NOTICE & COMMENT

We Have Nothing to Fear but “Sovereignty Fear” Itself*

Jill Family – August 5, 2021

*With apologies to President Roosevelt

The Trump administration used its leverage over immigration judges in extremely controversial ways that worsened (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3399486) an already dysfunctional adjudication system. These maneuvers (https://www.aila.org/infonet/immigration-courts) were a manifestation of President Trump’s explicit disdain (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3399486) for providing process and statutory benefits to noncitizens. For example, the Trump administration implemented unrealistic case completion quotas (https://www.yalejreg.com/nc/fair-process-in-name-only/) on immigration judges. Immigration judges felt pressure to take the fast route and deny a case or deny a continuance, rather than to take the longer time necessary to approve a case or to slow down to make sure a hearing is fair. The Trump administration also directly interfered with an ongoing case by removing (https://www.inquirer.com/philly/news/immigration-judges-association-grievance-philadelphia-steven-morley-removal-deportation-case-20180808.html) an immigration judge from a case because it did not like his approach, attempted to decertify (https://www.npr.org/2019/08/12/750656176/trump-administration-seeks-decertification-of-immigration-judges-union) the immigration judges’ union, and implemented restrictions (https://www.theregreview.org/2019/02/14/powell-how-sessions-reshaped-americas-immigration-court-system/) on immigration judges’ control over their own dockets to force faster decision-making at the expense of accuracy and fairness.

The current framework (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1328495) has the US Attorney General, the nation’s chief law enforcement officer, employing a corps of about 500 attorney employees to preside over removal hearings. These immigration “judges” lack sufficient independence in that the Attorney General controls the conditions of their employment (https://www.yalejreg.com/nc/even-worse-again/). For example, immigration judges do not serve fixed terms, they have limited protections against firing, and even if not fired, the Attorney General has the power to reassign judges to far away, isolated geographical areas.

Many call for reform (https://www.americanbar.org/news/abanews/aba-news-archives/2019/03/aba-commission-to-recommend-immigration-reform/) of the immigration adjudication system. One idea is to make immigration adjudicators more independent from the executive branch by creating an Article I immigration court (https://www.naij-usa.org/images/uploads/newsroom/Article_1_-_NAIJ_summary-of-salient-facts-and-arguments_2.20.2021.pdf). Immigration judges would serve fixed terms and would no longer work for the US Attorney General. Instead, immigration judges would report to Article I appellate immigration judges, and those appellate judges would be appointed by the president and confirmed by the Senate. This would move immigration judges away from the law enforcement focus of the Department of Justice and would allow for supervision in an agency setting that is dedicated to adjudication, rather than maintaining a law enforcement reputation.

One possible hesitation to moving the immigration courts out of the executive branch is a fear the president would no longer have adequate control over immigration. Would the president still be able to maintain control over foreign policy? Would the nation’s sovereignty remain intact? The answer to both questions is yes. I’ll call this hesitation “sovereignty fear.”

According to the US Supreme Court’s plenary power doctrine, the president and Congress should have great power over immigration law because of a need to protect the nation’s sovereignty. As recently as 2018 (https://casetext.com/case/trump-v-hawaii-4), the Supreme Court referred to the admission and exclusion of noncitizens as a fundamental characteristic of sovereignty.

As I have previously argued, this conception of immigration needs to be (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2566896) disrupted (https://www.yalejreg.com/nc/disrupting-immigration-sovereignty-by-jill-e-family/). Immigration is not an inherent threat to national security or to the ability of the United States to govern itself. The narrative should be flipped. Immigration is so beneficial that we should see it as *essential* to the nation. This idea should be the major force in designing immigration regulation, and adjudication is a major facet of regulation. Regulation based on this flipped notion is still regulation but based on a different foundation. It is possible to control immigration without giving special deference to the president and Congress.

Sovereignty fear should not prevent us from providing fair adjudication. More independent immigration adjudicators would not have the power to put US sovereignty or foreign policy at risk. Immigration judges hear individual cases. In individual cases, immigration judges are tasked with applying the statutes, regulations, and agency guidance documents that are created either by Congress or the Department of Homeland Security. For an Article I immigration judge to put the nation’s sovereignty or foreign policy at risk, then, we must assume that the judge would act in contravention of established law and that no one would be able or willing to stop a rogue judge who decided to ignore all established law. This seems highly unlikely, especially if the work of an immigration judge is subject to judicial review. In fact, I have argued that creating more independent adjudicators, while crucial, is not enough (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1659704) to adequately reform immigration law precisely because even independent adjudicators will be obliged to apply the current statute, warts and all.

The same holds true for potential appellate immigration judges. These principal officers too would be subject to judicial review and would be bound by existing law. If the appellate immigration judges hear cases in panels of three, then two of the judges would have to agree to act in contravention of law.

More independent immigration adjudicators would not be able to ignore existing law and create *de facto* open borders. Additionally, the United States has defenses other than immigration judges.

If anything, the establishment of more independent immigration judges would *promote* sovereignty by reinforcing the United States’ foundational rule of law values. The current dependent framework led to the abuses of the Trump administration. The goal should be a system where immigration judges decide cases based on the law and not based on fear of reprisal from a boss who does not like the state of the law. Attorney General Sessions welcomed (https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-largest-class-immigration-judges-history) a new group of immigration judges by telling them that “the vast majority of the current asylum claims are not valid.” Such politicization only denigrates the rule of law.

Additionally, the status quo does not guarantee that no one will be present in the United States without permission. In fact, with the plenary power doctrine in place, there are approximately 10 million individuals living in the United States without permission. (And most of them (https://cmsny.org/publications/essay-warren-022719/) crossed the border legally, entering the territory with legal authorization for some period that expired.) Despite this, the United States continues to exist. Noncitizens, however, are denied more independent adjudicators under the false idea that by denying them we somehow protect the nation’s sovereignty. These are complex lives interwoven with our communities, businesses, schools, and the lives of US citizens. The failure to provide fair process affects more than just the noncitizen; in fact, it degrades our democracy and affects us all.

Perhaps the sovereignty fear is shorthand for something else? Is it an objection to multiculturalism? The reflection of a desire to give the president power to thwart statutory immigration law? Or perhaps courts and policymakers have been invoking the phrase “plenary power” for so long that it has become an out of date, knee-jerk reaction.

Sovereignty and foreign policy will remain intact even with more independent immigration adjudication. The sovereignty fear is a distraction from what really needs our attention; we should not let it stop us from providing fair process.