AN INDEPENDENT IMMIGRATION COURT: An Idea Whose Time Has Come

A Position Paper by the National Association of Immigration Judges
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Hon. Dana Marks Keener
President, NAIJ
550 Kearny Street, Suite 800
San Francisco, CA 94108
(415) 705-4415 x262

Hon. Denise Noonan Slavin
Vice-President, NAIJ
155 S. Miami Ave., Room 800
Miami, FL 33130
(305) 530-6455 x177

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Summary

** With DOJ and INS reorganization a top priority after September 11th, the time for structural reform of the Immigration Courts is now

** NAIJ offers a bipartisan solution, which is the result of a multi-year, Congressionally-mandated study conducted in cooler times

** Independence and Impartiality in the hearing process must be safeguarded and this solution is the best way to do so

** Historical factors that caused the removal of the Immigration Court from the INS persist and show that the Court should now be moved outside the Department of Justice

** The Attorney General should not be the boss of the prosecutor and the judge

** The public does not perceive the Immigration Courts as separate from the INS, which undermines public confidence in the process

** Removing the Immigration Courts from the DOJ will enhance administrative efficiency, increase accountability and facilitate Congressional oversight of the INS

** Immigration Judges have unparalleled expertise and experience in this highly specialized and complex area of law

** A Presidentially-appointed Director of an independent Immigration Court will be free to focus on judicial priorities, ensuring administrative efficiency while protecting due process, without the mission conflict of prosecutorial and law enforcement responsibilities.

AN INDEPENDENT IMMIGRATION COURT:
An Idea Whose Time Has Come

Never before September 11th has the urgency been so great and the stakes so high. The time to reform our nation's immigration system is clearly now.[1] Yet never before have conditions made such an undertaking more perilous. The ideas we advance are not new.[2] Many date back over a decade. Never before have the competing interests been so poignant. Strong criticism has been leveled against the President, the Attorney General and the Department of Justice that legal rights have been curtailed in the aftermath of September 11th.[3] There are those who say the terrorists have won if we abandon the freedoms which characterize the American way of life.[4] Congressmen and Senators (on both sides of the aisle) and legal experts have expressed serious concern that due process rights for noncitizens have been encroached upon.[5] Yet all agree we must take appropriate action. The challenge is to balance all interests to ascertain the most effective, efficient and judicious steps to take.

The National Association of Immigration Judges offers a solution.[6] We advocate the creation of a separate, Executive Branch agency to house the trial-level Immigration Courts and the administrative appeals court, currently called the Board of Immigration Appeals. This solution was first proposed in 1997 by the United States Commission on Immigration Reform, a bipartisan, Congressional study group, which worked years reviewing the immigration system from the perspective of all parties involved.[7] We do not believe it is our role to advise beyond the area of our direct experience, thus we do not address broader reform encompassing the Immigration and Naturalization Service.[8]

The collective expertise of our corps in this complex and highly specialized area of law is unparalleled.[9] Our perspective is non-partisan, and has been forged in the trenches where the battles are being waged. We are firmly convinced that the plan we advocate will go a long way towards achieving the appropriate balance between fundamental fairness and security concerns in these tumultuous times.

Our paramount concern is safeguarding the independence of the Immigration Court system so as to protect America's core, legal values. Although immigration proceedings are civil in nature, they have long been recognized as having the potential to deprive one of that which makes life worth living.[10] When dealing with asylum issues, they can be death penalty cases, since an erroneous denial of a claim can result in the applicant's death.[11]

It is the most fundamental aspect of due process that one be given the opportunity to present one's case and confront the adverse evidence in an impartial forum. At present, there is at least the perception that this is not always provided. To understand our current posture within the Department of Justice and the reasons for our proposal, a bit of context and history is needed.

THE CURRENT STRUCTURE

Congress has delegated authority to the Attorney General to enforce and administer immigration laws through the provisions of the Immigration and Nationality Act (INA).[12] The Attorney General, in turn, has delegated the bulk of that authority to the Commissioner of the INS.[13] However, specific authority for immigration, trial level and appellate administrative review has been delegated by the Attorney General to the Executive Office for Immigration Review (EOIR).[14]

Immigration Courts are the trial-level tribunals that determine if an individual ("respondent") is in the United States illegally, and if so, whether there is any status or benefit to which he is entitled under the Immigration and Nationality Act of 1952, as amended (INA).[15] The INS has virutally unfettered prosecutorial discretion to lodge charges with the Immigration Court, which sets the removal process in motion. The INS is represented in Immigration Court proceedings by an INS trial attorney (usually an Assistant District Counsel). For a respondent in such proceedings, eligibility for relief from deportation or removal (through attaining a status such as lawful permanent residence through a relative's petition or asylum, for example) generally involves two aspects: a statutory eligibility component and a discretionary component. Respondents have the right to be represented by an attorney, but at no expense to the U.S. Government. Some respondents are placed in proceedings before the Immigration Court after an application filed by them has been denied by the INS, while others are discovered illegally in the U.S. (for example, after being witnessed crossing the border without inspection or after the commission of a crime while serving a criminal sentence in a State prison). Thus, Immigration Judges make many determinations regarding eligibility for relief as initial applications,[16] others upon de novo review of an INS denial of an application,[17] and still others upon review of whether an INS decision below was based on sufficient evidence.[18] Once in removal proceedings, many respondents are eligible for release on bond.[19] The INS sets the initial amount of bond and generally an Immigration Judge may redetermine if custody is mandatory or desirable and the proper amount of any bond.[20]

Many lawyers are surprised to learn that the Administrative Procedure Act of 1946, as amended (APA)[21] does not apply to most proceedings under the INA. Even the United States Supreme Court initially ruled that such hearings were subject to the procedural safeguards of the APA, acknowledging that the purpose of the APA was to eliminate the commingling of prosecutorial and fact-finding functions, because it "not only undermines judicial fairness; it weakens public confidence in that fairness."[22] The Court noted that "this commingling, if objectionable anywhere, would seem to be particularly so in deportation proceedings, where we frequently meet with a voiceless class of litigants who not only lack the influence of citizens, but who are strangers to the laws and customs in which they find themselves involved and who often do not even understand the tongue in which they are accused."[23] However, when Congress enacted the Immigration and Nationality Act of 1952, it instead provided a specific procedure applicable only to deportation proceedings under §242, distinct from the APA.[24] This congressional choice was upheld by the United States Supreme Court in 1955.[25]

In an effort to ameliorate some concerns, several steps have been taken over the years to protect fundamental fairness. In 1956, Immigration Judges (then called Special Inquiry Officers or SIOs) were removed from the supervision of the INS District Directors and the position of Chief SIO was created.[26] In 1973, SIOs were authorized to use the title Immigration Judge and wear robes in the courtroom.[27] In 1983, the Attorney General formally separated the Immigration Court and the Board of Immigration Appeals from the INS, creating the EOIR, the agency within the Department of Justice which houses these functions to this day.[28]

CURRENT PROBLEMS

The historical reasons for creating EOIR and separating its functions from the INS are even more compelling today. Just short months ago, the United States Supreme Court reminded us that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent."[29] Yet the need to safeguard due process has long been seen as at odds with the demands for productivity in this high volume realm. The Immigration Courts handle more than 260,000 matters annually, employing 221 Immigration Judges in more than 52 locations across the country.[30] It is undisputed that administrative efficiency is a practical necessity in this area. With this enormous caseload, the need for public confidence in the integrity and impartiality of the system is all the more pronounced. Without it, unnecessary appeals and last-ditch, legal maneuvering flourish.

Unfortunately, there have been many instances where public cynicism was justified. Prior to 1983, Immigration Judges were dependent on INS District Directors, the direct line boss of the prosecutors who appeared before them daily, to provide their hearing facilities, office space, supplies and clerical staff. Most in our judge corps are aware of the rumor that a Texas Immigration Judge lost his parking space when a District Director became miffed by an adverse decision! Whether true or not, this example serves to illustrate the need for Immigration Judges to be independent of outside influences. More recent examples of equally disturbing encroachments on judicial independence regrettably occur.

In all fairness, the line between administrative, procedural and substantive issues is not always a bright or obvious one. However many disturbing situations persist, and demonstrate that actual conflicts of interest, and the appearance of possible conflicts, continue to arise. Many believe this occurs due to the Immigration Court's placement within the Department of Justice, where it is sometimes referred to as a "Cinderella" because it appears to be dominated by its more powerful older sibling, the INS.

For example, actions taken by the Chief Immigration Judge and the Chairman of the Board of Immigration Appeals, acting on the delegated authority of the Attorney General, have been reversed by the Ninth Circuit Court of Appeals, which declined to find the issue merely an "administrative" matter.[31] "The Creppy and Schmidt issued directives were purportedly temporary and internal, but they did not leave any real discretion to the BIA board members or the immigration judges. Whether or not the directives constituted rules requiring notice and comment, or merely general policy statements, is a question requiring further examination by the district court."[32] Years later, this class action litigation has dragged on because Immigration Judges (and BIA board members) were not allowed to apply their own sound, legal skills in the moment to conditionally grant a case. Instead, the Attorney General froze the process, delaying the bestowing of benefits (or the issuance of deportation orders), to address matters deemed merely "administrative".

The taint of inherent conflict of interest caused by housing the Immigration Court within the DOJ is insidious and pervasive. Rather than follow proper legal procedures and appeal adverse rulings on a case-by-case basis, disgruntled INS prosecutors have resorted to tattle-tale tactics and end-runs.[33] Since many high-level managers at EOIR

had been INS or DOJ employees for years, INS has more than once found a sympathetic ear for its discontent with a particular Immigration Judge's ruling. There is a strong temptation to have cases "administratively" resolved, by an ex-parte phone call to a former colleague or high-ranking administrator, rather than through the appropriate appeals process.[34] Allegations of forum shopping by INS officials and manipulation of venue issues have been documented as well.[35]

Perhaps the most blatant example of this susceptibility to improper interference relates to the failure to implement the Congressional enactment of contempt authority for Immigration Judges. In 1996, contempt authority for Immigration Judges was mandated by Congress.[36] However, actual implementation required the promulgation of regulations by the Attorney General. When Immigration Judges protested the lengthy delay in implementation, it was discovered that the Attorney General had failed to do so, in large part, because the INS objected to having its attorneys subjected to contempt provisions by other attorneys within the Department, even if they do serve as judges. "The INS has generally opposed the application of this [contempt] authority to its attorneys. In more than [six] years since the enactment of IIRIRA, the Executive Office for Immigration Review (EOIR) and the INS have failed to resolve this issue. Consequently, the Attorney General has not published regulations implementing contempt authority for Immigration Judges,"[37] despite the Congressional mandate.

Another recent action demonstrates that this trend continues with equal force. On October 31, 2001, the Attorney General issued an interim rule which insulates INS custody determinations from any IJ review by granting an automatic stay of release on Immigration Judge decisions where the initial bond was set by the Service at $10,000 or

higher.[38] Since the INS is the entity which sets the initial bond amount, this provision guarantees it the ability to prevent an alien's release from custody during the pendency of administrative proceedings, despite the statutory provisions which entitle an alien to a bail re-determination hearing.[39]

Just as this paper was being finalized, another issue arose that reveals both the public perception that due process is not available before Immigration Courts because of their commingling with INS and the reality that INS through DOJ sometimes dictates to EOIR. On January 29, 2002, National Public Radio reported that two local newspapers and the ACLU are filing suit against the DOJ because of its policy of closing Immigration Court hearings. The report noted that while "INS Judges" used to make the decision on a case-by-case basis as to whether a hearing would be closed, an "INS policy" after September 11th has mandated the closing of all hearings where the Department suspected terrorist activity, even where the hearings themselves were on "technical immigration violations." When explaining how this could happen, the report noted that Immigration Judges are employees of the Department of Justice.

When reduced to its simplest form, in the current structure the Attorney General supervises both the prosecutor and the judge in Immigration Court proceedings. One does not need legal training to find this a disturbing concept, which creates, at the very minimum, the appearance of partiality. Thus, it is not surprising that the public perceives this system as "rigged."[40] Indeed, the analysis of legal scholars also supports the notion that the independence of the decisionmaker is perhaps the most crucial component needed to assure fundamental fairness:

> "The reviewing body must not only seem to be, but must in fact be free of command influence. Whether we are talking about an Article I court

> or a corps of ALJs afloat within the executive branch is beside the point… What is important is that the court/corps not be part of the agency on whose actions it is to sit in judgment. More specifically, the members of such a body cannot be beholden to the agency in matters of compensation, tenure, or conditions of employment. This means it should be free to formulate and advance its own budget before the relevant Congressional authorizing and appropriating committees."[41]

THE SOLUTION

In less emotionally charged times, the United States Commission on Immigration Reform (USCIR) concluded, after years of study, that the Immigration Courts and the Board of Immigration Appeals should be taken out of the Department of Justice and given the status of an independent agency in the Executive Branch. The report observed that: "Experience teaches that the review function works best when it is well-insulated from the initial adjudicatory function and when it is conducted by decisionmakers entrusted with the highest degree of independence. Not only is independence in decisionmaking the hallmark of meaningful and effective review, it is also critical to the reality and the perception of fair and impartial review."[42] In arriving at its decision:

> "The Commission was persuaded by the arguments that the review function should be completely independent of the underlying enforcement and benefits adjudication functions and the reviewing officials should not be beholden to the head of any Department. Although the desired independence could be attained by establishing an Article I Immigration Court … the overall operation of the immigration system requires flexibility and coordination of function, including the review function, by the various agencies in the Executive Branch."[43]

We believe the time has come to adopt the Commission's solution. The primary impetus behind the universal call for INS reorganization is the need to restore accountability to the system.[44] Implementation of our proposal will satisfy this need in

the circumscribed area of adjudicative review, while retaining the efficiency of an administrative tribunal. The removal of the immigration review functions from the Department of Justice and establishment of an independent and insulated agency[45] for the Immigration Courts and administrative appeals, will create a forum which will provide the needed checks and balances. The DOJ will be freed to focus its mission on the prosecution of those in the United States illegally -- an increasingly compelling focus.

Both due process and administrative efficiency will be fostered by a structure where the Immigration Courts continue to be a neutral arbiter. The Court's credibility would be strengthened by a more separate identity, one clearly outside the imposing shadow of our larger and more powerful sibling, the INS. The Immigration Courts would continue to impartially scrutinize the allegations made by the INS, endorsing those determinations which are correct, and providing vindication to those who are accused without sufficient objective proof, without the need to apologize to the public for the close alignment with the INS. The creation of an Immigration Court which is not a component of the DOJ will also aid Congress and the American people by providing an independent source of statistical information to assist them in determining whether the INS mandate is being carried out in a fair, impartial and efficient manner.[46] In addition, such a structure will provide a needed safeguard against possible prosecutorial excesses.

The traditional reason for maintaining the Immigration Courts within the DOJ no longer has the same force as it did in the1950s, when the current structure of the Immigration and Nationality Act was promulgated.[47] The historical basis for the

establishment of administrative agencies in general was to maximize the existing expertise in a given field, through general, rulemaking authority and specific, case adjudications.[48] "The purpose of the administrative bodies is to withdraw from the courts, subject to the power of judicial review, a class of controversy which experience has shown can be more effectively and expeditiously handled in the first instance by a special and expert tribunal."[49]

While it is indisputable that the expertise of the Immigration Courts is unmatched, the need for the Attorney General (usually through his delegees) to set broad policy based on that expertise has diminished considerably in recent years.[50] In the past decade, for example, Congressional enactments involving immigration matters have provided specific and detailed roadmaps to enforcement, not general goals which require the specialized skill of an agency to provide a methodology to implement or flesh-out.[51] The general trend in the field of administrative law appears to be shifting towards a judicial focus of insuring that Congressional will is implemented, rather than a reliance on agency expertise in interpretation.[52] This is a task which affords far less deference to administrative experience and interpretation, since it focuses instead on a search for Congressional purpose.[53] In any event, such guidance would be available if needed by a Presidentially-appointed Director, who would serve subject to the advice and consent of the U.S. Senate. Such a Director of the newly created agency would be free to focus on adjudicative fairness and efficiency, unfettered by the competing concerns of prosecutorial imperatives.[54]

THE BENEFITS OF THIS APPROACH

Some would argue that any reform of the current system should place the Immigration Courts under the Administrative Procedure Act (APA).[55] The American Bar Association in 1983 supported legislation to require administrative judges for immigration proceedings to be appointed pursuant to the APA.[56] Others assert that Immigration Courts should be Article I courts, as was done in the fields of tax law and bankruptcy law.[57]

The factors which favor the creation of an administrative agency, an administrative tribunal or an Article I court are the same: to accommodate the need for specialized expertise, to reduce the caseload burdens placed on Article III courts and to encourage legal uniformity.[58] Generally, the major distinction between the APA tribunals and Article I courts is the greater degree of judicial independence which is provided by the latter, due to the insulation of decisionmakers from the agency whose rulings it impacts.[59] Legal experts differ on their views as to how the degree of independence varies between the two types of forums and it is an issue to which a great amount of academic discussion has been devoted.[60]

The suggestions to make Immigration Court proceedings subject to the APA or to create an Article I Immigration Court were studied in depth by the USCIR and rejected.[61] In brief, the APA approach was viewed as unworkable by some, because it requires too much formality, such as discovery and written decisions with findings of fact and conclusions of law in all cases. These aspects of the traditional APA jurisprudence were perceived as interfering with the ability to quickly adjudicate the large volume of cases currently handled by the Immigration Court. Similarly, critics of the Article I

approach predicted a decrease in efficiency and increase in operating costs. We recognize the merits of Article I status, and in fact believe it is an appropriate solution to which we have no objections.[62] However, independent agency status seems a more feasible approach at this time, especially in light of the Commission's recommendations. Moreover, it may well comprise the best of all alternatives, since it would involve a minimum of disruption or restructuring to implement, but would provide a significant amount of additional impartiality and fundamental fairness.

The optimal balance of efficiency, accountability and impartiality would be achieved by adopting the USCIR's recommendation to establish an independent Immigration Court as an agency within the Executive Branch. This conclusion was reached after years of thorough study of all aspects of this intricate process by a bipartisan panel of experts. Establishment of an independent Immigration Court would achieve meaningful reform of the current structure with a minimum of disruption and expense. It would restore public confidence and safeguard due process, insulated from any political agenda. And the time for such action is now!

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[1] See, e.g., United States Immigration Law in a World of Terror, Margaret Stock, National Security White Paper, The Federalist Society for Law and Public Policy (2001).

[2] To the contrary, in the early 1980's Congress, in considering immigration reform, discussed removing the deportation and exclusion hearing process entirely from INS. Options raised by members of Congress included converting SIO's to Administrative Law Judges, or even creating an Article I Immigration Court. (The latter idea had been popularized by several law journal articles). The Evolution of the Immigration Court, Chris Grant. In recent years, Congress has introduced at least three bills to convert the Immigration Court to an Article I Court. See United States Immigration Act of 1996, H.R. 4258, 104th Cong. 2d Sess. (1996); United States Immigration Court Act of 1998, H.R. 4107, 105th Cong. 2d Sess (1998); and United States Immigration Court Act of 1999, H.R. 185, 106th Cong. 1st Sess. (1999).

[3] See, e.g., "ABA Urges Ashcroft to Kill Order," by George Lardner, Jr., Washington Post, 1/4/02; Eight Weeks in Jail for the Crime of Being from Yemen: Life on Ashcroft's Enemies List," by Carole Bass, The New Haven Advocate, 12/13/01; "Closed Immigration Hearings Criticized as Prejudicial," by William Glaberson, New York Times, 12/7/01; "Cheer Ashcroft On, With a Little Bit of Friendly Oversight," by Alan Charles Raul, L.A. Times, 12/5/01; "Ashcroft Under Fire for U.S. Anti-terrorism Tactics," CNN.com, 12/4/01; " Our Liberty and Freedoms Today: Statement of the American Immigration Layers Association," AILA Washington Update, Volume 5, Number 17, November 30, 2001; "A Familiar Battle Fought and Won," by Robin Toner and Neil A. Lewis, New York Times, 10/26/01; "A Panicky Bill," Washington Post Editorial, 10/26/01; "Proposed Antiterrorism Law Draws Tough Questions," by John Lancaster and Walter Pincus, Washington Post, 9/25/01; "Tightening Immigration Raises Civil Liberties Flag," by Jonathan Peterson and Patrick J. McDonnell, L.A. Times, 9/23/01; "Caution Urged in Terrorism Legislation," by Walter Pincus, Washington Post, 9/21/01; " Civil Rights Lawyers Sound Alarm," by Jason Hoppin, The Recorder 9/21/01; "Immigrants in America: Attack Response is Too Sweeping," Miami Herald Editorial, 9/20/01.

[4] "Crusade Against Due Process," by Ellis Henican, NewsDay Commentary, 12/7/01; "Beware of Creeping Authoritarianism," by Jack M. Balkin, The Detroit News, 12/4/01; "New World Disorder: Assault on America II," by Greg Goldin, L.A.Weekly, 11/30/01; "It Can Happen Here," by Anthony Lewis, New York Times, 12/1/01; "Ashcroft Ignores Lessons of the Last RoundUp," The Salt Lake Tribune Editorial, 12/4/01; "Rough Justice," by Adam Cohen, CNN.com, 12/3/01; "Wake Up America," by Anthony Lewis, New York Times, 11/30/01; "What Price Security?," Newsday Editorial, 11/26/01; "Dispensing with Traditional Justice," by Jacob Sullivan, Washington Times, 11/23/01; "Justice During Wartime," by Jim Oliphant, Legal Times, 11/21/01; "No Carte Blanche in Terror Investigation," GoMemphis.com Editorial, 11/13/01; "U.S. Will Monitor Calls to Lawyers," by George Lardner Jr, Washington Post, 11/9/01; "Feds Monitoring Lawyer Client Calls," by the Associated Press, New York Times, 11/9/01; "In Ashcroft We Trust," by Evan P. Schultz, New Jersey Law Journal, 11/8/01; "Due Process Must Survive," L.A.Times Editorial, 11/6/01; "Is Fear Crushing Freedom?," CBSnews.com, 10/31/01; "With Powers Like These, Can Repression Be Far Behind?," by Robert Scheer, L.A.Times, 10/30/01; "National Security and Citizens' Rights," by Bill Blakemore, ABCnews.com, 10/29/01; "Wage War on Terror, Not on Civil Rights," NewsDay Editorial, 10/28/01; "Don't Sacrifice Liberties to Protect Them," Dan K. Thomasson, Fresno Bee, 9/28/01; "Investigators Should Not Abuse Legal Process," Dallas Morning News Editorial, 10/18/01; "Liberty in a Time of Fear," by David Cole, New York Times, 9/25/01.

[5] "Diplomats Protest Lack of Information," by Barbara Crossette, New York Times, 12/20/01; "Uniformed Lawlessness," by Edward Wasserman, Miami Herald, 12/3/01; "U.S. Defends Anti-terror Tactics," by Kathy Gambrell, Washington Times, 12/2/01; "Rules to Use Military Tribunals Still Being Written by Pentagon Lawyers, Under Pressure to Build In Basic Safeguards," Newsweek, 12/2/01; "With Justice for Some, Not All," by Rogers M. Smith, The Christian Science Monitor, 11/20/01; "On Left and Right, Concern Over Anti-Terrorism Moves," by George Larder Jr, Washington Post, 11/16/01; "Power to Abuse," Miami Herald Editorial, 11/13/01; "An Affront to Democracy," Washington Post Editorial, 11/12/01; "Sen. Leahy, ABA Protest Ashcroft's Monitoring Order," by Helen Dewar, Washington Post, 11/10/01; "Senators Question an Anti-terrorism Proposal," by John Lancaster, Washington Post, 9/26/01.

[6] The National Association of Immigration Judges (NAIJ) is the certified representative and recognized collective bargaining unit which represents the Immigration Judges of the United States. NAIJ is an affiliate of the International Federation of Professional and Technical Engineers, an affiliate of AFL-CIO. This paper was prepared by the current President of NAIJ, Judge Dana Marks Keener and Vice President, Judge Denise Noonan Slavin. The opinions expressed here do not purport to represent the views of the United States Department of Justice, the Executive Office for Immigration Review, or the Office of the Chief Immigration Judge. Rather, they represent the formal position of NAIJ, based on the personal opinions of the authors which were formed after extensive consultation with their constituency. To the best of our ability to ascertain, the authors believe this paper represents the clear consensus of the majority of our members.

[7] Unites States Commission on Immigration Reform (USCIR), 1997 Report to Congress, Becoming An American: Immigration and Immigrant Policy, at 174 (September 1997)

[8] While we do not dwell on possible reforms affecting the appellate level of administrative review, the Board of Immigration Appeals, we do believe that the current placement of the trial level immigration courts within the same structure as the appellate level administrative court to be appropriate.

[9] Immigration Judges are a diverse corps of highly skilled attorneys, whose backgrounds include representation in administrative and federal courts, and even successful arguments at the United States Supreme Court . Some of us are former INS prosecutors, others former private practitioners. Our ranks include former state court judges, former U.S. Attorneys, and the former national president of the American Immigration Lawyers Association, the field's most prestigious legal organization, as well as several former local chapter officers. Many Immigration Judges continue to serve as adjunct law professors at well-respected law schools throughout the United States. Many former Immigration Judges have been selected to serve as ALJs, whose qualifications have been compared with federal district judges. "The calibre of administrative law judges … is certainly as high as those of federal district judges…" Treasury Postal Serv., and Gen. Gov't Appropriations for Fiscal Year 1984: Hearings on S.1275 before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 112 (1983) (statement of Loren A. Smith, Chairman of ACUS).

[10] Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)

[11] These cases have also been analogized to criminal trials, because fundamental human rights are so involved in these enforcement type proceedings. See, John H. Frye lll, "Survey of Non-ALJ Hearing Programs in the Federal Government," 44 Admin. L.Rev. 261, 276 (1992).

[12] 8 U.S.C. §1103.

[13] Id., 8 C.F.R. §2.1.

[14] 8 C.F.R. §§3.0 - 3.65.

[15] For a concise but comprehensive explanation of immigration court proceedings, see Kurzban's Immigration Sourcebook: A Comprehensive Outline and Reference Tool, 7th Ed. 2000, by Ira J. Kurzban.

[16] One example of this is cancellation of removal for nonpermanent residents under §240A(b) of the INA.

[17] Asylum applications under §208 can be initially filed with the INS. If the application is not granted, it is referred to the Immigration Court for a de novo determination of eligibility.

[18] When the INS determines that a conditional permanent resident who obtained that status through his marriage is not entitled to have the condition removed, the standard for review in the Immigration Court is whether the INS decision is based on substantial evidence. 8 U.S. C. §1186(b)(1).

[19] 8 U.S.C. §1226(a).

[20] 8 C.F.R. §3.19.

[21] 5 U.S.C. §551, et seq.

[22] See Wong Yong Sung v. McGrath, 339 U.S. 33, 42 (1950), citing the 1937 report of the President's Committee on Administrative Management considered by Congress in enacting the APA.

[23] Id. at 46.

[24] However, the APA provisions for rulemaking are nonetheless applicable to EOIR it its rulemaking capacity, and Administrative Law Judges subject to APA rules preside over employer sanction matters and discrimination cases in the Office of the Chief Administrative Hearings Officer (OCAHO), which is by far the smallest component of EOIR.

[25] Marcello v. Bonds, 349 U.S. 302 (1955)

[26] From Wong Yang Sung to Black Robes, Sidney B. Rawitz, Vol 65 Interpreter Releases No. 17 (May 2, 1988) at 458.

[27] 8 CF.R. §1.1(1)(1973); Rawitz at 48.

[28] See, e.g., Rawitz at 458-459; Education and Training Series, Major Issues in Immigration Law, A Report to the Federal Judicial Center, 1987, David A. Martin; The United States Immigration Court in the 21st Century, Institute for Court Management, Court Executive Development Program, Phase III Project, May 1999, Michael J. Creppy, H. Jere Armstrong, Thomas L. Pullen, Brian M. O'Leary, Robert P. Owens.

[29] Zadvydas v. Davis, 121 S.Ct. 2491, 2500 (2001)

[30] See, "In the Spotlight: The Honorable Michael J. Creppy, Chief Immigration Judge of the United States" in Lateral Attorney Recruitment, Office of Attorney Recruitment and Management, U.S. Department of Justice.

[31] Barahona-Gomez v. Reno, 167 F.3d 1228 (9th Cir. 1999)

[32] Id. at 1235.

[33] An Immigration Judge in York, Pennsylvania ,was trumped in his decision to remove a case from the docket over the objection of the INS through an administrative closure order when the local Court Administrator, under orders from the Chief Immigration Judge, ignored the ruling and placed the matter back on calendar. See "Immigration Judge Criticizes Intervention into Deportation Case," Siskind's Immigration Bulletin, June 29, 2001; "Two Judges Do Battle in Immigration Case" by Eric Schmitt, New York Times, 6/21/01.

[34] "Judge's High Caseload" by Frederic Tulsky, San Jose Mercury News, 10/17/00 (describing an accidentally recorded *ex parte* telephone conversation between an Immigration Judge, who was a former INS employee, and an INS trial attorney regarding the merits of a pending case).

[35] See Xiao v. Reno, 837 F.Supp. 1506, 1539-1541(discussing allegations of forum shopping); "Misconduct Alleged in Heroin Smuggling Case," by Jim Doyle, San Francisco Chronicle, 11/24/92; "INS Transfer Procedures Making a Mockery of Detainee Rights," by Robyn Blumner, Salt Lake Tribune, 1/4/02; Committee of Central American Refugees, et al. v. INS, et al., 795 F.2d 1434 (9th Cir. 1986); see also, Committee of Central American Refugees, et al. v. INS, et al., 807 F.2d 769 (9th Cir. 1987).

[36] See §240(b)(1) of the INA, as amended by §304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (IIRIRA).

[37] The United States Immigration Court in the 21st Century, Institute for Court Management, Court Executive Development Program, Phase III Project, May 1999, Michael J. Creppy, H. Jere Armstrong, Thomas L. Pullen, Brian M. O'Leary, Robert P. Owens, at page 109, n.313.

[38] 66 Fed. Reg. 54909 (10-31-01)

[39] Testimony of Margaret H. Taylor, Professor of Law, Wake Forest University School of Law, at the Hearing Before the Immigration and Claims Judiciary Committee, House of Representatives, December 19, 2001.

[40] The United States Immigration Court in the 21st Century, Institute for Court Management, Court Executive Development Program, Phase III Project, May 1999, Michael J. Creppy, H. Jere Armstrong, Thomas L. Pullen, Brian M. O'Leary, Robert P. Owens at 100 - 105 (finding that 68% of those who were surveyed thought the Immigration Courts were part of the INS, while nearly 1/4 (22%) indicated that the close personal relationships

between employees of the INS and the Immigration Courts were a factor in their conclusion that the Immigration Courts were not separate from the INS)

[41] Richard B. Hoffman and Frank P. Cihlar, Judicial Independence: Can It Be Done Without Article I?, 46 Mercer L. Rev. 863, 878 (Winter, 1995).

[42] Unites States Commission on Immigration Reform (USCIR), 1997 Report to Congress, Becoming An American: Immigration and Immigrant Policy, at 175 (September 1997)(emphasis added).

[43] Id. at 179.

[44] The cries for accountability in recent months have been virtually deafening. See, e.g.,:"Secret Evidence Invites Abuse," Red Bluff Daily News Editorial, 1/9/02; "Questions Raised About Detainees," by Mae M. Cheng, NewsDay, 12/7/01; "U.S. Has Overstated Terrorist Arrests for Years," by Mark Fazlollah and Peter Nicholas, Miami Herald, 12/14/01; "Secret Justice: Ashcroft Orders Closed Courts," by Josh Gerstein, ABCnews.com, 11/28/01; "Ashcroft Offers Accounting of 641 Charged or Held - Names 93" by Neil Lewis and Don Van Natta Jr, New York Times, 11/28/01; "Analysis- Ashcroft Does an About-Face on Detainees," by Todd S. Purdum, New York Times, 11/28/01; "INS Can Overrule Judges' Orders to Release Jailed Immigrants," by David Firestone, New York Times, 11/28/01; "Cases Closed," by Josh Gerstein, ABCnews.com, 11/19/01; "US Issues Rules to Indefinitely Detain Illegal Aliens Who Are Potential Terrorists," by Jess Bravin, The Wall Street Journal, 11/15/01; "INS to Stop Issuing Detention Tallies," by Amy Goldstein and Dan Eggen, Washington Post, 11/9/01; "Count of Released Detainees is Hard to Pin Down," by Dan Eggen and Susan Schmidt, Washington Post, 11/6/01; "Justice Department Cannot Confirm How Many Detainees Released," by Terry Frieden, CNN.com, 11/6/01; "Opponents' and Supporters' Portrayals of Detentions Prove Inaccurate," by Christopher Drew and William Rashbaum, New York Times, 114/3/01; "U.S. Holds Hundreds in Terror Probes; Who Are They?," by Chris Mondics, The Record, 11/3/01; "Detentions After Attacks Pass 1000, U.S. Says," by Neil A. Lewis, New York Times, 10/30/01; "Detention and Accountability," New York Times Editorial, 10/19/01; "A Need for Sunlight," Washington Post Editorial, 10/17/01.

[45] Similarly, the impetus for the creation of the Tax Court "was, in large measure, the desire to provide a forum for review of administrative action that was unfettered by agency control." Richard B. Hoffman and Frank P. Cihlar, Judicial Independence: Can It Be Done Without Article I?, 46 Mercer L. Rev. 863, 871 (Winter, 1995)

[46] See footnote 43, supra.

[47] For a general discussion of how the current structure succeeds in part (and falls short in others) in providing optimal due process safeguards in various decisional contexts, see "A Study of Immigration Procedures" by Paul Verkuil, 31 UCLA L. Rev. 1141 (August, 1984).

[48] See, 2 Am. Jur. Adm. Law. §24, et seq.

[49] Cromwell v. Benson, 285 U.S. 22, 88 (1932).

[50] Since EOIR became a separate agency within the DOJ on January 9, 1983, the Board of Immigration Appeals has published 525 precedent decisions. Only seven of those decisions were reviewed by the Attorney General during that time. See Matter of N-J-B-, 21 I&N Dec. 812 (AG 7/9/97); Matter of Soriano, 21 I&N Dec. 516 (AG 2/21/97); Matter of Farias-Mendoza, 21 I&N Dec. 269 (AG 3/27/97); Matter of Cazares-Alvarez, 21 I&N Dec. 188 (AG 6/29/97); Matter of De Leon-Ruiz, 21 I&N Dec. 154 (AG 6/29/97); Matter of Hernandez-Casillas, 20 I&N Dec. 262 (AG 3/18/91); Matter of Leon-Orosco and Rodriguez-Colas, 19 I&N Dec. 136 (AG 7/27/84).

[51] See, e.g., Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. Law 104-132, 110 Stat. 279 (Apr. 24, 19960; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

[52] Richard H. Fallon, Jr., Of Legislative Courts, Administrative Agencies, and Article III, 101 Harv. L. Rev. 915, 916-7 (1988) (arguing that in order for administrative agencies to pass constitutional muster in their provision of justice they must be subject to appellate review by an Article III court); "See also. United States v. Mead, 121 S.Ct. 2164 (2001); William Funk, One of the Most Significant Opinions Ever Rendered?, 27 Fall Admin. & Reg. L. News 8.

[53] As an independent agency, the President would be free, subject to the advice and consent of the Senate, to appoint a Director who would have only the single task of assuring the efficient and fair administrative review of immigration decisions. See United States Commission on Immigration Reform, 1997 Report to Congress, Becoming An American: Immigration and Immigrant Policy, at 180 (September 1997)

[54] This would then remove the Attorney General from the dilemma which has been the most frequently attributed cause for the dsyfunction of the INS: conflicting priorities between enforcement and adjudications goals.

[55] See, Richard B. Hoffman and Frank P. Cihlar, Judicial Independence: Can It Be Done Without Article I?, 46 Mercer L. Rev. 863, 864 (Winter, 1995) ("It should be emphasized that some regard ALJs --- and by implication, Article I judges, but not AJs --- as imbued with the essential elements of judicial independence.")

[56] American Bar Association, Policy/Procedures Handbook at page 294. See also, Recommendations of the Administrative Conference of the United States, The Federal Administrative Judiciary, 1 C.F.R. 305.92-7 (1992) ("The Conference's general view is that the movement away from uniformity of qualifications, procedures and protections of independence that derives from using ALJs in appropriate adjudications is unfortunate."); see also, Paul R. Verkuil, Reflections Upon the Federal Administrative Judiciary, 39 UCLA L.Rev. 1341, 1358-1359, 1361 ("The argument for ALJs would be strongest in situations were individual liberty is at stake and weaker where the disbursing of of government benefits is involved. On this scale, the use of ALJs in the immigration context takes on heightened importance…" Id. at 1362-1363.)

[57] See, Isabel Medina, Judicial Review - A Nice Thing? Article III, Separation of Powers and IIRIRA of 1996, 29 Conn. L. Rev. 1525 (1998); Maurice Roberts, Proposed: A Specialized Immigration Court, 18 San Diego L.Rev. 8, (1980); Leon Wildes, The Need for a Specialized Immigration Court: A Practical Response, 18 San Diego L. Rev. 53 (1980).

[58] Paul M. Bator, The Constitution as Architecture: Legislative and Administrative Courts under Article III, 65 Ind. L. J. 233; Martin H. Redish, Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision, 1983 Duke L.J. 197 (April 1983).

[59] Richard B. Hoffman and Frank P. Cihlar, Judicial Independence: Can It Be Done Without Article I?, 46 Mercer L. Rev. 863 (Winter, 1995)

[60] See footnotes 50, 55 and 56, supra.

[61] Unites States Commission on Immigration Reform , 1997 Report to Congress, Becoming An American: Immigration and Immigrant Policy, at 179 (September 1997)

[62] We do, of course, strongly believe that any legislative conversion to Article I status must include a provision which would "grandfather" our current Immigration Judge corps. See note 9, infra.