Childhood Solutions to the Immigration-Judge Hiring Mess

By Angelo A. Paparelli

On August 12 in a speech to the American Bar Association, U.S. Attorney General Michael B. Mukasey, taking a page from Robert Fulghum's book, *All I Really Need to Know I Learned in Kindergarten*, offered this august body a lesson "we all learned in the schoolyard." Citing the "principle of equity" that "two wrongs do not make a right," the AG attempted to justify his refusal to fire the many immigration judges and members of the Board of Immigration Appeals (BIA) who were hired from 2004 to 2007 for ideological or partisan reasons:

> As the Inspector General himself recently told the Senate Judiciary Committee, the people who were hired in an improper way did not themselves do anything wrong. It therefore would be unfair and quite possibly illegal, given their civil service protection, to fire them or to reassign them without individual cause. Also that some of the officials involved in hiring gave improper consideration to politics does not mean that the people they hired are unqualified for their jobs.

Confessing to the ABA in the "privacy" of the auditorium that he never sat for a competitive examination when appointed as a federal judge, Mr. Mukasey also implied that experience in immigration law is unnecessary and that on-the-job training will suffice.

As reported by the Inspector General (IG) of the Department of Justice (DOJ), these appointees, identified by the politicos who hired them as "Bushies," were placed into career civil service positions not for their experience in immigration law (they had none), but for passing a Republican Party loyalty test, or a litmus test establishing their conservative *bona fides*. These tests were administered by the now disgraced Monica Goodling, using a Lexis search with such immigration-relevant key words as "spotted owl," "sex," and "Iraq."

While taking no action against the unlawfully appointed Bushies, Mr. Mukasey announced that reforms had been instituted to correct the "flawed process," and prevent a recurrence of these "disturbing" practices, proclaiming nonetheless that "professionalism is alive and well at the Justice Department today."

The AG's justification fails the schoolyard principle of fairness. The more relevant aphorism from elementary school is "no taking cuts." That principle is well understood by many in Congress, mostly Republicans, who oppose immigration reforms that would legalize the status of undocumented border-crossers and allow them to cut ahead of others patiently waiting abroad to immigrate.

The Attorney General is mistaken in maintaining that the unlawfully hired partisans "did not themselves do anything wrong." His address to the ABA did not fully explain why it would be "quite possibly illegal given their civil service protection, to fire them or to reassign them without individual cause." One Bushie, a self-professed "friend of [Karl] Rove's since his youth," according to the IG's report, had "called the White House to complain to Rove that his appointment to be an IJ had stalled." All of the Goodling candidates knew that they lacked immigration experience and were applying outside the normal hiring process, a process involving submission of their résumés directly to the Executive Office for Immigration Review (EOIR) or DOJ.

As lawyers, they were presumed to know the law, including civil service laws, and know that they were being considered not for their expertise but rather for ideological purity and party loyalty, factors that by law are *verboten* in the hiring of career civil servants who serve as judges in this highly technical area of law. Also as lawyers, they knew that they must satisfy an ethical duty of competence, one that cannot be fulfilled by taking a crash course in immigration law or affiliating with an experienced immigration lawyer. Thus, to a greater or lesser extent, they all are culpable for knowingly accepting a civil service job through connections based on partisan and ideological factors without possessing competence in the subject matter.

What Mr. Mukasey should have done instead was to insist on the resignations of all immigration judges and BIA members hired for partisan or ideological reasons. The EOIR should then post the vacancies and hire only the most qualified applicants for these positions based on immigration experience and loyalty to the rule of law. He should also have ordered new immigration hearings and the reopening and remanding of all appeals in cases previously heard or considered by an illegally appointed judge.

Although the Mukasey Justice Department will take no action, lawyers representing foreign citizens in removal proceedings or appeals to the BIA or the federal circuit courts should consider a variety of measures to achieve procedural due process for their clients.

The first step is to identify immigration judges hired from April 2004 (when the improper hirings began) until April 2007 (when they ended). The IG's report, except in two instances, studiously avoided disclosing the names of the Bushies. Fortunately, however, the EOIR issued press releases during this period (accessible at www.justice.gov/eoir/press/chrono.htm). Don't expect, however, that the press releases will include any reference to a Goodling appointee's partisan or ideologically conservative background; look instead for the absence of immigration-related experience as a telling clue.

If an immigration client had a hearing or a case considered before one of the judges appointed in the tainted process, the next step is to review the biographical facts about the improperly appointed judges and identify the city to which each was assigned, as reported in Ch. 6 of the IG's report (available at www.usdoj.gov/opr/goodling072408.pdf). Next, check the list of IJs by city published at: www.justice.gov/eoir/sibpages/ICadr.htm. Then, using the information obtained in the earlier steps, search the internet and Lexis or

Westlaw to confirm the Republican or ideological background of the immigration judge in question. Finally, review the immigration hearing transcript and the BIA appellate record to discern incompetence, bias or other prejudicial behavior by the judge.

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. In cases not yet heard, lawyers whose hearing is assigned to a Bushie IJ should file a motion for recusal. Even if the motion is denied, the assertion of error will be preserved for appeal, and the IJ, 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% asylum denial rate, compared to a national average of 59.8%, according to TRAC Immigration, whose reports on immigration judges' asylum adjudications can be accessed at www.trac.syr.edu/immigration/reports/judgereports, while another Goodling appointee has denied 90.7% of all asylum requests.)

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, at: www.usdoj.gov/eoir/sibpages/IJConduct.htm. In an egregious case, the lawyer of an immigration client held in detention or deported based on the dubious legal ruling of an incompetent or biased IJ who was appointed illegally, might consider civil litigation alleging tort violations, especially if the detention was abusive, or resulted in death for lack of proper medical care, or the deportation caused substantial injury 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.

If the immigration lawyer had applied for one of the jobs given instead to a conservative ideologue or partisan, the slighted attorney may wish to follow the example of Guadalupe Gonzalez, a career government immigration lawyer and the Chief Counsel for the U.S. Immigration and Customs Enforcement in El Paso, Texas. She filed an employment discrimination lawsuit against the DOJ based on gender and national origin discrimination that led to the discovery and cessation of the politicized hiring process.

"Two wrongs do not make a right" is not in Fulghum's book, but there are other kindergarten lessons he espouses that the AG should have considered: Play fair. Put things back where you found them. Clean up your own mess. Don't take things that aren't yours. If the Justice Department won't clean up its own mess, then the justice system, energized by outraged lawyers zealously representing aggrieved immigration clients, and lawfully appointed judges, must do so.

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