
POLITICS

Jeff Sessions Is Quietly Transforming the Nation's Immigration Courts

The attorney general has stepped up the hiring of immigration judges, ordered them to hear more cases, and shown a preference for those who've previously been prosecutors.

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CHARLIE NEIBERGALL / AP / KATIE MARTIN / THE ATLANTIC

Dorothea Lay was on track to become a member of the Board of Immigration Appeals, part of the Justice Department's Executive Office for Immigration Review. Her 25-year government career had prepared her for the post, as reflected in four letters of recommendation from academics and current and former officials. In December 2016, nine months after submitting her application, she was offered the job. But administrations changed, Jeff Sessions assumed the role of attorney general, and by early 2018 the offer was withdrawn.

Why?

That's the question at the center of a complaint filed by Lay, an Idaho native, with the Office of Special Counsel, an independent federal investigative body. In a letter to Lay, 53, the EOIR said it was rescinding her offer because "the needs of the agency have evolved," even though the agency announced around the same time that it wanted to expand the size of the appeals board. The complaint, which was first reported by CNN, suggests that political considerations may have been taken into account in a review of Lay's background, citing Lay's letters of recommendation from people who "had liberal backgrounds or were perceived as having liberal backgrounds."

The suspicion of politically based hiring has lingered among Democrats, who raised concerns in April and again in May. In the May letter, directed to Michael E. Horowitz, Democrats urged the inspector general of the Justice Department to investigate "allegations of politicized hiring practices," citing cases in which offers for immigration judges and Board of Immigration Appeals positions had been delayed or withdrawn. (Lay's attorney, Zachary Henige, also represents two other people who say their offers were withdrawn over political differences.) Assistant Attorney General Stephen Boyd responded to the Democrats' allegations in a letter: "As stated in every immigration judge hiring announcement, the Department of Justice does not discriminate on the basis of political affiliation."

The investigation into Lay's complaint is ongoing, so it's still not clear whether there were ulterior motives behind the withdrawal of her offer. But the case speaks to how DOJ can pick and choose who fills roles and, in doing so, influence who's at the helm of deciding immigration cases.

This isn't unique to the current administration. The Justice Department has considerable leeway when appointing immigration judges—the immigration courts are part of its direct purview. The attorney general therefore has unique authority to overrule decisions and hire immigration judges. To that end, Sessions appears to be shaping the court by, at the very least, hiring former law-enforcement officials as immigration judges.

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"The more you bring people from the same background, the same set of experiences, the same perspective, the more you expose the court to criticism," said Ashley Tabaddor, the president of the National Association of Immigration Judges. "Those decisions will be more open to being questioned."

Of the 128 judges hired since Donald Trump's inauguration, more than half have past

prosecutorial experience or some other government experience. The pace of hiring has also stepped up: In fiscal year 2017, the Justice Department hired 64 immigration judges, compared with 81 in fiscal year 2018—bringing the total of immigration judges to 395, according to [data released by the EOIR](#). Sessions’s hiring spree is not unusual. It’s also not unwarranted: His predecessors brought on new immigration judges, and the immigration-court backlog continues to creep up, with the latest figure at more than 760,000 pending cases. Of the newly hired immigration judges, at least half had received conditional offers during the Obama administration, said Kathryn Mattingly, assistant press secretary at the EOIR, in an email.

It’s not just how many immigration judges are being brought on but where they’re being located. The EOIR has hired immigration judges for two adjudication centers—in Falls Church, Virginia, and Fort Worth, Texas—where cases from around the country will be heard through video teleconferencing. Judges will be located at the centers, while attorneys and respondents will be in separate locations. According to Rob Barnes, a regional public-information officer for the EOIR, immigration judges at these centers will be evaluated like others. It’s likely, then, that thousands of immigration cases will be heard with respondents never seeing a judge face-to-face.

Across the board, there appears to be a preference for people who come from an enforcement background, according to biographies of newly hired immigration judges posted by the Justice Department. Of the 23 judges announced in August, more than half previously worked with the Department of Homeland Security, and of those remaining, most came from a law-enforcement background. In September, the EOIR announced 46 new immigration judges, two of whom will serve in a supervisory role: 19 previously worked for ICE, 10 had served at DOJ or as a former local prosecutor, and seven had a background in the military ([one of whom previously served in Guantánamo](#)). It’s not yet known how these judges will rule once they’re on the bench and whether their enforcement background will inform their decisions. But experts, attorneys, and current and former immigration judges have warned about hiring too many people from government before.

“It’s not that we’re saying [those] with law-enforcement or military background are unqualified,” Tabaddor, the head of the immigration judges’ association, told me. “A diverse bench is what brings fairness and legitimacy to court. It’s very important for a court to be reflective of the people it serves and the community at large to gain legitimacy and respect.”

Mattingly, the EOIR spokeswoman, has provided a series of specific qualifications that

all candidates for immigration judge must have.

Previous administrations also pulled from within government, reasoning that candidates have already passed background checks and can therefore be hired more quickly. But that can present some challenges. It's possible that having spent years fighting in court on behalf of the government, an individual might be biased, said Jeremy McKinney, an immigration lawyer in North Carolina. The American Immigration Lawyers Association, of which McKinney is a part, and the National Association of Immigration Judges have called for the pool of immigration judges to also include people from private firms and academia.

[Read: Trump's immigration crackdown is overwhelming a strained system.]

Their concerns were backed up by Booz Allen Hamilton, which conducted a year-long study of the immigration-court system at the EOIR's direction. The April 2017 study found that at least 41 percent of immigration judges previously worked in the Department of Homeland Security, and nearly 20 percent worked at other branches within the Justice Department. The report recommended broadening "hiring pools and outreach programs to increase diversity of experience among [immigration judges]." It's not clear whether the Justice Department took the study into account in putting together its hiring plan in April 2017, the same month the study was presumably handed over.

The hiring of immigration judges has always been a contentious issue: Complaints have been lodged about insufficient career diversity; it often takes months to hire judges (though the Justice Department recently pushed the time it took down from an average of 742 days to about 266 days); and political affiliations have previously been weighed in selecting judges. In 2008, the Inspector General issued a report on the hiring practices of DOJ in selecting attorneys, immigration judges, and members of the Board of Immigration Appeals. The report concluded that hiring based on political or ideological affiliation is a violation of department policy.

The fear—as expressed by some Democrats, legal experts, and immigration advocates—is that Sessions is improperly seeking out conservatives in order to influence the tilt of the nation's immigration courts and hire a large cadre of immigration judges who will likely far outlast his tenure.

"I think he's trying to get a complacent judiciary: 'Forget the title—you guys are really DOJ employees. You're out there to carry out my policies,'" said Paul W. Schmidt, former chairman of the EOIR's Board of Immigration Appeals from 1995 to 2001 and

a former immigration judge.

Beyond whom the Justice Department decides to bring on board, the message Sessions sends down to judges can also heavily influence their decisions, as direct reports to the department, Schmidt, and others argue.

[Read: [The Democratic effort to keep Jeff Sessions in office](#)]

In September, for example, Sessions [delivered remarks](#) to a new class of immigration judges, the largest in history, according to the Justice Department, in which he pressed them to decide cases swiftly. “You have an obligation to decide cases efficiently and to keep our federal laws functioning effectively, fairly, and consistently,” he said. “As you take on this critically important role, I hope that you will be imaginative and inventive in order to manage a high-volume caseload. I do not apologize for expecting you to perform at a high level, efficiently, and effectively.”

The message was striking, given who it’s intended for. “If he was speaking to attorneys, that’d be normal. He has the right to set prosecutorial policy,” McKinney said. “That doesn’t translate to immigration judges.” Judges—even when they are DOJ employees—are expected to be independent. By effectively telling them how to handle cases and how quickly, the Justice Department is infringing on that independence, McKinney said.

And Sessions’s words weren’t just an expression of what he hopes judges will do either. As of October 1, the expectation to “efficiently and effectively” adjudicate cases is being enforced. Earlier this year, the Justice Department took the unprecedented step of rolling out quotas for judges. To receive a “satisfactory” performance evaluation, judges are required to clear at least 700 cases a year. According to the Justice Department, judges now complete [678 cases a year](#) on average, meaning they will have to pick up the pace to remain in good standing.

This fall, DOJ [expects](#) to bring on at least 75 more immigration judges. Even if Sessions’s days as attorney general are numbered, as Trump has suggested, his selections will decide the fate of immigrants for years to come.

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