

An Urgent Priority: Why Congress Should Establish an Article I Immigration Court

Hon. Dana Leigh Marks

Introduction

Five years have now passed since the functions of the Immigration and Naturalization Service (INS) were moved out of the Department of Justice (DOJ) and placed in the purview of the newly created Department of Homeland Security (DHS). At that juncture, serious concerns were raised as to the proper placement of the Executive Office for Immigration Review (EOIR) within the Executive Branch. The reorganization was seen by many as a golden opportunity to remedy long-standing concerns regarding decisional independence in the trial-level Immigration Courts and the agency component that reviews their decisions, the Board of Immigration Appeals (BIA). The choice was made to provide EOIR with some degree of independence from the INS prosecutors by keeping EOIR within the DOJ. Time and experience have shown that this structure fails to assure the independence and impartiality of Immigration Judges. Both are imperative in immigration law which so heavily implicates fundamental rights.

The National Association of Immigration Judges (NAIJ)¹ testified five years ago before the Senate Judiciary Subcommittee on Immigration and documented the long history of actual and perceived encroachments on decisional independence caused by the placement of the Immigration Courts in an agency which was too closely aligned with the prosecutor in

¹ The National Association of Immigration Judges 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 the AFL-CIO. This statement was prepared by the current President of the NAIJ, Judge Dana Leigh Marks. The opinions expressed here do not purport to represent the views of the U.S. 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 and the personal opinions of the author, which were formed after extensive consultation with her constituency.

such cases.² The purpose of this written statement is to discuss the problems which persist today and to propose a legislative solution: the placement of the trial-level Immigration Courts and the appellate BIA in an Article I Immigration Court within the Executive Branch, with the right of appeal by both parties to the appropriate regional federal circuit court of appeal, and with the naming of judges by the President, with the advice and consent of the Senate.

The current court structure is marked by the absence of traditional checks and balances, a concept fundamental to the separation of powers doctrine. This structural flaw is readily apparent to lawyers, scholars and jurists. At present, the Attorney General, our nation's chief prosecutor in terrorism cases, acts as the boss of the judges who decide whether an accused non-citizen should be removed from the United States.³ At the same time, despite the creation of the DHS and the placement of trial-level immigration prosecutors there, the Attorney General continues to supervise a critical element of the prosecution process,

² See *Immigration Reform and the Reorganization of Homeland Defense: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. 14-16, 70-98 (2002) (statement and written submissions of Dana Marks Keener, President, National Association of Immigration Judges). Included in the NAIJ submission was a position paper entitled *An Independent Immigration Court: An Idea Whose Time Has Come*. See *id.* at 79-98 (written statement of Dana Marks Keener and Denise Noonan Slavin, Vice President, National Association of Immigration Judges) [hereinafter Keener & Slavin, *An Independent Immigration Court*].

³ Here is one disturbing example of the structural flaw. On January 29, 2002, National Public Radio reported that two local newspapers and the ACLU filed a lawsuit 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 mandated the closing of all hearings where the DOJ 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 DOJ employees.

the Office of Immigration Litigation (OIL), which defends immigration cases on behalf of the government in the circuit courts of appeals. This conflict of interest between the judicial and prosecutorial functions creates a significant (and perhaps even fatal) flaw to the immigration court structure, one that is obvious to the public and undermines confidence in the impartiality of the courts. There are understandable concerns that the decisions rendered by Immigration Judges are not independent and free from pressure or manipulation.⁴

These concerns contribute to a ripple effect of increased recourse to the circuit courts of appeals from decisions rendered by individual Immigration Judges and the BIA. The rising immigration caseload has placed pressures on the circuit courts, and the astronomical increase in immigration appeals in recent years has captured the attention of many experts in this field.⁵ The solution proposed here, the establishment of an Article I Immigration Court, would alleviate this problem as well, since previous appeal rates are likely

⁴ Unfortunately, this perception was recently given new support by the DOJ's own "shot across the bow" to Immigration Judges. Acknowledging that there have been some instances of confusion among observers regarding the role and status of Immigration Judges, the Department seized the opportunity to diminish their quasi-judicial role by continuing to emphasize the fact that Immigration Judges are merely "Department of Justice attorneys who are designated by the Attorney General to conduct such proceedings, and they are subject to the Attorney General's direction and control." Authorities Delegated to the Director of the Executive Office for Immigration Review, and the Chief Immigration Judge, 72 Fed. Reg. 53,673, 53,673 (Sept. 20, 2007). See also Stephen H. Legomsky, *Deportation and the War on Independence*, 91 Cornell L. Rev. 369, 370 (2006) (asserting that actions taken by the Attorney General in 2002 and 2003 "drain the administrative phase of the deportation process of all meaningful decisional independence").

⁵ This issue was deemed so pressing that a hearing was held before the Senate Judiciary Committee in 2006. See *Immigration Litigation Reduction: Hearing Before S. Comm. on the Judiciary*, 109th Cong. (2006). For some comments regarding the effect changes at the administrative level would have on the circuit courts, see *id.* at 30 (statement of David Martin, Professor of Law, University of Virginia, discussing the adverse effects of streamlining) ("[T]he current stresses on the system for judicial review could best be addressed by restoring sound functioning of the adjudication and appeals systems at the administrative level . . ."); *id.* at 22 (statement of John M. Walker, Jr., Chief J., U.S. Court of Appeals for the Second Circuit regarding the crush of immigration cases in the circuit courts) ("So I totally applaud this effort on the part of the Chairman, on the part of you, to give the BIA adequate resources and ask them to do their job of deciding these cases and doing so by written opinion. It will make a big difference to the Courts of Appeals.").

to be restored once the public is confident that the Immigration Courts are independent and free from political influences.⁶

Immigration Judges have unparalleled expertise and experience in a highly specialized and complex area of law. Precisely because of their expertise, they are similar to United States Tax Court judges, whose placement in a specialized Article I court has been a legal success story.⁷ The creation of an Article I Immigration Court would free knowledgeable experts to focus on judicial priorities and ensure judicial economy while protecting due process. By removing the mission conflict between prosecutorial and law enforcement responsibilities legitimately at the DOJ, and the requirement of neutral adjudications of immigration cases, the public's faith in the impartiality of the nation's immigration tribunals would be restored.

Overview

This statement will begin by providing background and context to the current needs of the Immigration Courts, explain the reasons which gave rise to the current organizational structure, and summarize reasons for advocating change now. Next, an overview of the present structure will be provided for those not

⁶ Dory Mitros Durham, Note, *The Once and Future Judge: The Rise and Fall (And Rise?) of Independence in U.S. Immigration Courts*, 81 Notre Dame L. Rev. 655, 691 (2006) ("Perhaps more importantly, however, the change of direction in the evolution of adjudication structures has produced a telling response – overwhelming demands for judicial review. These demands demonstrate that the parties to these proceedings and their advocates will continue to demand, as they have throughout history, that their cases be heard by an independent adjudicator, whether internal or external to the agency. This demand, as in the past, may very well impel changes giving greater procedural protections to aliens and greater quasi-judicial independence to adjudicators. Should potential changes to immigration adjudications structures be considered, legislators should be wary of overly simplistic approaches that attempt to cut off judicial review and leave the current adjudications structure otherwise as is. As the current situation demonstrates, such a measure will eventually force aliens to seek protection elsewhere.").

⁷ See 26 U.S.C. § 7441 *et seq.* (2007); see also *Immigration Litigation Reduction: Hearing Before S. Comm. on the Judiciary*, 109th Cong. (2006), at 9 (statement of Carlos T. Bea, Chief J., U.S. Court of Appeals for the Ninth Circuit) ("Immigration is a very complicated area. It is somewhat like tax law because we keep passing immigration bills, and there are layers It is three different acts, three different layers you have to go through in practically every immigration case. And it is a little bit like tax. That is why we have a Tax Court"); Ellen R. Jordan, *Specialized Courts: A Choice?*, 76 Nw. U. L. Rev. 745, 749-57 (1981).

familiar with the daily workings of the Immigration Courts. Then, the persistent problems engendered by the inherent conflict of interest in the current structure will be discussed. A full explanation of a proposed solution will be provided next, followed by the rationale for this model and the reasons it is supported by legal scholars and a bipartisan Presidential commission. Finally, the benefits of the Article I solution and its superiority to other possible solutions will be explained.

I. Background

Our proposal comes at a time when the issue of immigration has once again hit the nation's radar as a matter in critical need of a strong national policy. Yet, as we have often seen in the past, during debate on the divisive issue of comprehensive immigration reform, the unique role and specific needs of the Immigration Court are often overlooked.

In the post 9/11 world of international terrorism, concerns about national security and possible threats posed by uncontrolled immigration to and from our homeland gave birth to the DHS.⁸ At that time the NAIJ advocated that EOIR remain in its historical location, as a component of the DOJ.⁹ This position was taken in acknowledgement that the realistic alternatives at that point in time were for EOIR to either become part of the newly created DHS or remain at the DOJ. The DOJ position was taken in recognition of the practical and political realities at that juncture. Mostly, however, that position was taken in the hope that the past encroachments on judicial independence at the Immigration Court, some actual and some perceptual, would be ameliorated by the transfer of the prosecutorial functions of the former INS to the DHS.

Sadly, the ensuing five years has shown us that the initial proposed solution, to seek complete removal of EOIR from the DOJ, remains an urgent need and the

only viable solution to a flawed structure. Experience has also shown us that the only durable solution to the conflict-of-interest problems plaguing the Immigration Court is to create an Immigration Court pursuant to Article I of the Constitution, which would house both the trial-level and appellate-level immigration tribunals. An Article I court is created by Congress pursuant to its enumerated powers. Article I judges are not subject to Article III protections (that is, lifetime tenure and salary-reduction protection). We propose the establishment of an Article I court within the Executive Branch for immigration cases, with a right of appeal to the regional courts of appeal.

The ideas we advance are not new.¹⁰ They date back to the findings released after an extensive study on this issue was conducted by the President's Select Commission on Immigration and Refugee Policy in 1981 (1981 Select Commission) which expressly recommended "that existing law be amended to create an immigration court under Article I of the U.S. Constitution."¹¹ Indeed, since the early 1980s, the controversy has smoldered among legal scholars and academics as to whether an independent Executive Branch agency outside of the DOJ would suffice or whether an Article I court was necessary.¹² But the

⁸ For a discussion of the objectives of placing immigration matters at the DHS, see David A. Martin, *Immigration Policy and the Homeland Security Act Reorganization: An Early Agenda for Practical Improvements*, 80 Interpreter Releases 601 (2003). See also *Immigration Reform and the Reorganization of Homeland Defense: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. 14-16, 70-98 (2002) (statement and written submissions of Dana Marks Keener, President National Association of Immigration Judges).

⁹ The initial position advanced by NAIJ was complete removal from the DOJ. See *Immigration Reform and the Reorganization of Homeland Defense: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. 15 (2002) (statement of Dana Marks Keener, President, National Association of Immigration Judges).

¹⁰ To the contrary, in the early 1980's Congress, in considering immigration reform, discussed removing the deportation and exclusion hearing process entirely from the INS. Select Comm'n on Immigration & Refugee Policy, *U.S. Immigration Policy and the National Interest: Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy With Supplemental Views by Commissioners* 248-50 (1981). 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. See, e.g., Maurice A. Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 San Diego L. Rev. 1, 18-20 (1980); Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 Notre Dame L. 644, 651-55 (1980-81); M. Isabel Medina, *Judicial Review – A Nice Thing? Article III, Separation of Powers and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 Conn. L. Rev. 1525 (1997). In recent years, Congress has introduced at least three bills to convert the Immigration Courts to an Article I Court. See United States Immigration Court Act of 1999, H.R. 185, 106th Cong. (1999); United States Immigration Court Act of 1998, H.R. 4107, 105th Cong. (1998); United States Immigration Act of 1996, H.R. 4258, 104th Cong. (1996).

¹¹ Select Comm'n on Immigration & Refugee Policy, *U.S. Immigration Policy and the National Interest: Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy With Supplemental Views by Commissioners* 248-50 (1981).

Commission's report and recommendations have stood the test of time.

In light of the fact that incremental changes have not significantly ameliorated the persistent problems caused by a lack of independence at the Immigration Court, we strongly believe that the time has come to take the step of creating an Article I Immigration Court. We are firmly convinced that our proposal is the most effective and judicious approach to achieve the appropriate balance between fundamental fairness and security concerns in these tumultuous times. We are confident that such a structure would also prove cost-effective, as we predict that the creation of an Article I Immigration Court would dramatically reduce the immigration caseload in the circuit courts of appeal.

Our paramount concern is safeguarding the independence of the Immigration Court system in order to protect America's core legal values and exemplify the principles of the American judicial system to all who come before it. It is the most fundamental aspect of due process that one be given the opportunity to present one's case and confront adverse evidence in an impartial forum. At present, the structure of the Immigration Court creates the appearance, and sometimes the reality, that this impartiality is not always present. To fully understand the reasons for our proposal, an analysis of the current court structure is useful.

II. An Understanding of the Current Structure of the Immigration Courts is Necessary

¹² See, e.g., Maurice A. Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 San Diego L. Rev. 1, 17-20 (1980); Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 Notre Dame L. 644, 651-54 (1980-81); M. Isabel Medina, *Judicial Review – A Nice Thing? Article III, Separation of Powers and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 Conn. L. Rev. 1525 *passim* (1997); Timothy S. Barker, *A Critique of the Establishment of a Specialized Immigration Court*, 18 San Diego L. Rev. 25, 25-28 (1980); Robert E. Juceam & Stephen Jacobs, *Constitutional Policy Considerations of an Article I Court*, 18 San Diego L. Rev. 29, 32-35 (1980); James J. Orlow, *Comments on "A Specialized Statutory Immigration Court,"* 18 San Diego L. Rev. 47, 49-51 (1980); Leon Wildes, *The Need for a Specialized Immigration Court: A Practical Response*, 18 San Diego L. Rev. 53, 55-63 (1980); Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudications: A Study of the Immigration Process*, 71 Iowa L. Rev. 1297, 1386-96 (1986); Dory Mitros Durham, Note, *The Once and Future Judge: The Rise and Fall (And Rise?) of Independence in U.S. Immigration Courts*, 81 Notre Dame L. Rev. 655, 688-91 (2006); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 Cornell L. Rev. 369, 404-05 (2006).

Although immigration proceedings are civil in nature, they have long been recognized as having the potential to deprive individuals of "all that makes life worth living."¹³ When dealing with asylum issues, immigration proceedings can be effectively death penalty cases, because an erroneous denial of a claim can result in an applicant's death.¹⁴ Because of the complex and highly specialized laws in this area,¹⁵ Immigration Judges – who must be attorneys and are appointed by the Attorney General – are a unique and highly qualified specialty corps of judges. The collective expertise of the Immigration Judge corps in this challenging legal specialty is unparalleled.¹⁶

¹³ Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

¹⁴ These cases also have been analogized to criminal trials, because fundamental human rights are so involved in these enforcement-type proceedings. See John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 Admin. L. Rev. 261, 276 (1992).

¹⁵ The highly complex nature of immigration laws repeatedly has been acknowledged by federal circuit courts. See, e.g., Baltazar-Alcazar v. INS, 386 F.3d 940, 947-48 (9th Cir. 2004) ("A petitioner must weave together a complex tapestry of evidence and juxtapose and reconcile that picture with the voluminous and not always consistent, administrative and court precedent in this changing area."); United States v. Aguirre-Tello, 324 F.3d 1181, 1187 (10th Cir. 2003) ("The district judge observed that immigration law is technical and complex to the point that it is confusing to lawyers, much less to laymen."); *vacated*, 324 F.3d 1181 (en banc); Escobar-Ruiz v. INS, 813 F.2d 283, 292 (9th Cir. 1987) (describing deportation proceedings as "proceedings in which individuals have fundamental interests at stake that the government is attacking in a complex and adversarial hearing. The complexity of deportation proceedings goes beyond the fact that they embody the features listed in [APA] section 554. Both sides present evidence and interrogate, examine, and cross-examine the witnesses. The immigration judge is required to base the decision of deportability on reasonable, substantial, and probative evidence. And the proceedings involve the intricate laws of the INA, which resemble 'King Minos's labyrinth in ancient Crete.' Deportation, hence, involves a substantially complex proceeding.") (internal citations omitted); Castro-O'Ryan v. U.S. Dep't of INS, 847 F.2d 1307, 1312 (9th Cir. 1988) ("With only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.'") (quoting E. Hull, Without Justice for All 107 (1985)); Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977) ("We have had occasion to note the striking resemblance between some of the laws we are called upon to interpret and King Minos's labyrinth in ancient Crete. The Tax Laws and Immigration and Nationality Acts are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges.").

¹⁶ 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 are

Unlike most administrative judges, the power of Immigration Judges is far-reaching as they render final decisions in individual cases¹⁷ and their factual findings receive deference on appeal unless they are determined to be clearly erroneous.¹⁸

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 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 General Government Appropriations for Fiscal Year 1984: Hearings on S.1275 Before the Subcomm. on Administrative Practice and Procedure of the S. Comm. on the Judiciary*, 98th Cong. 112 (1983) (statement of Loren A. Smith, Chairman, Administrative Conference of the United States). Many Immigration Judges continue to serve as adjunct law professors at well-respected law schools throughout the United States.

¹⁷ The EOIR Statistical Yearbook for fiscal year 2006 confirms the fact that an overwhelming 90% of Immigration Judge decisions in FY 2006 became final orders, with no appeal by either the respondent or the government. It also shows that in the last five years, the appeal rates from Immigration Judge (IJ) decisions to the BIA were as follows:

FY 2006 - 365,851 IJ completions, 33,586 appeals to the BIA = 9.18% rate of appeal;
 FY 2005 - 352,869 IJ completions, 38,684 appeals to the BIA = 10.97% rate of appeal;
 FY 2004 - 302,049 IJ completions, 40,136 appeals to the BIA = 13.29% rate of appeal;
 FY 2003 - 296,120 IJ completions, 40,146 appeals to the BIA = 13.56% rate of appeal;
 FY 2002 - 273,787 IJ completions, 33,176 appeals to the BIA = 12.12% rate of appeal.

Office of Planning, Analysis, and Tech., Dep't of Justice, FY 2006 Statistical Yearbook B5, T2 (2007).

¹⁸ Since 2002, *de novo* review of immigration judges' factual findings is no longer allowable, and instead deference is required unless the finding is clearly erroneous. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,880 (Aug. 26, 2002) (codified at 8 C.F.R. § 1003.1(d)(3)(i) (2007)). Accordingly, the BIA may no longer engage in its own factfinding, but instead must remand to the Immigration Courts if necessary. *Id.* at 54,902, 54,905 (codified at 8 C.F.R. § 1003.1(d)(3)(iv) (2007)). *Cf.* Richard B. Hoffman & Frank P. Cihlar, *Judicial Independence: Can It Be Without Article III?*, 46 Mercer L. Rev. 863, 866 (1995) (describing the level of finality accorded the decisions of ALJs: "[O]nce a decision is made, it is not granted the respect of automatic finality or even deference") (quoting Paul Verkuil *et al.*, *The Federal Administrative Judiciary*, 1992 A.C.U.S. 777, 796).

Immigration Courts are the trial-level tribunals which determine if an individual (respondent) is in the United States illegally, and if so, whether there is any status or benefit to which the individual is entitled under the Immigration and Nationality Act of 1952, as amended (INA).¹⁹ The DHS has virtually unfettered prosecutorial discretion to lodge charges with the Immigration Court, and thereby initiate the removal process. The DHS is represented in Immigration Court proceedings by an Immigration and Customs Enforcement (ICE) trial attorney (usually an Assistant Chief Counsel).

Some respondents are placed in proceedings before the Immigration Court after an application filed by them has been denied by the DHS Citizenship and Immigration Service (CIS), whereas others are persons in the United States who are alleged to be unlawfully present (for example, after being witnessed crossing the border without inspection, upon voluntary surrender to a DHS official at an airport or land border, or upon serving a criminal sentence in a State prison or a county jail after the commission of a crime). Respondents have the right to be represented by an attorney, but at no expense to the U.S. Government. A respondent in such proceedings can seek termination, asserting he is a United States citizen or that ICE has insufficient legal basis or factual evidence to meet its burden of proof. Even if proven to be removable, many applicants are eligible to apply for relief from deportation or removal (by attaining a status, such as lawful permanent residence based on a relative's petition or asylum) through a process wherein two determinations generally must be made: statutory eligibility for relief and whether the applicant merits the favorable exercise of discretion. Immigration Judges make determinations regarding eligibility for relief as initial applications,²⁰ upon *de novo* review of a CIS denial of an application,²¹ and, in

¹⁹ For a concise but comprehensive explanation of Immigration Court proceedings, see Gordon, Mailman and Yale-Loehr, *Immigration Law and Procedure*, §§ 3.06, 64.01-64.12. *See also* Robert C. Divine & R. Blake Chisam, *Immigration Practice: 2006-2007 Edition* (2006).

²⁰ One example of this is cancellation of removal for nonpermanent residents under section 240A(b) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1229b (b).

²¹ For example, asylum applications under section 208 of the INA, 8 U.S.C. § 1158, can be initially filed with USCIS. If the application is not granted, it is referred to the Immigration Court for a *de novo* determination of eligibility.

rarer cases, upon review of whether a prior CIS decision was based on sufficient evidence.²²

Once in removal proceedings, many respondents are eligible for release on bond.²³ A DHS District Director sets the initial amount of bond and generally an Immigration Judge may re-determine if custody is mandatory or desirable and the proper amount of any bond.²⁴

Over the years, several steps have been taken to ameliorate some of the concerns raised by the unusual structure which housed Immigration Judges and members of the BIA within the same agency that prosecuted immigration cases. In order to protect fundamental fairness, 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 in 1956.²⁵ In 1973, SIOs were authorized to use the title Immigration Judge and wear robes in the courtroom.²⁶ In 1983, the Attorney General formally separated the Immigration Court and the BIA from the INS, and created EOIR, the agency within the DOJ which houses these functions to this day.²⁷ In 2002, the choice was made to leave EOIR at the DOJ when all functions of the former INS were transferred to the DHS.²⁸

III. The Current Structure Suffers from Persistent Problems

²² For example, when USCIS determines that a conditional permanent resident who obtained that status through marriage is not entitled to have the condition removed, the standard for review in the Immigration Court is whether the USCIS decision is based on substantial evidence. Section 216(b)(2) of the INA, 8 U.S.C. §1186a(b)(2).

²³ Section 236(a) of the INA, 8 U.S.C. §1226(a).

²⁴ 8 C.F.R. § 1003.19 (2007).

²⁵ Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 65 Interpreter Releases 453, 458 (1988).

²⁶ 8 C.F.R. § 1.1(1) (1973); Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 65 Interpreter Releases 453, 458 (1988).

²⁷ Board of Immigration Appeals; Immigration Review Function; Editorial Amendments, 48 Fed. Reg. 8,056 (Feb. 25, 1983). See, e.g., Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 65 Interpreter Releases 453, 458-59 (1988); David A. Martin, Fed. Judicial Ctr., *Major Issues in Immigration Law, A Report to the Federal Judicial Center* (1987); Michael J. Creppy *et al.*, Court Executive Dev. Project, Inst. for Court Mgmt., *The United States Immigration Court in the 21st Century* (1999).

²⁸ Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, § 1101(a), 116 Stat. 2135, 2273 (2002).

The historical reasons for separating EOIR's functions from the INS continue to this day and provide compelling reasons for the establishment of an Article I Immigration Court. The current structure continues to inflict damage caused by the struggles between due process concerns and the need for administrative efficiency. The public's cynicism and concern that law enforcement priorities trump due process and encroach on judicial independence regrettably have been proven to be well-founded. The flawed structure which institutionalizes this inherent conflict of interest has contributed to the devastating result of mushrooming dockets in the circuit courts of appeal. Moreover, efforts by the DOJ to ameliorate these problems have fallen far short, and have sometimes exacerbated the situation. Immigration Judges are left in an untenable position where they must deal with overwhelming and increasingly complex caseloads²⁹ with chronically inadequate resources.

The Immigration Courts currently handle more than 365,850 matters annually,³⁰ employing 210 Immigration Judges³¹ in more than 54 locations³² across the country. The U.S. Supreme Court reminds us that, "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence is lawful, unlawful, temporary or permanent."³³ Unfortunately, the need to safeguard due process has long been seen as at odds with the demands for productivity in this high-volume realm. In this regard, it is undisputed that administrative

²⁹ Dorsey & Whitney LLP, Study Conducted for the American Bar Association Commission on Immigration Policy, Practice and Pro Bono Re: Board of Immigration Appeals: Board of Immigration Appeals: Procedural Reforms to Improve Case Management 14 (2003) (identifying nine recent statutes, including the Patriot Act, which contribute to the complexity of immigration law), available at http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf [last accessed 12/14/07].

³⁰ See Office of Planning, Analysis, and Tech., Dep't of Justice, FY 2006 Statistical Yearbook B5, T2 (2007) (citing decisions by Immigration Judges in 323,845 proceedings, 29,824 bond matters, and 12,182 motions). The total of 365,851 decisions rendered does not include an additional 50,230 other dispositions such as changes of venue or administrative closures. *Id.*

³¹ At the time of this writing, there are an estimated thirty-five (35) vacancies in the Immigration Judge corps, which is approximately 12% of the total number of Immigration Judges currently authorized by EOIR's budget.

³² Authorities Delegated to the Director of the Executive Office for Immigration Review, and the Chief Immigration Judge, 72 Fed. Reg. at 53,674.

³³ *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001).

efficiency is a practical necessity in this area and has been the historical motivation behind keeping EOIR an administrative agency at the DOJ. However, with the enormous caseload and ever-increasing burdens placed on the circuit courts of appeal to review immigration decisions,³⁴ the need to restore public confidence in the integrity and impartiality of the system is all the more pronounced.³⁵ Indeed, the rationale of administrative efficiency at any price appears to have been proven to provide a false economy. Without sufficient faith in the independence and neutrality of the Immigration Courts, unnecessary appeals and last-ditch legal maneuvering flourish and adversely impact circuit court caseloads. Legal scholars argue that streamlining efforts at the BIA have been the cause of this recent surge and should be reconsidered.³⁶

Unfortunately, throughout the history of the Immigration Courts, there have been many instances where public cynicism was justified as a result of the undue law enforcement pressures placed on Immigration Judges who were then housed within the

³⁴ See, e.g., John R.B. Palmer, *The Nature and Causes of the Immigration Surge in Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. Sch. L. Rev. 13 *passim* (2006-07); see also *Immigration Litigation Reduction: Hearing Before S. Comm. on the Judiciary*, 109th Cong. *passim* (2006) (testimony and submissions for the record); Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. Sch. L. Rev. 38 *passim* (2006-07).

³⁵ “[T]he current path of the EOIR destroys trust in the system.” Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. Sch. L. Rev. 38, 60-61 (2006-07).

³⁶ See, e.g., John R.B. Palmer, *The Nature and Causes of the Immigration Surge in Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. Sch. L. Rev. 13 (2006-07). However, the decision to implement streamlining regulations is not always viewed negatively. See *Guyadin v. Gonzales*, 449 F.3d 465, 470 (2d Cir. 2006) (“The BIA’s members and the dedicated corps of immigration judges under the Board’s supervision should be applauded for their continuing diligence, their integrity, and and [sic] – as is shown in the records of nearly all immigration cases we encounter in this Court – their earnest desire to reach fair and equitable results under an almost overwhelmingly complex legal regime. Statutes, regulations, and case law regularly change, and the cases before the IJs require subtle legal analysis as well as robust factfinding generally dependent on credibility assessments that a reviewing court cannot duplicate. IJs and the BIA are to be commended for their efforts, in which the “streamlining” policy plays an important role.”) (internal citation omitted).

INS.³⁷ That unfortunate history was fully recounted to Congress through NAIJ testimony in 2002 and submissions to the Senate Judiciary Committee’s Subcommittee on Immigration.³⁸ However, even after the creation of the DHS and the separation provided by retaining the Immigration Courts at the DOJ, examples of equally disturbing encroachments on judicial independence regrettably have occurred. For example, the Immigration Court has not escaped the inappropriate politicization of DOJ appointments. Testimony by Monica Goodling before the Senate Judiciary Committee revealed that these career appointments have been inappropriately subjected to political vetting.³⁹

³⁷ See *Immigration Reform and the Reorganization of Homeland Defense: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. 14-16, 70-98 (2002) (statement and written submissions of Dana Marks Keener, President, National Association of Immigration Judges). Included in the NAIJ submission was a position paper entitled *An Independent Immigration Court: An Idea Whose Time Has Come*. *id.* at 79, 85-88 (written statement of Dana Marks Keener and Denise Noonan Slavin, Vice President, National Association of Immigration Judges).

³⁸ *Id.*

³⁹ The testimony of Monica Goodling before the Senate Judiciary Committee on May 23, 2007, during which she admitted that political considerations influenced the hiring decisions for the career position of Immigration Judge, generated tremendous press coverage and raised questions of how far in the Department such practices extend. See, e.g., Susan Crabtree, *Goodling Asked DoJ Applicants Political Questions*, TheHill.com, May, 23, 2007; Dan Eggen & Paul Kane, *Goodling Says She “Crossed the Line,”* Wash. Post, May 24, 2007, at A01; Editorial, *“That Strikes at the Core,”* Wash. Post, May 24, 2007, at A30; David Johnston & Eric Lipton, *Ex-Justice Aide Admits Politics Affected Hiring*, N.Y. Times, May 24, 2007, at A1; Richard B. Schmitt, *Ex-Gonzales Aide Says She May Have “Crossed the Line,”* L.A. Times, May 24, 2007; Margaret Talev & Marisa Taylor, *Attorney General’s Aide Says She “Crossed the Lines,”* Houston Chron., May 24, 2007, at A4; Sandra Hernandez & Lawrence Hurley, *Goodling Weighed Politics in Recommendations*, Daily J., May 24, 2007; Richard B. Schmitt, *Inquiry Widens Into Justice Department Hiring*, L.A. Times, May 25, 2007; *Ex-Gonzales Aide Details Discussion*, New Press, May 24, 2007; David Johnston & Eric Lipton, *Bush Reaffirms His Support for Gonzales*, N.Y. Times, May 25, 2007, at A17; Dan Eggen & Paul Kane, *Politics at Work in Inquiry, Bush Says*, Wash. Post, May 25, 2007; Editorial, *Activities at Justice as Suspicious as Ever*, Austin Am. Statesman, May 25, 2007; Dan Eggen, *Officials Say Justice Dept. Based Hires on Politics Before Goodling Tenure*, Wash. Post, May 26, 2007, at A02; Richard B. Schmitt, *Immigration Judges Lack Apt Backgrounds*, L.A. Times, May 26, 2007; Emma Schwartz & Jason McLure, *DOJ Made Immigration Judgeships Political*, Legal Times, May 28, 2007, at 12; Margaret Talev & Greg Gordon,

Perhaps the most blatant example of this susceptibility to improper interference is the continuing failure of the DOJ to implement the Congressional enactment of contempt authority for Immigration Judges. This shameful inaction has persisted despite the separation of authority ostensibly provided by Congress through the Homeland Security Act of 2003 (HSA). In 1996, contempt authority for Immigration Judges was mandated by Congress.⁴⁰ However, actual implementation required the promulgation of regulations by the Attorney General. When Immigration Judges protested lengthy delay and inaction, 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 the attorneys do serve as judges.⁴¹ We expected that this matter would have been quickly resolved after the departure of the INS from the DOJ, yet five years later, some eleven years after Congress passed legislation on this issue, the situation remains

unchanged and the stalemate persists.⁴² In essence, the Immigration Judges are still held hostage to the DHS and deprived of this important procedural power.⁴³

Moreover, the structural conflict of interest caused by housing the Immigration Courts in a law enforcement agency has caused unnecessary legal issues to complicate circuit court cases.⁴⁴ The OIL remains in the DOJ and serves as the appellate prosecutor for the ICE in circuit court cases. At the same time, the OIL is charged with the duty of defending the decisions of the BIA in the circuit courts. In this position, the OIL retains a sometimes conflicting dual role which leaves unclear whether the OIL represents the DHS or the DOJ.⁴⁵ This leads to serious confusion over whether the OIL attorney is presenting the views held by the DHS or the DOJ to the circuit courts. Recently, the DOJ was soundly criticized for continuing its practice of advocating the DHS litigation position over the BIA decision as the position of the government.⁴⁶ This is a clear example, demonstrating that DHS interests can improperly influence the DOJ, where, as here, the OIL failed to

Justice Department Investigators Broaden Their Inquiry, McClatchy Newspapers, May 30, 2007; Dan Eggens, *Justice Dept. Expands Probe to Include Hiring Practices*, Wash. Post, May 31, 2007, at A04; Richard B. Schmitt, *Probe of Justice Department Hiring Expands*, L.A. Times, May 31, 2007; Charlie Savage, *Just Dept. Probes Its Hirings*, Boston Globe, May 31, 2007, at 1A; *Justice Department Expands Probe of U.S. Attorneys' Firings*, Assoc. Press, May 31, 2007; Jason McLure, *DOJ Probes Turn to Civil Rights Division*, Legal Times, June 4, 2007; *At A Glance*, Star Trib., June 10, 2007; Amy Goldstein & Dan Eggen, *Immigration Judges Often Picked Based on GOP Ties*, Wash. Post, June 11, 2007; *Slaughter Demands Able Immigration Judges*, Wash. Times, June 12, 2007; Louie Gilot, *Immigration Judgeship Appointments Under Scrutiny*, El Paso Times, June 23, 2007; Louie Gilot, *Suite Shines Spotlight on Immigration Judgeships*, El Paso Times, June 24, 2007.

⁴⁰ See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 304, 110 Stat. 3009, 3009-589 (IIRIRA) (codified as amended at INA § 240(b)(1) (2007), 8 U.S.C. § 1229a(b)(1)).

⁴¹ The situation remains unresolved today, eleven years after Congressional action. "The INS has generally opposed the application of this [contempt] authority to its attorneys. In more than three years since the enactment of IIRIRA, the [EOIR] and the DOJ have failed to resolve this issue, apparently still paralyzed by the legacy of their relationship with INS." Michael J. Creppy *et al.*, Court Executive Dev. Project, Inst. for Court Mgmt., *The United States Immigration Court in the 21st Century* 109 n.313 (1999). Because of this opposition, the Attorney General still has not published regulations implementing contempt authority for Immigration Judges.

⁴² As noted *supra* note 4, institutional denigration of the role of IJs by the DOJ itself persists today and provides the basis for pessimism that the situation will improve any time soon.

⁴³ Although EOIR has a robust attorney discipline program in place, it has been criticized as discriminatory because it only applies to private practitioners; EOIR lacks the ability to discipline DHS Trial Attorneys who appear in Immigration Courts. See 8 C.F.R. § 1292.3 (2007); Professional Conduct for Practitioners: Rules and Procedures, 65 Fed. Reg. 39,513, 39,522 (June 27, 2000) ("Many commenters expressed their concern that the proposed rule applies only to private practitioners and not to . . . Service trial attorneys.").

⁴⁴ Potential flaws in the current structure, which maintains EOIR on a peer, agency level with the DHS, were noted early on by legal observers. See David A. Martin, *Immigration Policy and the Homeland Security Act Reorganization: An Early Agenda for Practical Improvements*, 80 Interpreter Releases 601, 613-14 (2003) (noting that the Attorney General "referral" process provided by 8 C.F.R. § 3.1(h) was devised at a time when it was deemed inappropriate for the INS to appeal a BIA decision as both agencies were part of the same Executive Branch department). Even under the current structure, the DHS cannot appeal an adverse decision of the BIA.

⁴⁵ The DHS cannot initiate an appeal from a BIA decision, but once a respondent does so, the position asserted by the OIL before the circuit court can conflict with the position taken by the BIA. Sometimes the OIL reasserts the arguments advanced by the DHS to the IJ or BIA, even if they were initially rejected below.

⁴⁶ See *Singh v. Gonzales*, 502 F.3d 1128, 1129 (9th Cir. 2007) (citing *Thangaraja v. Gonzales*, 428 F.3d 870, 873 (9th Cir. 2005)).

recognize that the agency position which it was supposed to defend was that of the BIA and IJ. The Ninth Circuit Court of Appeals has recognized that the more thorny issue of to whom deference regarding agency expertise will be owed in competing opinions between the DHS and the BIA is a legal problem which exists but which has not yet ripened for review.⁴⁷ These examples demonstrate a profound structural flaw and inherent conflict of interest in the current system:

The possible perverse result: the decisions of immigration judges emerge from an agency permeated by a prosecutorial atmosphere, and are then subject to review by the nation's cabinet-level law enforcement officer at his discretion. On review, such decisions may actually be overturned because the agency which houses the immigration prosecutors, and is a party before the judge in each adjudication, has taken an opposite position. One can certainly envision this situation proving disastrous for both agencies, and for the courts of appeals, already so overwhelmed by petitions for review in immigration cases.⁴⁸

While officially stating its agreement with the principle of independence of judges within individual adjudications, the DOJ adds the dangerous caveat that "freedom to decide cases under the law and regulations should not be confused with managing the caseload and setting standards for review."⁴⁹ This blurred perspective is extremely troubling in a field such as immigration, where the line between administrative, procedural, and substantive issues is not always a bright or obvious one. Many disturbing opportunities for crossing blemished lines occurred in the past and persist today, allowing actual conflicts of interest and the appearance of possible conflicts to continue to arise.⁵⁰

⁴⁷ Lagandaon v. Ashcroft, 383 F.3d 983, 990 (9th Cir. 2004); see also Dory Mitros Durham, Note, *The Once and Future Judge: The Rise and Fall (And Rise?) of Independence in U.S. Immigration Courts*, 81 Notre Dame L. Rev. 655, 685-87 (2006).

⁴⁸ Dory Mitros Durham, Note, *The Once and Future Judge: The Rise and Fall (And Rise?) of Independence in U.S. Immigration Courts*, 81 Notre Dame L. Rev. 655, 660 (2006).

⁴⁹ Board of Immigration Appeals: *Procedural Reforms to Improve Case Management*, 67 Fed. Reg. at 54,883 (introductory commentary to regulatory changes affecting 8 C.F.R. § 3.1(a)(3)).

⁵⁰ See *Immigration Reform and the Reorganization of Homeland Defense: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong.

The taint of the inherent conflict of interest caused by housing the Immigration Court within the DOJ is insidious and pervasive and has not been resolved by the creation of the DHS and placement of all former INS functions there.⁵¹ To the contrary, the recent history of selective downsizing at the BIA underscores the precariousness of Immigration Judges and members of the BIA who are subject to removal by the Attorney General.⁵² The pro-enforcement appearance

14-16, 70-98 (2002) (statement and written submissions of Dana Marks Keener, President, National Association of Immigration Judges). Included in the NAIJ submission was a position paper entitled *An Independent Immigration Court: An Idea Whose Time Has Come*, id. at 79, 86-87 (written statement of Dana Marks Keener and Denise Noonan Slavin, Vice President, National Association of Immigration Judges) (discussing *Barahona-Gomez v. Reno*, 167 F.3d 1228 (9th Cir. 1999)).

⁵¹ The continued perception that the Immigration Courts are a mere enforcement tool, subservient to the will of the DHS, persists today. A typical example is provided by a private citizen when discussing the controversial case of his friend, Ibrahim Parlak, who is fighting deportation as an alleged terrorist. Commenting on the upcoming circuit court hearing, Martin Dzuris stated, "Unlike previous immigration courts that . . . 'do the bidding' of the U.S. government's executive branch, the Circuit Court of Appeals has no such allegiance . . ." Lou Mumford, *Upton and Levin Back Parlak's Cause: Congressman Says Ibrahim Parlak "Not A Rambo,"* S. Bend Trib., Oct. 16, 2007.

⁵² After implementation of streamlining at the BIA and the reduction of the size of the Board, argued by many to have been selectively based on the politics of their decisions, several legal observers have questioned their own previous assumptions that the mere separation from DHS prosecutorial functions is sufficient to safeguard independence. "The Board of Immigration Appeals' experience under [the Attorney General] should give new impetus to efforts to separate review of immigration judge decisions from an agency with law enforcement responsibilities." Peter J. Levinson, *The Façade of Quasi-Judicial Independence in Immigration Appellate Adjudications* 15 (2004) (conference paper delivered at the 2004 Annual Meeting of the American Political Science Association), 9 Bender's Immigr. Bull. 1154 (Oct. 1, 2004). See also, Stephen H. Legomsky, *Immigration and Refugee Law and Policy* 79 (3d ed. Supp. 2003) (stating that it can no longer be safely assumed that BIA members are free to render decisions they felt were required by evidence and their interpretations of applicable law while remaining immune from dismissal).

The Board of Immigration Appeals' experience under Attorney General Ashcroft should give new impetus to efforts to separate review of immigration judge decisions from an agency with law enforcement responsibilities. The fact that the Board of Immigration Appeals members, as recently as last year, faced termination because of decisions they rendered underscores the reality that appellate adjudicators – subject to removal

of that action has once again damaged the reputation of the Immigration Courts and the BIA as neutral, independent decisionmakers.

Other actions (or inactions) demonstrate that this trend of favoring enforcement priorities is deeply rooted and persists to this day. One clear example is a pre-separation rule promulgated by the Attorney General, which remains in force today, that insulates the DHS custody determinations from any Immigration Judge 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.⁵³ Since the DHS is the entity that sets the initial bond amount, this rule undergirds its ability to prevent an alien's release from custody during the pendency of administrative proceedings, despite statutory provisions that entitle an alien to a bond re-determination hearing before an Immigration Judge.⁵⁴ Yet more than five years after the creation of the DHS, this improper ability by one party virtually to guarantee its desired outcome in bond proceedings has not been remedied.⁵⁵ With one party retaining such a

by the Attorney General – are far from independent. This recent history underscores the precariousness of their situation. Although members of the Board of Immigration Appeals ostensibly exercise independent judgment in deciding cases, immigration appellate adjudications provide only the facade of quasi-judicial independence. The alternatives recommended by Federal commissions – a specialized court or independent Executive Branch adjudicatory agency – continue to provide potential solutions.”

Levinson, *supra*, at 15-16.

⁵³ Executive Office for Immigration Review; Review of Custody Determinations, 66 Fed. Reg. 54909 (Oct. 31, 2001) (codified at 8 C.F.R. § 1003.19(i)(2) (2007)).

⁵⁴ For a comprehensive discussion of the legal underpinnings of the executive branch's claimed authority to detain without bond in immigration proceedings, see Margaret H. Taylor, *Dangerous By Decree: Detention Without Bond In Immigration Proceedings*, 50 Loyola L. Rev. 149 (2004). “A Federal Register publication says ICE sought automatic stays in fiscal year 2004 to keep 273 immigrants in custody during deportation proceedings despite judges' ruling that they be released on bail.” Michelle Roberts, *African Immigrant Waits in Jail*, Assoc. Press, Oct. 16, 2007. Moreover, Immigration Judges in certain jurisdictions report that the DHS sets “no bond” as a matter of policy in virtually every case on their docket in order to have the benefit of an automatic stay whenever they want.

⁵⁵ The following is another dramatic example of action taken by the Attorney General which perpetuates the belief that the Immigration Courts serve as mere window-dressing to placate the public. Congress abolished distinctions between exclusion and deportation proceedings when it created removal proceedings in the Illegal Immigration Reform and

great legal advantage, it is understandable that the public finds the current arrangement to be mere window-dressing and doubts the impartiality of the Immigration Courts. It should come as no surprise, in light of the long history of encroachments on the decisional authority of the Immigration Judges and the BIA, that the public perceives this system as “rigged.”⁵⁶

Nor have the Attorney General's much touted reforms resolved these intractable issues at the most basic levels. In January of 2006, the Attorney General announced an intensive review of EOIR in light of strong criticisms by members of the public and circuit court judges complaining of a broken system. In a 22-point plan issued on August 9, 2006, several initiatives sounded quite promising.⁵⁷ But the reality in the trenches at the Immigration Courts is that most Immigration Judges remain untouched by these lofty promised changes. There has been no infusion of new judges or significant enhancement of law clerk support staff. In fact, as FY 2007 ended, there were five fewer Immigration Judges serving than the year before, and not one of the promised twenty additional Immigration Judge positions had been filled.

Immigrant Responsibility Act of 1996, enacted as Division C of the Departments of Commerce, Justice and State, and the Judiciary Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat. 3009-546 (IIRIRA), which presumably meant that Immigration Judge bond authority in removal proceedings would extend to arriving aliens. Despite this fact, the Attorney General chose to perpetuate one crucial aspect of the entrenched distinction between exclusion and deportation proceedings to the disadvantage of respondents. Through regulations promulgated shortly after IIRIRA's passage, which remain in force today, the INS (now DHS) maintains the exclusive authority to grant or deny bond to arriving aliens. 8 C.F.R. § 1003.19(h)(2)(i)(B). Many view this choice as providing an unfair prosecutorial advantage to the DHS, a particularly harsh consequence in cases where arriving lawful permanent residents have been granted admission after a hearing before an Immigration Judge, but must remain in custody for months pending an appeal as the Immigration Judge has no authority over their bond.

⁵⁶ Michael J. Creppy *et al.*, Court Executive Dev. Project, Inst. for Court Mgmt., *The United States Immigration Court in the 21st Century* 100-05 (1999) (finding that 68% of those who were surveyed thought the Immigration Courts were part of the INS, while nearly one-quarter (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).

⁵⁷ See Press Release, Dep't of Justice, *Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals* (Aug. 9, 2006), available at http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html [last accessed 12/14/2007].

While EOIR should be commended for working extremely diligently on improving training and reference materials, the ironic reality is that such steps are practically meaningless when those they are meant to benefit do not have any time actually provided to put them to use. To the contrary, rather than provide more opportunities for continuing legal education by allowing time off the bench, the DOJ has mandated EOIR plow forward with unrealistic completion goals. In accordance with the Government Performance and Results Act of 1993,⁵⁸ EOIR developed a strategic plan. That plan included a commitment to eliminate case backlogs by the end of FY 2008.⁵⁹ Although the plan expressly assumes that there are no uncontrollable factors preventing the completion of an identified case, EOIR has interpreted this qualification only to encompass delays caused by DHS inaction (such as failure to timely process background checks, failure to conclude overseas investigations or forensics, or failure to adjudicate a specified list of applications for relief) or an applicant's inaction (such as failure to timely participate in the records check process), but not EOIR's failure to provide the resources necessary for timely adjudications. Therefore, Immigration Judges have been held to these completion goals, despite the fact that additional resources have not been forthcoming.⁶⁰ The end result: the production pressures on individual Immigration Judges are worse now than when the Attorney General's review was conducted almost two years ago.⁶¹ Moreover, there is no protection from the

⁵⁸ Government Performance and Results Act of 1993, Pub. L. 103-62, 107 Stat. 285 (1993).

⁵⁹ Backlogs are defined as any case pending for more than one year before the Immigration Courts. See Executive Office for Immigration Review, U.S. Dep't of Justice, Fiscal Years 2005 – 2010 Strategic Plan 9 (2004).

⁶⁰ The practical result of this mandate is that in September 2004, Immigration Judges were required to complete all cases pending more than three and one-half years by June 30, 2005, and thereafter to reduce aging cases at six-month intervals. Currently, Immigration Judges are required by March 31, 2008 to complete all non-exempt cases received on or before September 30, 2006.

⁶¹ "Putting pressures on the individual IJs to hear cases too quickly or simply move a docket along too often results in simply moving problems onto the BIA and then to the courts." Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. Sch. L. Rev. 38, 62 (2006-07). Moreover, these pressures are not without a high personal cost: a recent survey of Immigration Judges conducted by University of California San Francisco Department of Psychiatry found, in addition to the expected secondary traumatic stress, which is not uncommon in those who aid trauma victims, that Immigration Judges reported more burnout than had been

encroachment of production pressures on decisional independence.⁶² For example, the system has no mechanism to address due process concerns which a judge may wish to consider as a justification for a delay in adjudication, nor does the mutual agreement of the parties factor in as a consideration justifying an exemption.⁶³

Meanwhile, as these pressures mount on the Immigration Judges, the circuit courts of appeal have made it clear that the work product required of Immigration Judges must be of the highest caliber, regardless of the lack of adequate resources. As noted by the Honorable John M. Walker, Jr. (Chief Judge of the U.S. Court of Appeals for the Second Circuit):

First, in my opinion, the principal reason for the current backlog in the courts of appeals and the reason that higher-than-expected numbers of cases are remanded are a severe lack of resources and manpower at the Immigration Judge and BIA levels in the Department of Justice. The 215 Immigration Judges are required to cope with filings of over 300,000 cases a year. With only 215 judges, a single Judge has to dispose of 1,400 cases a year or nearly twenty-seven cases a week, or more than five each business day, simply to stay abreast of his docket. I fail to see how Immigration

seen with any other professional group to whom the Copenhagen Burnout Inventory had been administered, surpassing rates of physicians in busy hospitals and prison wardens. See Stuart Lustig *et al.*, *Burnout and Stress Among United States Immigration Judges*, 13 Bender's Immigr. Bull. 20 (Jan. 1, 2008), *infra* this issue.

⁶² Nor can one measure the impact of these pressures on reports of wide variations throughout the system regarding grant or denial rates, another reason contributing to the suggestion by some academics that an Article I Immigration Court should be created. See Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 101, 191 (2007).

⁶³ When there are compelling circumstances, an Immigration Judge can request a case-by-case waiver of the aged completion requirement from his or her supervising Assistant Chief Immigration Judge. This merely shifts the decision to the supervisor to determine if due process requires a continuance, rather than allowing the Immigration Judge to make that determination as a legal matter in a pending case. The DOJ's position on this is clear: "[F]reedom to decide cases . . . should not be confused with managing the caseload . . ." Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,883. This process underscores the serious and persistent concerns of many that factors outside the record may be influencing an Immigration Judge's decision-making in a particular matter.

Judges can be expected to make thorough and competent findings of fact and conclusions of law under these circumstances.⁶⁴

Indeed, the persistent lack of resources for the Immigration Courts has reached crisis proportions. An August 2006 Government Accountability Report on EOIR⁶⁵ reported that from FY 2000 to FY 2005 the number of Immigration Judges on the bench increased by 3%. However, during the same period of time, the national caseload climbed by 39% and the average number of cases per judge rose 35% from 1,852 to 2,505.⁶⁶ Meanwhile, in FY 2005, the corps of Immigration Judges, which then numbered 225, only had a total of 31 judicial law clerks to assist them in their duties.⁶⁷ Is it hard to imagine how the quality of Immigration Judge decisions could not have been adversely affected by this pervasive lack of necessary resources during this period, when they have been described by Chief Judge Walker as "impossibly overtaxed."⁶⁸

With these pressures as a backdrop, individual Immigration Judges are placed in the untenable position of being classified by the DOJ as attorney employees who are then subject to discipline for the legitimate exercise of their independent judgment as adjudicators.⁶⁹ The DOJ's Office of Professional Responsibility (OPR) has consistently failed to

distinguish between legal criticism and findings of misconduct, and numerous Immigration Judges have been the focus of improper investigations for misconduct based on "serious criticism" by a circuit court of appeals, as well as frivolous complaints by members of the bar.⁷⁰ These OPR actions demean the role and duties of Immigration Judges and appear to be outside the scope of the OPR's legitimate jurisdiction.⁷¹ The investigations conducted by the OPR have become the present day equivalent of yesterday's tattling to the INS District Directors, as they circumvent proper appellate procedures and leave Immigration Judges personally vulnerable for their legal decisions, clearly an inappropriate consequence of merely performing one's job in good faith. In addition, it is a well-recognized and long-established principle that administrative law judges must be exempt from the provisions of agency administered performance evaluations and performance-based removal actions, precisely to ensure their independence in decision-making.⁷² Despite this well-established benchmark in administrative adjudications, the first item on the Attorney General's 22-point plan is to subject Immigration Judges to just such inappropriate performance evaluations.⁷³ Disregarding the improper encroachment on decision-making which they can engender, the OPR has persisted, and even intensified these investigations in the last few years. With this climate at the DOJ, and with the clear memory of the not-too-distant personnel purge at the BIA,⁷⁴ these actions have a decidedly chilling effect on Immigration Judges.

The pernicious effect on decisional independence caused by the current structure can no longer be

⁶⁴ *Immigration Litigation Reduction: Hearing Before S. Comm. on the Judiciary*, 109th Cong. 186-87 (2006) (written statement of John M. Walker, Jr., Chief J., U.S. Court of Appeals for the Second Circuit).

⁶⁵ U.S. Gov't Accountability Office, Executive Office for Immigration Review: Caseload Performance Reporting Needs Improvement, GAO 06-771 at 3-4 (2006).

⁶⁶ *Id.* at 13.

⁶⁷ On August 15, 2007, an official OCIJ roster of non-supervisory Immigration Judges provided to the NAIJ as part of its Collective Bargaining Agreement with the agency stated that there were 210 Immigration Judges at EOIR. In addition, there were ten Assistant Chief Immigration Judges serving at that time. Some, but not all of them, are located outside of EOIR headquarters in Falls Church, VA, and carry a reduced docket at the Court they supervise.

⁶⁸ *Immigration Litigation Reduction: Hearing Before S. Comm. on the Judiciary*, 109th Cong. 196 (2006) (letter of John M. Walker, Chief J., U.S. Court of Appeals for the Second Circuit).

⁶⁹ The Office of Professional Responsibility relies for that proposition on the provisions of 8 U.S.C. § 1101(b)(4) and 8 C.F.R. § 1001.1(1), which require Immigration Judges to be attorneys. Such a narrow reading of these provisions flies in the face of the nature of the duties performed by Immigration Judges and the standards to which they are rightfully held by the circuit courts of appeals.

⁷⁰ See Office of Professional Responsibility, *A Guide For Immigration Judges on Investigations by the Office of Professional Responsibility (OPR)* (2006).

⁷¹ The NAIJ believes that Immigration Judges should be held to the high judicial standards set forth by the American Bar Association's Model Code of Judicial Conduct. On July 25, 2007, NAIJ formally responded to EOIR's proposed rulemaking on the issue announced at 72 Fed. Reg. 35,510 (June 28, 2007), and recommended that EOIR adopt our proposed code, which is closely patterned after the ABA provisions.

⁷² L. Hope O'Keefe, Note, *Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability*, 54 Geo. Wash. L. Rev. 591, 593-94 (1986).

⁷³ See Press Release, Dep't of Justice, *Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals* (Aug. 9, 2006), available at http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html [last accessed 12/14/2007].

⁷⁴ See discussion *supra* note 52.

ignored. Nor can this country continue to hope that the incremental tinkering which has occurred to date will resolve a serious structural problem. Rather, the time has come to grapple seriously with the realities of what it will take to establish an optimal structure for our nation's Immigration Courts.

IV. An Article I Solution is Needed

The solution is an Article I Immigration Court. The structure would consist of a trial-level Immigration Court and an appellate-level Appellate Immigration Review Court. We strongly urge that following determinations by these tribunals, an aggrieved party would have resort to the regional federal circuit courts of appeal. This model is based on the United States Tax Court which also provides for initial adjudication in an Article I tribunal with limited jurisdiction followed by review in an Article III court of general jurisdiction, a regional circuit court of appeal. We propose that Immigration Judge appointments, terms of office, salary, retirement and discipline be patterned after the Tax Court provisions.⁷⁵

The solution of transferring EOIR functions to an Article I court was recommended by the 1981 Select Commission, an entity created by Congress in Public Law 95-412. Based on numerous hearings, reports and research studies, the Commission study concluded that the function of the immigration tribunals should be completely independent of any underlying law enforcement and that the reviewing officials should not be beholden to the head of any Executive branch department.⁷⁶ Several legal experts who analyzed the essential attributes needed by a court to ensure impartial adjudications determined that the best approach was the creation of an Article I Court.⁷⁷

⁷⁵ As set forth in 26 U.S.C. § 7443(b), appointments would be made by the President with the advice and consent of the Senate. Article I Immigration Judges would serve for fifteen-year terms, at a salary equivalent to that of U.S. District Court Judges. See U.S.C. § 7443(c) (2007). Retirement provisions would be as set forth in 26 U.S.C. §§ 7447 and 7448. Removal from office could occur for inefficiency, neglect of duty, or malfeasance in office. See 26 U.S.C. § 7443(f) (2007).

⁷⁶ Select Comm'n on Immigration & Refugee Policy, *U.S. Immigration Policy and the National Interest: Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy With Supplemental Views by Commissioners* 246-49 (1981); see also U.S. Comm'n on Immigration Reform, 1997 Report to Congress, *Becoming An American: Immigration and Immigrant Policy* 179 (1997).

⁷⁷ Maurice A. Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 San Diego L. Rev. 1, 18-20 (1980); Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 Notre Dame L. 644, 651-55

To address concerns that deportation decisions would benefit from adjudicators who have developed expertise in the area, immigration judges should be made an Article I court. The Article I court would adjudicate deportation orders. Full appellate review would be available from the Article I court's decision in the federal courts of appeal.⁷⁸ If resort to federal courts of appeals remains available, the major critics of Article I status would also have their concerns met and completely resolved.⁷⁹

The Immigration Courts and the BIA have evolved into tribunals which far more closely resemble Article I or Article III courts than they do administrative agencies. Traditionally, administrative agencies adjudicate prospectively, announcing rules to be followed based on congressionally enacted legislation, unlike courts which address cases and controversies.⁸⁰ Administrative agencies do not punish for contempt, one of the inherent powers of a court and a power recognized by Congress as an appropriate tool for

(1980-81); M. Isabel Medina, *Judicial Review – A Nice Thing? Article III, Separation of Powers and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 Conn. L. Rev. 1525, 1562 (1997).

⁷⁸ M. Isabel Medina, *Judicial Review – A Nice Thing? Article III, Separation of Powers and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 Conn. L. Rev. 1525, 1562 (1997).

⁷⁹ Timothy S. Barker, *A Critique of the Establishment of a Specialized Immigration Court*, 18 San Diego L. Rev. 25 (1980) (“My disagreement is basically directed toward the elimination of judicial review by the courts of appeals which would result if a specialized immigration court system were established.”); Robert E. Juceam & Stephen Jacobs, *Constitutional Policy Considerations of an Article I Court*, 18 San Diego L. Rev. 29, 34 (1980) (“We agree and consider it particularly important to preserve a role for the lower federal courts in considering immigration issues.”); James J. Orlow, *Comments on “A Specialized Statutory Immigration Court,”* 18 San Diego L. Rev. 47, 50 (1980) (“A more obvious defect of the proposal is the elimination of court of appeals review.... I fear that in isolating immigration appeals from the general jurisprudence, the process will grow even less flexible, less humane and less functional.”) (footnote omitted); Leon Wildes, *The Need for a Specialized Immigration Court: A Practical Response*, 18 San Diego L. Rev. 53, 56 (1980) (“[I]f such a proposal is successful in eliminating concurrent jurisdiction and insulates the adjudicative and appeal procedures within a single specialized statutory court dealing only with immigration matters, the restrictions and self-insulation of this single system will result in great prejudice to aliens.”).

⁸⁰ Christopher B. McNeil, *Similarities and Differences Between Judges in the Judicial Branch and the Executive Branch: The Further Evolution of Executive Adjudications Under the Administrative Central Panel*, 18 J. NAALJ 1, 8 (1998).

Immigration Judges.⁸¹ Rarely do administrative adjudicators render final decisions which are binding on their agency as do Immigration Judges in virtually 90% of their cases.⁸²

The time has come to adopt the 1981 Select Commission's recommendation. The primary impetus behind the universal call for INS reorganization which led to placement of these functions in the DHS was the need to restore accountability to the system,⁸³ yet time has proven that leaving EOIR at the DOJ has not restored accountability to our immigration tribunals. Failure to take this step now allows a damaging perception to persist: that the Immigration Courts remain controlled by an enforcement-minded agency. It also leaves unresolved the criticism raised by most legal scholars and academics who assert that the Immigration Courts should be treated differently

⁸¹ *Id.* See also discussion in text accompanying notes 40-43 and notes 42-43.

⁸² See *supra* note 17, for finality rates of IJ decisions. While the APA protects ALJs from agency control over the decision process, it does not provide them with any deference in arriving at the final agency decision and outcome in a given case. 5 U.S.C. § 557 (2007). See also Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. Rev. 1341, 1353 (1992).

⁸³ The cries for accountability in the post 9/11 crackdown were virtually deafening. See, e.g., Editorial, *Secret Evidence Invites Abuse*, Red Bluff Daily News, Jan. 9, 2002; Mae M. Cheng, *Questions Raised About Detainees*, NewsDay, Dec. 7, 2001; Mark Fazlollah & Peter Nicholas, *U.S. Has Overstated Terrorist Arrests for Years*, Miami Herald, Dec. 14, 2001; Josh Gerstein, *Secret Justice: Ashcroft Orders Closed Courts*, ABCnews.com, Nov. 28, 2001; Neil Lewis & Don Van Natta Jr., *Ashcroft Offers Accounting of 641 Charged or Held - Names 93*, N.Y. Times, Nov. 28, 2001; Todd S. Purdum, *Analysis - Ashcroft Does an About-Face on Detainees*, N.Y. Times, Nov. 28, 2001; David Firestone, *INS Can Overrule Judges' Orders to Release Jailed Immigrants*, N.Y. Times, Nov. 28, 2001; Josh Gerstein, *Cases Closed*, ABCnews.com, Nov. 19, 2001; Jess Bravin, *US Issues Rules to Indefinitely Detain Illegal Aliens Who Are Potential Terrorists*, Wall Street J., Nov. 15, 2001; Amy Goldstein & Dan Eggen, *INS to Stop Issuing Detention Tallies*, Wash. Post, Nov. 19, 2001; Dan Eggen & Susan Schmidt, *Count of Released Detainees is Hard to Pin Down*, Wash. Post, Nov. 6, 2001; Terry Frieden, *Justice Department Cannot Confirm How Many Detainees Released*, CNN.com, Nov. 16, 2001; Christopher Drew & William Rashbaum, *Opponents' and Supporters' Portrayals of Detentions Prove Inaccurate*, N.Y. Times, Nov. 3, 2001; Chris Mondics, *U.S. Holds Hundreds in Terror Probes; Who Are They?*, The Record, Nov. 3, 2001; Neil A. Lewis, *Detentions After Attacks Pass 1000*, U.S. Says, N.Y. Times, Oct. 30, 2001; Editorial, *Detention and Accountability*, N.Y. Times, Oct. 19, 2001; Editorial, *A Need for Sunlight*, Wash. Post, Oct. 17, 2001.

because of the severe penalties which can be imposed on respondents.⁸⁴

Implementation of our proposal will satisfy the need for independence in the area of adjudicative review, while retaining the efficiency of a specialized tribunal.⁸⁵ The removal of the immigration review functions from the DOJ and establishment of an independent and insulated Article I court for trial level and administrative appeals will create a forum with the needed checks and balances to ensure due process.⁸⁶ The DOJ will be freed to focus all its efforts on its primary mission, the prosecution of terrorists and other law enforcement activities, an increasingly compelling focus.⁸⁷

Both due process and judicial economy will be fostered by a structure where the Immigration Court's status as a neutral arbiter is enhanced. The Court's credibility would be strengthened by a more separate identity, one clearly outside the imposing shadow of the DHS or the law enforcement priorities of the DOJ. The Immigration Court would continue to scrutinize impartially the allegations made by the DHS, endorsing those determinations which are correct and

⁸⁴ See Dory Mitros Durham, Note, *The Once and Future Judge: The Rise and Fall (And Rise?) of Independence in U.S. Immigration Courts*, 81 Notre Dame L. Rev. 655, 686-87 (2006).

⁸⁵ The reasons for establishing an Article I Immigration Court are virtually identical to those given when the Tax Court was created. "The need for uniform and swift disposition of cases is not the only reason why specialist judges are necessary in the tax field. What makes tax law unique is the intricacy and complexity of the scheme embodied in the Internal Revenue Code. Thus the case for specialist courts seems to be a strong one in this area." Ellen R. Jordan, *Specialized Courts: A Choice?*, 76 Nw. U. L. Rev. 745, 750 (1981). Additionally, crucial 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," a factor which equally favors the establishment of an Article I Immigration Court. See Richard B. Hoffman & Frank P. Cihlar, *Judicial Independence: Can It Be Without Article III?*, 46 Mercer L. Rev. 863, 871 (1995).

⁸⁶ "Further, an Article I immigration court could capture the benefits of specialized courts and expertise, as well as an intercourt dialogue and generalist review." Doris Meissner, et al., *Immigration and America's Future: A New Chapter, Report of the Independent Task Force on Immigration and America's Future* 69 (2006)

⁸⁷ For an in-depth analysis debunking the commonly held assumption that all immigration cases are inextricably bound up with foreign policy which thereby justifies the prevention of judicial intrusion, see Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 Sup. Ct. Rev. 255, 261-69.

providing vindication to those who are accused without sufficient objective proof, free from the need to apologize to the public for its close alignment with the prosecutors.

The establishment of an Immigration Court, which is not an administrative agency but resides in the Executive Branch, would aid Congress and the American people by providing an independent source of statistical information to assist them in determining whether the mandate of immigration adjudication is being carried out in a fair, impartial, and efficient manner and will also allow an independent funding request to Congress so as to assure that the court's budget is not shortchanged.⁸⁸ In addition, such a structure will provide a needed safeguard against possible prosecutorial excesses and protect the trial level and appellate immigration tribunals from blurred lines of authority between the DHS and the DOJ.

Finally, to maintain continuity, sitting Immigration Judges would be grandfathered for their respective terms of office. However, the President's appointment authority would be invoked for vacancies occurring on the court after the date of enactment (including new judgeships), and mandatory retirements. Grandfather provisions have been used by Congress for the creation of other Article I courts.⁸⁹ A grandfather does not trench upon the appointments authority of the President; it merely confers new duties on officers of the United States where the new duties are "germane" to their existing functions, and simply delays the date on which the President has the authority to nominate and, by and with the consent of the Senate, to appoint.⁹⁰

⁸⁸ The court would be placed within the DOJ (or, if Congress deems it advisable, within the DHS). However, for fiscal purposes -- like the Tax Court -- its budget would receive a high degree of deference within the Executive Branch..

⁸⁹ See Act of April 2, 1982, Pub. L. No. 97-164, 97th Cong., § 167, 96 Stat. 25 (1982) (creating the United States Claims Court). See also H. Rep. No. 97-312, 26-27 (1981). This grandfather was similar to the continuation in office of the Court of Claims judges as judges of the U.S. Court of Appeals for the Federal Circuit.

⁹⁰ Congress, acting through the House and Senate Judiciary Committees, has in the past sought input from constitutional scholars on the grandfather issue in the context of creating other Article I courts. See, e.g., Letter from Leland E. Beck, Am. Law Div., Library of Congress, to Robert Kastenmeier, Chairman, Subcomm. on Courts, Civil, Liberties and the Administration of Justice, H. Comm. on the Judiciary, Constitutionality of Court of Claims Trial Commissioner Grandfather Clause in H.R. 4482, § 304 (Oct. 2, 1981) (on file with author).

V. The Arguments Militating for and Against an Article I Solution Tilt Towards the Former

The traditional reasons for maintaining the Immigration Courts within the DOJ no longer have the same force as they did in the 1950's, when the current structure was promulgated.⁹¹ 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.⁹² "The purpose of these 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."⁹³

The Immigration Court and the BIA have already transcended the traditional agency role. The overwhelming majority of the work they perform does not involve policy decisions or substantive rulemaking, but rather focuses on applying the law to individual facts. The modest amount of rulemaking that does occur should be confined to court rules and internal administrative matters regarding court operations. The number of policy decisions made by the Attorney General through his review of BIA precedent decisions is *de minimis*.⁹⁴ The authority of

⁹¹ See Immigration and Nationality Act of 1952, Pub. L. 82-414, 66 Stat. 163 (1952). 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 Paul R. Verkuil, *A Study of Immigration Procedures*, 31 UCLA L. Rev. 1141 (1984).

⁹² See Stein, Mitchell, Mezines, *Administrative Law* § 1.01[2], notes 40-51.

⁹³ *Crowell v. Benson*, 285 U.S. 22, 88 (1932).

⁹⁴ The number of BIA precedential decisions is very small when compared to the number of cases adjudicated by the Immigration Courts and BIA each year. Since EOIR became a separate agency within the DOJ on January 9, 1983, the BIA has published 650 precedent decisions. Only seventeen of those decisions, or less than three percent, were reviewed by the Attorney General during that time. See *Matter of J-F-F-*, 23 I. & N. Dec. 912 (A.G. 2006); *Matter of A-H-*, 23 I. & N. Dec. 774 (A.G. 2005); *Matter of Luviano-Rodriguez*, 23 I. & N. Dec. 718 (A.G. 2005); *Matter of Marroquin-Garcia*, 23 I. & N. Dec. 705 (A.G. 2005); *Matter of E-L-H-*, 23 I. & N. Dec. 700 (A.G. 2004); *Matter of R-A-*, 23 I. & N. Dec. 694 (A.G. 2005); *Matter of C-Y-Z-*, 23 I. & N. Dec. 693 (A.G. 2004); *Matter of D-J-*, 23 I. & N. Dec. 572 (A.G. 2003); *Matter of Jean*, 23 I. & N. Dec. 373 (A.G. 2002); *Matter of Y-L-, A-G-, R-S-R-*, 23 I. & N. Dec. 270 (A.G. 2002); *Matter of N-J-B-*, 21 I. & N. Dec. 812 (A.G. 1997); *Matter of Soriano*, 21 I. & N. Dec. 516 (A.G. 1997); *Matter of Farias-Mendoza*, 21 I. & N. Dec. 269 (A.G. 1997); *Matter of Cazares-Alvarez*, 21 I. & N. Dec. 188 (A.G. 1997); *Matter*

the Attorney General to substitute his judgment for that of the BIA has been increasingly criticized as an inappropriate injection of a law enforcement official into a quasi-judicial appellate process.⁹⁵ Questions have been raised as to the continued propriety of the Attorney General's ability to insert political considerations into immigration decisions, particularly after the HSA, despite the fact that all acknowledge that such intervention is exceedingly rare.⁹⁶ Moreover,

of De Leon-Ruiz, 21 I. & N. Dec. 154 (A.G. 1997); Matter of Hernandez-Casillas, 20 I. & N. Dec. 262 (A.G. 1991); Matter of Leon-Orosco and Rodriguez-Colas, 19 I. & N. Dec. 136 (A.G. 1984).

⁹⁵ Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 Notre Dame L. 644, 650 (1980-81); Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 Stanford L. Rev. 413, 458 (2007) ("There is little need for agency head review. Decisional consistency can be achieved through a combination of the administrative appellate process, legislative rules (including interim rules when necessary), and interpretative rules. Rulemaking and other powers can also preserve agency policy primacy and agency policy coherence. Moreover, agency head review poses inherent dangers to the dispensation of justice, including especially the substitution of a political outcome for one based on an independent adjudicative tribunal's honest reading of the evidence and the law. All of these considerations have special force in the asylum context, where the stakes are high and the potential for inappropriate political and ideological influence has been amply demonstrated.").

⁹⁶ Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 Stanford L. Rev. 413, 458 (Nov. 2007) ("To sum it up: the arguments based on agency policy coherence are particularly inapt, since immigration judges and the BIA are within the Department of Justice while the analogous policymaking agencies are now located within the Department of Homeland Security. Agency policy coherence, therefore, is simply not an issue in this context."); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 Cornell L. Rev. 369, 393-94 (2006) ("In the particular context of deportation, the policy-coherence concern commands less weight now that the bulk of the Attorney General's immigration policymaking authority has been ceded to the Department of Homeland Security . . ."). *See also Immigration Litigation Reduction: Hearing Before S. Comm. on the Judiciary*, 109th Cong. 20 (2006) (question of Arlen Specter, Chairman of the S. Comm. on the Judiciary) ("Judge Michel, I was surprised to find that after an immigration judge decides a case, and the Board of Immigration Appeals affirms, the Attorney General has the authority to set that aside. We questioned Attorney General Ashcroft on that subject at substantial length, and the best answer that the Department of Justice could give was that it is very infrequently used."). *See also id.* at 67-68 (written statement of Jonathan Cohn, Deputy Assistant Att'y Gen., Civil Division, Department of Justice).

legal scholars have long recognized that allowing the government to appeal to the circuit courts from an adverse BIA ruling would serve precisely the same purpose.⁹⁷

While it is indisputable that the expertise of the Immigration Courts is unmatched,⁹⁸ it has also been long recognized that the actual functions and operations of the Immigration Courts are much more analogous to judicial models than to other examples of executive agency decision-making.⁹⁹ The most important Congressional enactments involving immigration matters in recent times have provided specific and detailed roadmaps to enforcement, not general goals requiring the specialized skill of an agency to provide a methodology to implement or to flesh-out context.¹⁰⁰ The general trend in the field of immigration law appears to be shifting towards a judicial focus for the Immigration Courts and the BIA, to insure that Congressional will is implemented, rather than a reliance on agency expertise in interpretation. This is a task which affords far less deference to administrative experience and interpretation, since it focuses instead on a search for Congressional purpose, a traditional judicial role.¹⁰¹ An Article I court would be free to focus on adjudicative fairness and efficiency, unfettered by the competing concerns of prosecutorial imperatives.¹⁰²

⁹⁷ Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudications: A Study of the Immigration Process*, 71 Iowa L. Rev. 1297, 1382 (1986) ("Another alternative to Attorney General review is simply to authorize the Attorney General to do precisely what aliens may do when aggrieved by BIA decisions – go to court.").

⁹⁸ *See* discussion *supra* note 16. Because of the wealth of expertise in the present Immigration Judge corps, we strongly believe that any legislative conversion to Article I status must include a provision which would "grandfather" current Immigration Judges for a full term of office.

⁹⁹ *See* discussion *supra* note 17, regarding the finality of the majority of Immigration Judge decisions, and discussion *supra* notes 94-96, questioning the need for review of BIA decisions by the Attorney General for policy reasons.

¹⁰⁰ *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (1996); Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (1996).

¹⁰¹ *See* discussion *supra* notes 87, 94-96.

¹⁰² This would remove the Attorney General from the dilemma which was the most frequently cited cause for the dysfunction of the INS: conflicting priorities between enforcement and adjudication goals, a dilemma which remained partially unresolved by the transfer of INS functions to the DHS. *See* discussion *supra* note 4.

The suggestions to make Immigration Court proceedings subject to the Administrative Procedures Act (APA), an independent agency in the Executive Branch or to create an Article I Immigration Court were also studied by the 1997 Commission.¹⁰³ The 1997 Commission acknowledged that an Article I solution was a viable way to attain the desired level of independence, despite its decision not to adopt this approach as an official recommendation. The reason given by the majority of commissioners for favoring an independent administrative agency over Article I was a concern that a change from an agency structure might compromise operational flexibility and coordination of function in the Executive Branch.¹⁰⁴

With all due respect, we believe that the 1997 Commission's conclusion must be viewed in a different light today. Ten years later, we have the benefit of a significant amount of experience not available to the 1997 Commission. This experience has demonstrated an overwhelming increase of immigration cases in the federal courts of appeals, precisely because the Immigration Courts remained an agency housed in a law enforcement Executive Branch department. In 1997, critics of the Article I approach were concerned with a possible decrease in efficiency, an increase in operating costs and a compromised ability to employ operational flexibility. However, the most vociferous objection to creation of an Article I Immigration Court was the concern that it would preclude the opportunity for judicial review in an Article III court of general jurisdiction.¹⁰⁵ It is precisely because of the serious nature of this concern that we propose the Tax Court serve as a model for an

¹⁰³ U.S. Comm'n on Immigration Reform, 1997 Report to Congress, *Becoming An American: Immigration and Immigrant Policy* 179 (1997).

¹⁰⁴ The traditional rationale for administrative agencies was cited. *Id.* "In theory, administrative agencies provide efficient and politically neutral action particularly in areas requiring technical or scientific knowledge. As Professor Cass Sunstein has described: 'The New Deal conception of administration regarded agencies as politically insulated, self-starting, and technically sophisticated. The expectation was that neutral experts, operating above the fray, would be able to discern the public interest.' In practice, however, administrative agencies in some instances have failed to live up to their promise and have come under attack." M. Isabel Medina, *Judicial Review – A Nice Thing? Article III, Separation of Powers and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 Conn. L. Rev. 1525, 1547 (1997) (footnotes omitted).

¹⁰⁵ Our proposal would allow either party to appeal a BIA decision to the circuit court, a change from the present law which precludes the DHS from seeking judicial review of an adverse BIA ruling.

Article I Immigration Court and that resort to the regional federal courts of appeals be preserved.¹⁰⁶

The priority of administrative efficiency in the immigration tribunals has been eclipsed by the evolution of immigration as an issue of compelling national concern deserving of a judiciary of enhanced stature. The legal issues which arise now under our immigration laws are increasingly complex and layered.¹⁰⁷ At the same time, the consequences of removal have been intensified by the stricter laws now in force.¹⁰⁸ When taken cumulatively, these factors have raised the stakes for the individuals who come

¹⁰⁶ Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 918 (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*, 533 U.S. 218 (2001); William Funk, *One of the Most Significant Opinions Ever Rendered?*, 27 Admin. & Reg. L. News 8 (2001).

¹⁰⁷ "The benefits of expertise in aiding the thoughtful resolution of a difficult legal question in a highly specialized area of the law should not be too casually dismissed." Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudications: A Study of the Immigration Process*, 71 Iowa L. Rev. 1297, 1389 (1986). "Studies have shown that legal representation can actually expedite the administrative process and reduce litigation." Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. Sch. L. Rev. 38, 55 (2006-07) (footnote omitted).

One example of an area requiring complicated legal scrutiny by Immigration Judges is found in cases involving criminal convictions for aggravated felonies or crimes involving moral turpitude. In both situations, these matters require application of both a categorical and modified categorical approach to ascertain if the statute is divisible and to determine whether the statute at issue meets the criteria of a disqualifying conviction for immigration law purposes. See, e.g., *Lopez v. Gonzales*, 549 U.S. ___, 127 S. Ct. 625 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004). See also Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. Sch. L. Rev. 38, 42 n.10 (2006-07).

¹⁰⁸ For example, effective April 1, 1997, several new grounds of inadmissibility were added to the statute affecting individuals who had been unlawfully present in the United States for periods in excess of 180 consecutive days. See 8 U.S.C. § 1182(a)(9)(B) (2007). Depending on the length of the unlawful presence, such a person can be barred from legal re-entry to the United States for three years, ten years or even permanently. *Id.* Under some circumstances, no waiver of or exception to this ground of inadmissibility exists. *Id.*

before the Immigration Courts to a level never seen before in U.S. history.¹⁰⁹

With the stakes so high, the system cannot function properly without a structure that preserves our most honored Constitutional principles of separation of powers, impartial decision-making, and due process of law. With such fundamental rights at stake, legal commentators widely view the Immigration Court's placement as part of an enforcement culture as highly inappropriate.¹¹⁰ "Consider those cases where one's liberty is at stake or where the government seeks to enforce its will upon individuals. These 'enforcement' cases require deciders who enjoy maximum independence from agency control because their work is closest to that of federal district judges in criminal and civil cases."¹¹¹ The solution is clear: "Congress should select a model that responds to and balances the evolution of the adjudication structure and the values it embodies."¹¹² That solution is an Article I court.

VI. The Benefits of an Article I Are Numerous

An Article I Immigration Court is a solution that has been advanced for years and is favored by many legal scholars and academics who cite the benefits this approach has provided in the fields of tax law and bankruptcy law.¹¹³

¹⁰⁹ "[T]he incentives to litigate beyond the agency have partially increased as a reaction to the narrowing and elimination of prior forms of relief." Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. Sch. L. Rev. 38, 39 (2006-07). "[T]he complexity of the immigration law itself increased in the incentives to seek further review." *Id.* at 46.

¹¹⁰ Dory Mitros Durham, Note, *The Once and Future Judge: The Rise and Fall (And Rise?) of Independence in U.S. Immigration Courts*, 81 Notre Dame L. Rev. 655, 686-87 (2006).

¹¹¹ Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. Rev. 1341, 1358 (1992).

¹¹² Dory Mitros Durham, Note, *The Once and Future Judge: The Rise and Fall (And Rise?) of Independence in U.S. Immigration Courts*, 81 Notre Dame L. Rev. 655, 691 (2006).

¹¹³ See Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 Notre Dame L. 644, 650-55 (1980-81); M. Isabel Medina, *Judicial Review – A Nice Thing? Article III, Separation of Powers and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 Conn. L. Rev. 1525, 1562 (1997); Maurice A. Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 San Diego L. Rev. 1, 18 (1980).

It is true that the major factors which favor the creation of a separate administrative agency outside the DOJ or an Article I court are much the same. Each approach would accommodate the need for specialized expertise, reduce the caseload burdens on Article III courts and encourage legal uniformity.¹¹⁴ However, the major distinction between an administrative agency (whether or not an APA tribunal) and an Article I court is the greater degree of judicial independence which is provided by the latter, due to the clear insulation of decision-makers from the agency affected by its rulings.¹¹⁵ While legal experts differ in their views as to the degree to which this independence differs between these two types of fora,¹¹⁶ the need for independence in this area has been repeatedly identified as the crux of the problem plaguing the Immigration Courts. Recognizing that critical factor, the solution which provides the most independence, an Article I court, is clearly the optimal one.

Because Article I courts, like administrative agencies, do not exercise Article III judicial power, legal scholars argue that federal appellate review by lifetime tenured judges is a necessary mechanism to provide the proper checks and balances mandated by our constitutional scheme. "Appellate review affords an opportunity to correct legal errors including those that may have resulted from the kind of political influence on judicial decisionmaking that article III was intended to prevent."¹¹⁷ "The individuals involved in standard removal cases deserve at least one

¹¹⁴ See Paul Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 Ind. L. J. 233 (1990); Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 Duke L.J. 197.

¹¹⁵ "The Tax Court may be seen not only as a model for injecting a measure of judicial independence into an administrative process, but as a remarkably successful model.... [T]he Tax Court has engendered a greater degree of consumer confidence than has the ALJ process." Hoffman & Cihlar, *supra* note 18, at 871, 877.

¹¹⁶ See, e.g., discussion *supra* note 104.

¹¹⁷ Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 939 (1988) "Appellate review can provide an effective check against politically influenced adjudication, arbitrary and self-interested decision-making and other evils that the separation of powers was designed to prevent. *Id.* at 947. Cf. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 115 (1981) (White, J., dissenting) ("Crowell . . . suggests that the presence of appellate review by an Article III court will go a long way toward insuring a proper separation of powers.")"

opportunity for full consideration by Article III judges."¹¹⁸

The United States Tax Court, the Bankruptcy courts, and U.S. Court of Federal Claims balance the same legal policy concerns regarding the powers of the Executive Branch and the public rights doctrine as do the immigration courts. Because of that fact, they provide excellent models for immigration adjudications. Judges serve for set terms of office and are subjected to judicial discipline mechanisms. Each of these tribunals is an Article I court; the Tax Court is in the Executive Branch; the bankruptcy courts and the Court of Federal Claims reside in the Judicial Branch of government. Each provides a right of appeal to an Article III federal court subsequent to their decisions. Tax Court decisions are reviewable in the United States Courts of Appeal, subject to the same restrictions as nonjury civil matters arising from the federal district courts, and can work their way up all the way to the U.S. Supreme Court.¹¹⁹ Bankruptcy court decisions are reviewable in either a federal district court or a court of appeals, with final resort to the United States Supreme Court as well.¹²⁰ Finally, Court of Federal Claims decisions can be appealed to the U.S. Court of Appeals for the Federal Circuit.¹²¹

As the crush of immigration cases in the circuit courts of appeal now shows, administrative adjudications of immigration matters has proven to be a false economy.¹²² It serves no purpose to economize at the agency level to such a drastic degree that the expense is merely transferred to a coordinate branch of government (the judiciary), where the costs in terms of judicial time and resources end up exceeding the savings below.

The way to restore balance and faith in the system is to provide safeguards at the trial level, which will restore public confidence and reduce resort to the federal appellate courts. The most fundamental safeguard of due process is an impartial, neutral arbiter. "Experience teaches that the review function

works best when it is well-insulated from the initial adjudicatory function and when it is conducted by decision-makers entrusted with the highest degree of independence. Not only is independence in decision-making the hallmark of meaningful and effective review, it is also critical to the reality and the perception of fair and impartial review."¹²³

CONCLUSION

The optimal balance between efficiency, accountability and impartiality would be achieved by adopting the 1981 Select Commission's recommendation to establish an Article I Immigration Court. A bipartisan panel of experts (including Members of Congress) after years of thorough study of all aspects of this intricate process, reached this solution. The test of time has shown that modest steps to ensure decisional independence for the Immigration Court and the BIA have failed. Establishment of an Article I Immigration Court would achieve meaningful reform of the current structure and would end these persistent encroachments on independence once and for all. It would restore public confidence, safeguard due process, provide insulation from any political, law-enforcement agenda, and be sufficiently flexible to meet changing societal needs. Because historical levels of immigration appeals would resume once public confidence in impartiality is restored, the crush of immigration appeals in the circuit courts would be alleviated. The time for decisive action is now. History has show that the issues in immigration law will not get any easier or less compelling. Failure to act now to create an Article I Immigration Court would give concrete meaning to the old adage: justice delayed is justice denied.

Dana Leigh Marks is President, National Association of Immigration Judges, 120 Montgomery Street, Suite 800, San Francisco, CA 94104.

¹¹⁸ *Immigration Litigation Reduction: Hearing Before S. Comm. on the Judiciary* 29 109th Cong. (2006) (statement of David Martin, Professor of Law, University of Virginia).

¹¹⁹ 26 U.S.C. § 7482(a) (2007). Thereafter, review may be sought via a *writ of certiorari* to the U.S. Supreme Court. *See* 28 U.S.C. § 1254 (2007).

¹²⁰ 28 U.S.C. §§ 151-58, 1408-12, 1254 (2007).

¹²¹ 28 U.S.C. § 1295(a)(3) (2007). A proposal to consolidate all immigration appeals in the Federal Circuit was clearly disfavored by a majority of the circuit court judges who testified before Congress recently. *See Immigration Litigation Reduction Hearing, supra* note 5, at 3-4, 6, 10-11.

¹²² *See* discussion and citations *supra* notes 5 and 34.

¹²³ *See* U.S. Comm'n on Immigration Reform, 1997 Report to Congress, *Becoming An American: Immigration and Immigrant Policy* 175 (1997). The 1997 Commission ultimately decided on an independent agency approach over an Article I solution believing that approach provided necessary administrative flexibility. For the reasons discussed earlier in the text such as the deluge of cases in the circuit courts, text accompanying note 34 *supra*, and the continually diminishing role of the Attorney General in policy-making, text accompanying notes 94-97 *supra*, we respectfully disagree and feel that subsequent events have proven this to be an erroneous premise.