

The Sentinel Effect: Improving the Behavior of “Bushie” Immigration Judges

By Angelo A. Paparelli

In a perverse and delicious irony, the Bush administration, and Attorney General Michael Mukasey in particular, recently bestowed what may prove to be a helpful gift on foreign citizens in removal proceedings. The gift results from the AG's refusal to fire or reassign any of the roughly 31 judges (18 of whom the *New York Times* has identified) who were hired in violation of civil service laws. As the Justice Department's Inspector General reported, these judges, dubbed by Monica Goodling and her administration cronies as “Bushies,” though possessing scant immigration experience, were hired for their ideological or partisan activities or beliefs.

The gift, likely made without purposeful donative intent, is the opportunity to apply a theory variously known as the Hawthorne effect (based on an industrial performance study in the 1930s) or as I and others prefer to call it, the sentinel effect.

Although controversial, the sentinel effect holds that if you single out a group of people, make them feel special, and let them know you're watching, their behavior improves in measurable ways.

Let's suppose then that foreign citizens, aided by zealous immigration lawyers who use the sentinel effect, begin to single out the Bushie immigration judges. To apply the sentinel effect, lawyers should divide their clients' cases into two categories: (1) immigration cases not yet heard but assigned to a Bushie judge, and (2) immigration cases already heard by such a judge.

I outline the strategy and hint at the sentinel effect in a recent Op-Ed published by *The Los Angeles Daily Journal*:

[Category 1 cases]. In cases not yet heard, lawyers whose hearing is assigned to a Bushie immigration judge should file a motion for recusal. Even if the motion is denied, the assertion of error will be preserved for appeal, and the judge, in the meantime, will likely be on his or her best behavior in hearing the client's requests for relief from removal. (Interestingly, one of the tainted judges has a 16 percent asylum denial rate, compared with a national average of 59.8 percent, according to TRAC Immigration, while another Goodling appointee has denied 90.7 percent of all asylum requests.)

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requests for relief from removal. (Interestingly, one of the tainted judges has a 16 percent asylum denial rate, compared with a national average of 59.8 percent, according to TRAC Immigration, while another Goodling appointee has denied 90.7 percent of all asylum requests.)

Perhaps the IJ with the 16% asylum denial rate, anticipating that his conduct would come under scrutiny, applied the sentinel effect proactively. Perhaps the other improperly appointed judges -- with asylum denial rates substantially above the national or city averages -- might yet adjust their rate of asylum approval (consciously or unconsciously, who is to say?) if they know their conduct is under scrutiny.

The sentinel effect may also apply to cases already heard:

[Category 2 cases]. If the hearing or appeals process seems to have been prejudiced against the client based on the manifest behavior of an unlawfully hired judge, the immigration lawyer should consider filing a motion to reopen and remand for a new hearing before a judge not appointed through the illegal process. . . .

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Lawyers with immigration clients who were harmed by the unlawful hires should also consider other strategies. These might include the submission of an online complaint to the assistant chief immigration judge for conduct and professionalism, MaryBeth Keller. In an egregious case, the lawyer of an immigration client held in detention or deported based on the dubious legal ruling of a demonstrably incompetent or biased immigration judge who was appointed illegally, might consider civil litigation alleging tort violations, especially if the detention was abusive, or resulted in injury or death for lack of proper medical care, or the deportation caused substantial harm to the client or the client's family or business associates. In addition, a class action in federal district court for injunctive relief and damages may also be viable.

To be sure, I'm not suggesting that the controversial sentinel effect is a surefire winner. Based on the remarks in the *New York Times* by the leader of the IJs' union, immigration lawyers should expect resistance if they challenge improperly hired judges:

Dana Marks, an immigration judge in San Francisco and the president of the judges' union, said her organization opposed reassigning its new members.

"We are confident that many of the people hired under this process are excellent judges," said Judge Marks, who was appointed in 1987, "and should not be penalized for having been hired under a process that they had no control over at the time, that ***some of them may not even have known was irregular or inappropriate*** [italics and bolding supplied]."

Still, the cardinal rule of ethics (never do anything you wouldn't want proclaimed on the front pages of the nation's newspapers) may apply here. Or, as the *New York Times* reported in yesterday's article about a

self-policing practice at the controversial clothing-optional San Onofre beach in California: “[i]f you wouldn’t do it in front of a police officer, don’t do it here.”

In other words, the sentinel effect may be one additional strategy to improve immigration-related judicial ethics and behavior. For other suggestions, see Prof. Michelle Benedetto’s excellent [article](#) (“Crisis on the Immigration Bench: An Ethical Perspective.”). Here is the abstract of her article:

The troubled status of the immigration court system has garnered much attention from scholars, appellate judges, and even the United States Attorney General. This article suggests a new lens through which to examine the acknowledged crisis in immigration courts: judicial ethics. Because the term judicial ethics encompasses a broad array of principles, the article narrows its focus to bias and incompetence on the part of immigration judges in the courtroom.

Immigration judges operate as a unique judiciary under the Executive Branch of government. An examination of the modern immigration court system, including inadequate disciplinary procedures for immigration judges, reveals that the existing structural crisis has substantial implications for judicial ethics. Evidence of biased and incompetent judicial conduct has been found in statistics showing inconsistent decisions and cases reviewed by circuit courts. Recognizing the breadth and severity of the problem, the Attorney General proposed new ethical Codes of Conduct for immigration judges in June 2007. However, the proposed Codes are weakened by their lack of specificity and enforceability. Accordingly, the article recommends reforms designed to encourage unbiased and competent judicial behavior. Implementation of these reforms will initiate the process of restoring the ethical integrity of the immigration bench.

The bottom line is that something must be done to improve the ethics and behavior of immigration judges in order to ensure procedural due process for foreign citizens in removal proceedings. The gift of the sentinel effect, then, may be one step in that direction.