overworked immigration judges and the BIA. A study by Dorsey & Whitney, LLP of the 2002 streamlining rules highlighted five cases in which an immigration judge “made a patently obvious mistake” in ordering an expulsion, but the BIA “summarily affirmed the erroneous decision without opinion or explanation.”⁵⁶ One of those five cases was that of Ms. Georgis, the Ethiopian asylum-seeker mentioned above. Another highlighted case was Yong Tang, a leader of the Tiananmen Square protest in China. The Third Circuit reversed and remanded in the latter case, finding that the immigration judge based his decision on “inferences, assumptions, and feelings that range from overreaching to sheer speculation.”⁵⁷

Following these critiques from the circuit courts, Attorney General Alberto Gonzales publicly chided immigration judges for what he called “intemperate and abusive” behavior towards aliens. He issued memos in January 2006, asking judges to improve their behavior. He noted “reports of immigration judges who fail to treat aliens appearing before them with appropriate respect and consideration and who fail to produce the quality of work that I expect from employees of the Department of Justice.”⁵⁸ In view of these reports, he commissioned a study of the work of the immigration judges.⁵⁹ After receiving the study, he announced twenty-two “measures” to create performance standards, increase resources, discipline incompetent or intemperate immigration judges, and to improve conditions at the BIA.⁶⁰ However, the Attorney General formulated most of the measures in very general terms, and by early 2007, there was still no sign that the plan had been implemented.⁶¹

54. *Dawoud v. Gonzales*, 424 F.3d 608, 610 (7th Cir. 2005).

55. *Ssali v. Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005).

56. DORSEY & WHITNEY REPORT, *supra* note 4, at 6.

57. *Id.*

58. Memorandum from Attorney General Alberto Gonzales to Immigration Judges (Jan. 9, 2006), available at <http://www.humanrightsfirst.info/pdf/06202-asy-ag-memo-ijs.pdf>.

59. *Id.*

60. U.S. DEP’T OF JUSTICE, MEASURES TO IMPROVE THE IMMIGRATION COURTS AND THE BOARD OF IMMIGRATION APPEALS (Aug 9, 2006), available at <http://trac.syr.edu/tracatwork/detail/P104.pdf>.

61. Pamela A. MacLean, *Immigration Judging Overhaul Stalled*, NAT’L L.J., Feb. 27, 2007.

The widespread criticism of immigration adjudication and lack of reform thus far, call on those of us interested in the system to examine the question, “what is due process for non-citizens?” more deeply than asking merely, “what does the law require?” The challenges to BIA streamlining have only explained what the law does *not* require, i.e., a meaningful appeal of a decision to expel a non-citizen from the United States. These cases do not explain what due process *does* require, even as a matter of law, never mind as a matter of justice. I would like to propose a two-pronged definition.

First, the system must produce accurate, fair decisions, as often as is reasonably possible. Immigration judges, as the critical first tier of the system, must be competent. They must be familiar with their complex branch of the law, and must not be biased against the people whose cases they decide. Second, the system must be perceived as fair, so that people who lose their cases feel that there was some rational basis for the decisions against them. Social psychology studies have found that the perception that the decision-maker has given “due consideration” to the “respondent’s views and arguments” is crucial to individuals’ acceptance of both the decision and the authority of the institution that imposes the decision.⁶²

Unfortunately, the Attorneys General have been appointing immigration judges based more on their personal political views than on jurisprudential competence. Attorney General Gonzales’ former senior counselor and White House liaison, Monica Goodling, recently testified before Congress that she had “crossed the line” by using political criteria in hiring immigration judges.⁶³ She was not alone—of the thirty-seven immigration judges appointed by Attorneys General Ashcroft and Gonzales, half lacked immigration law experience, according to a newspaper investigation, and at least one-third had Republican ties or were Bush Administration insiders.⁶⁴ Among the recent appointees who did have some experience in immigration law, all had been prosecutors or enforcement officers.⁶⁵ Finally, two newly appointed immigration judges had failed as candidates for judgeships on the U.S. Tax Court and one judge even filed inaccurate tax returns.⁶⁶ Handing out immigration judgeships in such a blatantly

62. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 80-81, 104-06 (1988).

63. See Dan Eggen & Paul Kane, *Goodling Says She ‘Crossed the Line,’* WASH. POST, May 24, 2007, at A1.

64. Amy Goldstein & Dan Eggen, *Immigration Judges Often Picked Based on GOP Ties*, WASH. POST, June 11, 2007, at A1.

65. *Id.*

66. *Id.*

politicized manner increases the chances that the judges will make poor decisions and decreases the chances that non-citizen petitioners will perceive the administration of justice as fair.

If the Attorney General was to make a serious effort to reform immigration adjudication, tens of thousands of non-citizens who go before immigration judges would likely gain those perceptions of fairness and competence, which are so vital to the right of due process. As a result, federal courts would see fewer appeals. To the contrary, Ashcroft and Gonzales took steps that undermined public perceptions of due process and fairness. When former Attorney General Ashcroft decreased the size of the BIA by reassigning several of its members who were most likely to rule in favor of non-citizens, his streamlining initiative lost credibility even as it began. The fact that non-citizens do not have a constitutional right to a meaningful appeal does not diminish the damage that such a step causes to perceptions of fairness and effective due process.

More recently, Attorney General Gonzales has been under scathing public criticism, not, as far as we know, because he committed an unlawful act, but rather because he created an appearance of bias by firing federal prosecutors who apparently did not tow a political line. Similarly, former Attorney General Ashcroft reassigned certain BIA members, perhaps because they failed to follow a certain jurisprudential posture, and forced them to issue tens of thousands of rapid-fire AWOs—which in turn dramatically diminished the number of cases in which the BIA reversed immigration judges' decisions to expel non-citizens.

In both cases, the Attorneys General seem to have allowed politics to interfere unduly with decisions that, in turn, affect the administration of justice. This temptation would be avoided in immigration adjudication if the BIA and immigration judges were made independent of the Department of Justice. As far back as 1981, the Select Commission on Immigration and Refugee Policy, a joint presidential-congressional body, has recommended the creation of an immigration court with both first-instance and appellate divisions to replace the immigration judges and the BIA.⁶⁷ Reform of this scale would surely improve due process in U.S. immigration adjudication.

67. Levinson, *supra* note 24, at 14.