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PERSPECTIVE

Ordered 'recusal' shows lack of autonomy

By Kevin R. Johnson

In a recently filed lawsuit, a respected immigration court judge, former federal prosecutor, and adjunct professor at UCLA School of Law, Afsaneh Ashley Tabaddor, challenges a U.S. Department of Justice order that she not hear cases involving Iranian nationals. Born in Iran, Tabaddor has been a leader in the Iranian American community.

The Allegations

Appointed during the Bush administration, Tabaddor has served as an immigration judge since 1995. The complaint alleges that the White House Office of Public Engagement in 2012 invited her to a "Roundtable with Iranian-American Community Leaders." The Executive Office for Immigration Review (EOIR), which is in the DOJ and is the office that includes the immigration courts, permitted her a day of leave to attend the event. It further recommended that Tabaddor be recused from all cases, and cease to be assigned any cases, involving Iranian nationals. After Tabaddor protested, the DOJ transformed the EOIR's recommendation into an order.

Note at the outset that we do not have the full story. The EOIR to this point has declined to respond to the charges. That said, the case raises a number of troubling issues that got to the core of judicial independence.

Stereotypes of Prejudice and Bias?

The obvious question is how could ordinary community activity — including participation in an event at the White House — lead to a removal from Tabaddor's docket of all cases involving Iranians?

Diversity among the judges generally is viewed as positive. Diverse judges bring diverse experiences to bear on the court's decisions and enhance the perceived legitimacy of the decision-makers. Someone with Tabaddor's background — a women and an immigrant from Iran — would seem to add the kind of diversity that we want on the immigration court. Her community leadership also is something that is to be encouraged.

Recusal of a judge in both state and federal courts generally requires (1) a showing of potential bias in a specific case; or (2) that the judge's impartiality might reasonably be questioned in a specific case. If a judge knows or is related to a litigant in a case, or has a financial interest (such as ownership of stock) in a business involved in the litigation, recusal is routine. However, bias is not generally assumed because of one's national origin.

It was known that Tabaddor was born in Iran when she was appointed as an immigration judge. The justification for the DOJ's order apparently is that a person from Iran who is active in the Iranian-American community cannot be impartial when it comes to the immigration matters involving nationals of Iran. No evidence has been presented that Tabaddor could not be impartial in cases involving Iranians. Nor has there been any allegation that she engaged in favoritism or any impropriety in any case.

Perhaps one could think of an organization (such as the Ku Klux Klan, for example) that might warrant consideration of some kind of recusal in certain kinds of cases (perhaps civil rights cases). However, such a recusal still would raise thorny legal issues. Concerns with widespread bias against broad categories of cases might warrant removal from the bench. In any event, it is difficult to fathom how Tabaddor's community activities, including attendance at a White House forum, fall anywhere near this category.

There was a time in the late 1970s and early 1980s when recusal motions were filed by defendants seeking to remove African-American judges from hearing civil rights cases. The judges resisted and established that judicial bias cannot be assumed based on the race. In one well-known case, influential African-American jurist A. Leon Higginbotham rejected a union's effort to recuse him from adjudicating the discrimination claims of black union members.

More recently, arguments were made that Judge Vaughan Walker's sexual orientation made him biased in favor of the plaintiffs seeking to invalidate Proposition 8, which prohibited same sex marriage. He heard the case and history was made when the court struck down the initiative.

Ashley Tabador. Associated Press

Taken to their logical conclusions, the ramifications of the DOJ's order prohibiting Tabaddor from hearing cases of Iranian nationals raise troubling questions. Can immigration judges born in Mexico — or of Mexican ancestry — who are involved in community activities, be barred from hearing any case involving a Mexican national? What about persons whose ancestry was traceable to Germany and the cases of German immigrants? Where is the line, how is it drawn, and who draws it?

It is not clear whether the DOJ applied any kind of rule in ordering Tabaddor to recuse herself from deciding cases involving Iranians. The DOJ apparently made an ad hoc decision to issue the order. If allowed to stand, the lack of transparency and reasoning justifying the recusal order may well chill the community activities of some immigration court judges. It also might discourage applications from immigration court judges from diverse backgrounds who are active in the community.

The Lack of Judicial Independence of the Immigration Courts

The second fundamental question raised by the Tabaddor lawsuit goes to judicial independence. The treatment of Tabaddor reminds us that, put simply, the immigration courts are not independent. The immigration courts are part of the EOIR and therefore part of the DOJ. The DOJ removes judges — or, in this instance, removes cases from their docket — as it sees fit.

The lack of judicial independence is nothing new. A few years ago, Attorney General John Ashcroft removed the more liberal (i.e., pro-immigrant) members of the appellate tribunal — the Board of Immigration Appeals — as part of the downsizing of the board by the Bush administration. In addition, the Office of the Inspector General concluded that the selection of immigration judges during the Bush years considered ties to the Republican Party and other partisan political considerations.

To remedy the lack of judicial independence, Dana Leigh Marks, who has served as an immigration judge since 1987 and is president of the National Association of Immigration Judges, has advocated that immigration court judges be afforded more independence, such as by making them Article I courts (like the tax courts and bankruptcy courts) with appointments with fixed terms.

In this instance, the DOJ, without a specific motion brought by a litigant or an order explaining its reasons, issued a blanket order barring Tabaddor from hearing any cases involving Iranian nationals. The lack of judicial independence of the immigration courts could not be clearer.

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It may well be that there are important parts missing to the story behind the Department of Justice's seemingly unprecedented blanket removal of Immigration Court Judge Tabaddor from cases involving nationals of Iran. Still, the order raises troubling issues of stereotyping of the thinking of minorities in judicial positions. Whatever the final resolution of the matter, the Tabaddor case is a stark and clear reminder that immigration courts lack judicial independence and currently answer directly to the DOJ.

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