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Asylum: Another Third Rail

Posted March 3, 2008 | 08:33 PM (EST)

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In January 2006 -- on the heels of reports of widespread incompetence, injustice, and political cronyism among the judges who decide the fate of thousands of immigrants seeking asylum in the United States -- the then Attorney General, Alberto Gonzales, announced a sweeping review of the entire asylum process. Six months later, Gonzales mandated a series of new guidelines and initiatives to improve the system and said he was "reassured of the talent and professionalism" of the judges and the fairness of the system.

But today, more than two years later, immigration law experts and human rights advocates charge that there has been little real change. They say that people forced to flee to the U.S. to escape torture and political or religious persecution continue to face a deeply flawed, ideologically-driven, and bureaucratically daunting process that is more likely than not to order them back to the countries from which they fled.

Prof. Philip Schrag, an immigration law expert and professor at the Georgetown University law school, told us, "The attorney general declared that the objective of improving the process had been met, but stated no specifics, and I am not aware that anything has changed in practice." Schrag is one of the authors of "Refugee Roulette," a 2007 landmark study of the shortcomings of the U.S. asylum system.

Among Gonzales' instructions: Periodic performance evaluations to review the work of each immigration judge and member of the Board of Immigration Appeals; an immigration law exam to ensure that all immigration judges are proficient in the key principles of immigration law; increased funding to hire more immigration judges, staff attorneys and judicial law clerks; and technological improvements to increase the Immigration Courts' ability to record, transcribe, and interpret court proceedings.

Given America's current anti-immigrant environment, the asylum issue is seen by elected office-holders and government officials as a political third rail that receives scant attention from the media.

The issue flared up again briefly last spring. In connection with the firestorm accompanying revelations of the DOJ's firing of eight U.S. Attorneys, a Bush appointee, former DOJ aide Monica Goodling, told the House of Representatives Judiciary Committee that she "crossed the line" in considering political affiliation for several categories of career applicants at the DOJ, including immigration judges.

But even before Goodling's explosive testimony, Bush-appointed DOJ lawyers said they had considered political affiliation in screening applicants for immigration court judgeships for several years - until the department's career lawyers objected. That could mean that the DOJ may have violated civil service laws, which prohibit political considerations in hiring.

In the two years preceding Goodling's testimony, Gonzales appointed 49 of 226 current judges in the nation's 54 immigration courts - many without any background in immigration law. They included a former treasurer of the Louisiana Republican Party, who was a legal advisor to the Bush Florida recount team after the 2000 presidential election, a former GOP congressional aide who had tracked voter fraud issues for the DOJ, and a Texan appointed by then-Gov. George W. Bush to a seat on the state library commission. Many others among the nation's more than 200 immigration judges lack immigration experience.

The result is what some Administration critics term "cowboy justice" that produces wide disparities in outcomes. For example, one judge is 1820% more likely to grant asylum than another judge in the same courthouse, and one U.S. Court of Appeals is 1148% more likely to rule in favor of an asylum-seeker than another.

Prof. Schrag's study found that the fate of asylum-seekers is often decided not by the facts of the case but rather by a clerk's random assignment of an applicant to one asylum officer rather than another, or one immigration judge rather than another. It concluded that the outcome of asylum cases is being influenced less by the merits of their claims and more by such factors as the location of the court and the gender and professional background of judges.

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For example, one male immigration judge currently on the Miami court granted only three percent of the asylum cases he heard -- the second-toughest judge in the nation on asylum issues. A female judge, who hears cases at the Krome North detention center in Miami, granted 59 percent of the asylum claims she considered, placing her in the top 15 percent of judges approving such claims.

While immigration officers at Citizenship and Immigration Services, part of the Department of Homeland Security (DHS) have the authority to grant asylum, the majority of asylum cases are referred to and decided by the immigration judges.

If an asylum-seeker's claim is rejected by the immigration judges, it can be appealed to the Board of Immigration Appeals, whose members are also appointed by the Justice Department. If the claimant fails there, the case can be appealed to a U.S. federal appeals court. These appeals stand a far higher chance of being accepted if the claimant has a lawyer - but most asylum-seekers don't have lawyers.

Federal judges have been among the harshest critics of immigration judges. For example, last year the Seventh Circuit Court of Appeals delivered another in a series of stinging rebukes to the immigration courts and Board of Immigration Appeals (BIA). It ordered a review of a case of a Lebanese who was denied asylum despite fear that he would be persecuted if forced to return to his home country. The Appeals Court called for the DOJ to allocate more resources to ensure that immigrants receive fair review of their cases.

The BIA's decision-making process is among Prof. Schrag's principal concerns. He told IPS that the BIA is increasingly rendering "one-judge brief decisions, a conclusory paragraph rather than a few pages, so in many cases they don't really deal with the losing party's arguments."

The "Refugee Roulette" study analyzed 140,000 decisions by immigration judges over four years, including those cases from the 15 countries that have produced the most asylum seekers in recent years, among them China, Haiti, Colombia, Albania and Russia.

The study found vast differences in the handling of claims with generally comparable factual circumstances. For example, Colombians had an 88 percent chance of winning asylum from one judge in the Miami immigration court and a five percent chance from another judge in the same court. It also found that someone who has fled China in fear of persecution and asks for asylum in immigration court in Orlando, Fla., has an excellent -- 76 percent -- chance of success, while the same refugee would have a seven percent chance in Atlanta.

Collectively, asylum officers, immigration judges, members of the Board of Immigration Appeals, and judges of US Courts of Appeals render about 77,000 asylum decisions annually. Almost all of them involve claims that an applicant for asylum reasonably fears imprisonment, torture, or death if forced to return to her home country. Immigration court cases increased from 290,400 in 2002 to 348,216 in 2006, the last year for which reliable data is available. The grant rate for asylum applications increased to 45 percent in 2006.

According to Prof. Schrag, "It is very disturbing that these decisions can mean life or death, and they seem to a large extent to be the result of a clerk's random assignment of a case to a particular judge."

Professor Karen Musalo, a refugee law expert at the University of California, Hastings College of the Law, agrees. She told us that "luck of the draw, rather than careful application of law to facts - has determined the fate of all too many people. Shining light on this problem will hopefully lead to the adoption of measures to correct this serious problem."

This ball is now squarely in the court of Michael Mukasey, our newest AG. We wonder if he'll defy the third rail and actually get something done.

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