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## Ordered recusal of immigration judge boggles the mind

By Bruce J. Einhorn, Dalila Kamal-Griffin and Majed Dakak

The greatest common law jurist in the history of the United States, Justice Benjamin Cardozo, wrote that a good judge understands that the true sources of law "are to be found in the seething life of the people, in their actual doings, their ways of behaving." Our nation's courts are therefore best served when filled by diverse qualified jurists, of all races and nationalities, applying their unique perspective and understanding to the parties before them.

It is a shame that the administrators of the government agency that oversees our nation's busy and important immigration courts apparently have never been inclined or required to read Cardozo. If they had, they would never have made the serious error of ordering U.S. Immigration Judge Ashley Tabaddor, an Iranian-American, to indefinitely recuse herself from all cases involving litigants of Iranian origin, although no claim or allegation of actual wrongdoing or bias has ever been made against Tabaddor. If they had read Cardozo and used common sense, they would have instead commended Tabaddor for her service.

Tabaddor served as a judicial law clerk for several different judges including a chief U.S. immigration judge. She later worked as an appellate attorney with the U.S. Justice Department's Office of Immigration Litigation, and then as an assistant U.S. attorney in Los Angeles. In each of her roles, Tabaddor earned praise. So it was no surprise that, at the young age of 33, she was appointed to the immigration court in Los Angeles, the nation's busiest. No one - including those who have disagreed with her rulings - has accused Tabaddor of judicial bias for or against the government or those individuals facing removal and seeking relief from deportation in her court. The same agency that promulgated its blanket recusal order against Tabaddor admitted there was no claim or allegation of actual bias or impropriety against her.

So how was such an accomplished jurist ordered to recuse herself from all cases dealing with parties of the same national origin as her own? Not so long ago, several Iranian-Americans, including Tabaddor acting in her personal capacity, were invited to the White House for an event put on by the White House Office of Public Engagement. The Iranian-Americans in attendance had an opportunity hear from and speak to the Obama administration about the activities of the administration and issues of concern to the Iranian-American community. This is similar to many events the White House puts on to engage with different ethnic communities and minority groups.

Shortly after she returned from the White House, Tabaddor was informed by the Office of the Chief Immigration Judge (OCIJ) that she must indefinitely recuse herself from hearing any immigration cases involving Iranians because the OCIJ feared that

Tabaddor's high profile Iranian-American identity may give "an appearance" of bias. The OCIJ's order was based the Standards of Ethical Conduct for Employees of the Executive, 5 C.F.R. Section 2635.502(a). The regulation, however, only applies to disqualification from a "particular matter" involving "specific parties." But in Tabaddor's case, the blanket recusal order applied broadly to any matter before the immigration court involving any person of Iranian nationality.

The OCIJ's unreasonable and unconstitutional application of Section 2635.502(a) would make textualists and the most conservative jurists, including Justice Antonin Scalia, cringe. The OCIJ's decision flies in the face of its own rules and policies. Former Attorney General Janet Reno encouraged immigration judges and Justice Department attorneys to actively engage in their communities, so long as their extrajudicial service did not promote tangible judicial bias in the courtroom. Reno's rules have never been reversed.

Tabaddor has followed these rules by participating as a longtime leader in the Iranian-American Bar Association of Los Angeles and other nonpartisan groups that involve Americans of Iranian descent, lawfully present in the U.S., who seek to better the Southern California community and the country as a whole. As a U.S. citizen and a member of a family that fled the ruthless theocratic regime in charge of Iran, Tabaddor uniquely understands the importance of a fair and impartial system of justice, one she and her family risked their lives to find in America. Tabaddor is a role model for young immigrants and the children of immigrants who aspire to a leadership role in our democratic society, where an individual should be judged under law for her conduct rather than her religious or ethnic background. Many of us were blessed to be born in a meritocracy where equality forms a bedrock principle of jurisprudence. Tabaddor risked everything to choose such a nation.

The immigration courts in Los Angeles and throughout the country are filled with judges from diverse ethnic and religious backgrounds. Latino-Americans, Jewish-Americans, Asian-Americans, socially and religiously active and church-going Mormon, Catholic and Protestant Americans, and nonbelievers are all represented among the immigration judiciary. Many of these competent, fair-minded and dedicated jurists, like Tabaddor, are active in their religious and ethnic communities. However, only Tabaddor, an Iranian immigrant and a Muslim, has been singled out for the undeserved humiliation of wholesale recusal. It is as if Tabaddor has been punished for being a good citizen and a proud immigrant.

The mind boggles at such bigotry and raises the question: Does OCIJ have a separate standard for assessing the fairness of judges from one ethnic and religious community? Should all Catholic or female judges be recused from cases that involve issues of reproductive rights? Should all Jewish or atheist judges be recused from cases involving alleged hate crimes against religious minorities? Should all lesbian, gay, bisexual and transgender judges be recused from cases involving the alleged persecution of gays and lesbians?

Judges are not monks or mere machines, nor should they be. Although they must park their politics at the courthouse door, they should never be ashamed of applying the experiences of their heritage to their work, provided they do so in an impartial way. As the late, great Supreme Court Justice Felix Frankfurter's wrote:

"I came into the world a Jew, and although I did not live my life entirely as a Jew, I think it is fitting that I should leave as a Jew. I don't want to turn my back on a great and noble heritage."

Frankfurter was a proud Jewish immigrant, himself a refugee from persecution, whose impartiality as a jurist was never seriously or successfully questioned. His urging that judges apply their personal values of good and experienced citizenship to their duties on the bench is one Tabaddor understands, but sadly, OCIJ does not.

The OCIJ's discriminatory treatment of a competent judge who has served on the

immigration bench with distinction and the highest professional responsibility is troubling. As a judge and citizen, Ashley Tabaddor has proved a patriot. Her recent court action against the OCIJ for violation of her civil rights is yet another manifestation of her patriotism. If OCIJ's recusal order against her is carried to its logical conclusion, then only white, straight, male, and Anglo-Saxon Protestant jurists from Nebraska will populate our judiciary. Justices Cardozo and Frankfurter would be ashamed of us. We choose their values over OCIJ's anytime, and twice on Sunday.

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