

RESTRUCTURING IMMIGRATION ADJUDICATION

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ABSTRACT

For decades, the immigration adjudication system has been under relentless attack from both the left and the right. The left has been concerned with the fairness of the proceedings, the accuracy and consistency of the outcomes, and the acceptability of both the procedures and the outcomes to the parties and to the public. The right has focused on the fiscal costs and elapsed times of these proceedings. This Article demonstrates that all of these criticisms have been well founded and that the roots of the problems are severe underfunding, reckless procedural shortcuts, the politicization of the process, and a handful of adjudicators personally ill suited to the task.

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Over the years, commentators and commissions have offered thoughtful solutions, but consensus has proven elusive. This Article calls for redesigning the entire system. For the trial phase, this Article endorses previous proposals for converting the current immigration judges into administrative law judges, who enjoy greater job security, and moving them from the Department of Justice into a new, independent executive branch tribunal. For the appellate phase, this Article proposes radical surgery, replacing both administrative appeals and regional court of appeals review with a single round of appellate review by a new, Article III immigration court. The new court would be staffed by experienced Article III district and circuit judges serving two-year assignments. This new system would significantly depoliticize the hiring, judging, supervision, and control of immigration adjudicators. It would consolidate the two current, largely duplicative rounds of appellate review into one, in the process restoring the Article III jurisdiction that Congress stripped away in 1996. It would save tax dollars and speed the removal process, thus reducing not only prolonged detention, but also what some believe is a meaningful incentive to file frivolous appeals to delay removal. It would preserve both specialized expertise and a generalist perspective. And it is politically realistic, permitting all sides to meet the specific objectives they hold most dear while requiring each side to make only modest concessions.

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INTRODUCTION

Immigration law presents special complexities. The sheer size and chaotic layout of the principal statute and related sources of law bewilder specialists and nonspecialists alike. The labyrinth known as the Immigration and Nationality Act¹ governs the admission of noncitizens to the United States, their expulsion from the United States, and a host of miscellaneous decisions. Its five hundred pages conspire with more than one thousand pages of administrative regulations issued by a variety of federal departments,² as well as precedent decisions of administrative tribunals, executive officers, and courts, to create a byzantine network of substantive and procedural rules of law. The organization of the statute further confounds nonspecialists because qualifications to many of its most important provisions appear in distant and unexpected places.³

1. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-537 (2006)).

2. *E.g.*, 6 C.F.R. (Department of Homeland Security); 8 C.F.R. (Department of Justice); 20 C.F.R. (Department of Labor); 22 C.F.R. (Department of State).

3. For example, the grounds on which a noncitizen may be deported are listed in 8 U.S.C. § 1227(a), but many of the provisions for discretionary relief in these cases are scattered throughout the statute. *See, e.g., id.* §§ 1158, 1182(h), 1229b, 1229c, 1255, 1259. To receive asylum, one must be a “refugee,” *id.* § 1158(b)(1)(A), but the term “refugee” is defined in § 1101(a)(42). The main requirements for the various classes of “nonimmigrant” temporary

Moreover, even when the law is otherwise clear, rules that require judges to apply broadly worded statutory or regulatory language to individualized facts are exceptionally common,⁴ rendering outcomes highly indeterminate.

The resulting legal complexities and fact-specific uncertainties, in turn, generate disputes over the facts, the law, and the many discretionary determinations delegated to a range of government actors. The sheer number of noncitizens seeking admission or resisting deportation,⁵ combined with the critical interests at stake for both the individuals and the public, guarantee that the number of disputes will be high.

This Article focuses on the formal system for adjudicating removal cases. These are cases in which the government seeks either to deny a noncitizen admission to the United States or to expel a noncitizen after arrival.⁶ Described in Part I, these proceedings

visitors are laid out in § 1101(a)(15), but numerous other requirements for those same admissions appear in § 1184.

4. Two of the most frequent remedies requested in removal proceedings, for example, are asylum and cancellation of removal. The former requires a showing of “refugee” status, *id.* § 1158(b)(1)(A), which in turn requires a “well-founded fear of persecution,” *id.* § 1101(a)(42). The latter requires a showing of “exceptional and extremely unusual hardship.” *Id.* § 1229b.

5. In fiscal year 2008, more than 1.1 million people were admitted to the United States as lawful permanent residents, OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., 2008 YEARBOOK OF IMMIGRATION STATISTICS 5 tbl.1 (2009), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/ois_yb_2008.pdf, and another 60,000 as refugees, *id.* at 39 tbl.13. There were over 175 million “nonimmigrant” (temporary visitor) admissions. *Id.* at 65 tbl.25. In the same fiscal year, the immigration courts received more than 350,000 “matters,” mainly removal proceedings. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (EOIR), U.S. DEP’T OF JUSTICE, FY 2008 STATISTICAL YEAR BOOK B7 fig.2 (2009), available at <http://www.usdoj.gov/eoir/statspub/fy08syb.pdf>.

6. See 8 U.S.C. § 1229a. This is only one of several immigration adjudication systems that Congress and the executive branch have constructed. United States Citizenship and Immigration Services (USCIS), an agency of the Department of Homeland Security, engages in informal adjudication when it decides a wide variety of individual applications for immigration benefits, sometimes providing intra-agency appellate review of its decisions. See Homeland Security Act of 2002 § 451, 6 U.S.C. § 271 (2006) (establishing the Bureau of Citizenship and Immigration Services and detailing the functions of the agency and its officers); Notice of Name Change from the Bureau of Citizenship and Immigration Services to United States Citizenship and Immigration Services, 69 Fed. Reg. 60,938 (Oct. 13, 2004). The Department of Labor has its own procedures for deciding—and offering review of its decisions denying—applications for labor certification, a prerequisite to immigration in certain employment-related admission categories. 8 C.F.R. § 212 (2009); 20 C.F.R. § 656 (2009). The State Department has procedures for deciding visa applications and, in its discretion, reviewing visa denials by consular officers. 22 C.F.R. §§ 40–42 (2009). Several entities are involved in the adjudication of citizenship disputes. See generally 7 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE (rev. ed. 2009) (covering the law of nationality and citizenship, and the process of naturalization). The USCIS asylum officers have procedures for

comprise evidentiary hearings before immigration judges in the Justice Department's Executive Office for Immigration Review (EOIR), appellate review by the Board of Immigration Appeals (BIA), also within EOIR, and in certain cases, review by the U.S. courts of appeals. Removal proceedings are the centerpiece, and by far the most controversial, of the immigration adjudication systems in place today. For decades, the system has been under relentless attack from both the left and the right.

As this Article will show, the criticisms are well founded. There have been fundamental problems with the fairness of the proceedings, the accuracy and consistency of the outcomes, the efficiency of the process (with respect to both fiscal resources and elapsed time), and the acceptability of both the procedures and the outcomes to parties and to the public. This Article argues that the principal sources of these problems are severe underfunding, reckless procedural shortcuts, the inappropriate politicization of the process, and a handful of adjudicators personally ill suited to the task.

Over the years, commentators have offered thoughtful solutions,⁷ but consensus has proved elusive. The various proposals have fallen

adjudicating certain asylum applications. 8 C.F.R. § 208. A truly comprehensive study of immigration adjudication in the United States would embrace all of these disparate systems. As a consultant to the Administrative Conference of the United States many years ago, I attempted such an examination, but only with respect to the appellate phase. See Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297 (1986). Much of that study has been overtaken by subsequent developments.

7. Several reports and other writings have recommended replacing EOIR with an Article I immigration court that would have trial and appellate divisions. See APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA'S IMMIGRATION COURTS 35–36 (2009), available at http://www.chicagoappleseed.org/uploads/view/75/download:1/assembly_line_injustice_june09.pdf; COMM'N ON IMMIGRATION, ABA, REFORMING THE IMMIGRATION SYSTEM: EXECUTIVE SUMMARY 43–48 (2010), available at <http://new.abanet.org/Immigration/Documents/ReformingtheImmigrationSystemExecutiveSummary.pdf>; JAYA RAMJI-NOGALES, ANDREW SCHOENHOLTZ & PHILIP SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 103–04 (2009); SELECT COMM'N ON IMMIGRATION & REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: THE FINAL REPORT AND RECOMMENDATIONS 248–50 (1981); Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 NOTRE DAME LAW. 644, 651–54 (1981); Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGR. BULL. 3, 15–21 (2008); Maurice A. Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 SAN DIEGO L. REV. 1, 18–20 (1980); Marshall Fitz & Philip Schrag, Proposed Bill to Create an Independent Immigration Court System (2010) (unpublished manuscript, on file with the *Duke Law Journal*); see also ABA, DAILY JOURNAL: 2010 MIDYEAR MEETING (2010), available at http://www.abanet.org/leadership/2010/midyear/docs/daily_journal.pdf (showing ABA House of Delegates approval of Resolutions 114A, B, C, D, and F); Press Release, ABA, New Report to ABA Addresses Crisis Within Immigration Removal System (Feb. 2, 2010), available at <http://www.abanet.org/abanet/>

victim to structural impediments, funding priorities, and vast political chasms that continue to separate the diverse clusters of critics.

This Article seeks to construct a politically realistic proposal that would solve the major problems afflicting immigration adjudication. To be politically feasible, the proposal must enable all sides to achieve the legitimate goals they consider most important without requiring any side to make more than modest concessions.

My proposal has two parts. The first part would convert current immigration judges into administrative law judges (who enjoy greater job security) and move them from the Department of Justice into a new, independent tribunal. This new tribunal would remain within the executive branch but would be located outside all departments of the federal government. The second half of my proposal would abolish both the BIA and the current role of the regional courts of appeals, replacing them with a single round of appellate review by a new, Article III immigration court. The new court would be staffed by Article III judges drawn from the district courts and the regional courts of appeals for two-year assignments. Only judges with at least three years of experience on federal courts of general jurisdiction would be eligible for such assignments.

It bears emphasis that restructuring, although essential to reform of the immigration adjudication system, is not sufficient. Even a perfect adjudication structure, staffed by perfect people, would solve only a fraction of what ails immigration adjudication. As discussed below, realistic funding is critical. There are, moreover, a number of procedural issues that ideally require reform as well. Examples

media/release/news_release.cfm? releaseid=870 (summarizing the ABA Commission on Immigration's proposals); cf. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 386 (2007) (proposing conversion of the BIA to an Article I court). One study proposed the functional equivalent of an Article I court with trial and appellate divisions, also within the executive branch and outside the Department of Justice, but preferred not to call it a "court." See U.S. COMM'N ON IMMIGRATION REFORM, 1997 REPORT TO CONGRESS: BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 178-82 (1997). Numerous other studies have criticized core components of the EOIR adjudication system but without proposing specific restructuring options. See, e.g., DORSEY & WHITNEY LLP, STUDY CONDUCTED FOR THE AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION POLICY, PRACTICE AND PRO BONO RE: BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT (2003), available at http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf; Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1 (2006); Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 73 BROOK. L. REV. 467 (2008); Lenni B. Benson, *You Can't Get There from Here: Managing Judicial Review of Immigration Cases*, 2007 U. CHI. LEGAL F. 405.

include the range of available remedies, access to counsel, the quality of interpretation, standards of proof, and the rules concerning motions to reopen or reconsider.⁸ For the most part, these issues are beyond the scope of this Article. Though the distinction is not always clear-cut, the emphasis here will be on the broad design of the system rather than specific procedural ingredients.

Part I of this Article provides a bare-bones summary of the current adjudication system for the removal of noncitizens from the United States. Part II identifies and describes the fundamental problems with the current system and seeks to diagnose their causes. Part III articulates the essential principles that any reform would have to follow to remedy the problems discussed in Part II. It then tests some of the more significant proposals against those principles, finding them to be improvements over the status quo but still not fully satisfying. Part IV lays out the details of my proposed solution and examines its benefits and costs.

I. THE BACKGROUND

Removal proceedings are the forum for determining whether noncitizens should be removed from the United States, either upon seeking admission (formerly called exclusion hearings) or after admission (formerly called deportation hearings). The Department of Homeland Security (DHS) initiates the proceedings by serving a “notice to appear” on the noncitizen whom it wishes to remove.⁹ DHS is typically represented by an assistant chief counsel in Immigration and Customs Enforcement (ICE), an agency of DHS.¹⁰ The noncitizen and DHS are the opposing parties. An immigration judge conducts an evidentiary hearing.¹¹

The immigration judges, based in offices located throughout the United States,¹² are part of the Office of the Chief Immigration Judge (OCIJ). The latter is a component of the Executive Office for

8. For a thoughtful discussion of the many external contributors to EOIR’s case management problems, see generally Benson, *supra* note 7.

9. 8 U.S.C. § 1229(a)(1).

10. See E-mail from Peter Vincent, Principal Legal Advisor, Immigration and Customs Enforcement, to Author (Aug. 19, 2009) (on file with the *Duke Law Journal*).

11. 8 U.S.C. § 1229a(a)(1).

12. See EOIR, *supra* note 5, at B3 tbl.1 (listing office locations). Under the EOIR “Institutional Hearing Program,” the immigration judges also conduct removal hearings in prison facilities. *Id.* at P1.

Immigration Review (EOIR),¹³ a tribunal within the Department of Justice. The immigration judge first determines whether the noncitizen is removable under any of the statutorily enumerated grounds for inadmissibility¹⁴ or deportability.¹⁵ If the person is found inadmissible or deportable, the immigration judge then decides any affirmative applications for relief that the noncitizen has properly filed.¹⁶ These latter determinations typically entail an initial decision whether the person has met the specific statutory prerequisites for the relief sought and, if so, whether discretion should be favorably exercised. At the conclusion of the hearing, the immigration judge renders a decision, either orally or in writing.¹⁷ The decision culminates in a formal order directing the person's removal, terminating proceedings, or otherwise disposing of the case.¹⁸

Among the mechanisms for affirmative relief are two remedies designed specifically to protect the applicant from persecution: asylum and a narrower remedy commonly called "withholding of removal" (or, by statute, "restriction on removal").¹⁹ Their adjudication procedures require brief additional explanation. A person who is already in removal proceedings may file a defensive application for these remedies with the immigration judge.²⁰ One who is not in removal proceedings may file an affirmative application for asylum (but not for withholding of removal) with the United States Citizenship and Immigration Services (USCIS).²¹ If the asylum officer is not prepared to grant the application, he or she refers the person

13. 8 C.F.R. §§ 1003.9–.10 (2009).

14. 8 U.S.C. § 1182(a).

15. *Id.* § 1227(a).

16. *See id.* § 1229a(c)(4)(A).

17. 8 C.F.R. § 1240.13.

18. *Id.* § 1240.12(c).

19. Asylum, which is discretionary, enables the recipient to remain in the United States and, subject to some limitations, to bring in a spouse and children. 8 U.S.C. § 1158. Withholding of removal merely immunizes the person from return to the country in which his or her life or freedom is threatened (not from return to a third country), and it makes no provision for the admission of family members. *See id.* § 1231(b)(3).

20. DEP'T OF HOMELAND SEC. & U.S. DEP'T OF JUSTICE, I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL: INSTRUCTIONS 10 (2009), available at <http://www.uscis.gov/files/form/i-589instr.pdf>.

21. *See id.* at 11; EOIR, *supra* note 5, at I1.

for removal proceedings,²² in which the person may apply de novo to the immigration judge.²³

The Justice Department regulations give each of the opposing parties the right to appeal the immigration judge's decision to the BIA,²⁴ located in Falls Church, Virginia.²⁵ The filing of the appeal automatically stays execution of the immigration judge's decision.²⁶ The attorney general created the BIA in 1940,²⁷ names its members, determines its procedures, and may review any of its decisions.²⁸ Like the immigration judges, the BIA is part of EOIR.²⁹ As a result of controversial reforms introduced in 2002 by Attorney General John Ashcroft, the BIA decides the vast majority of its cases by single members rather than multimember panels, and, in specified categories, without providing reasons.³⁰ The BIA reviews the immigration judge's legal conclusions and discretionary decisions de novo, but as a result of the 2002 reforms, the BIA may not reverse findings of fact, including credibility determinations, unless they are "clearly erroneous."³¹

Subject to some broad exceptions enacted in 1996,³² the noncitizen has the right to judicial review of the BIA's decision. The exclusive procedure for obtaining such review is a petition for review in the United States court of appeals for the circuit in which the removal hearing was held.³³

The three main classes of cases for which judicial review is barred are expedited removal orders,³⁴ most discretionary

22. 8 C.F.R. § 208.14(c)(1) (assuming inadmissibility or deportability).

23. See DEP'T OF HOMELAND SEC. & U.S. DEP'T OF JUSTICE, *supra* note 20, at 10. EOIR reports that in fiscal year 2008, immigration judges received over 33,000 such affirmative asylum claims and 14,000 defensive claims. EOIR, *supra* note 5, at I1 fig.13.

24. 8 C.F.R. § 1003.1(b)(3).

25. EOIR, U.S. Dep't of Justice, Board of Immigration Appeals, <http://www.justice.gov/eoir/biainfo.htm> (last visited Mar. 28, 2010).

26. 8 C.F.R. § 1003.6(a).

27. Regulations Governing Departmental Organization and Authority, 5 Fed. Reg. 3502, 3503 (Sept. 4, 1940) (codified as amended at 8 C.F.R. pt. 1003).

28. 8 C.F.R. § 1003.1.

29. *Id.* § 1003.0(a).

30. See *infra* Part II.B.2.

31. 8 C.F.R. § 1003.1(d)(3).

32. For a summary of those restrictions, see Jill E. Family, *Stripping Judicial Review During Immigration Reform: The Certificate of Reviewability*, 8 NEV. L.J. 499, 502-03 (2008).

33. 8 U.S.C. § 1252(b)(2) (2006).

34. The statute authorizes immigration inspectors to order expedited removal when they determine that arriving noncitizens at ports of entry are inadmissible because of either fraud or

determinations, and most cases in which the noncitizens are removable on crime-related grounds.³⁵ The bar on review of most discretionary decisions has had a particularly substantial impact because, as the Justice Department has pointed out, “the dominant number of the Board’s cases relate to . . . relief from removal.”³⁶ The collective consequence of these various bars on judicial review has been that asylum cases (which are still reviewable)³⁷ now make up the bulk of the courts’ immigration caseloads.³⁸ Service of the petition for review does not automatically stay removal pending the court’s decision, but upon motion by the noncitizen the court has the discretion to grant a stay.³⁹

II. THE PROBLEMS

The United States immigration adjudication system is beset with crippling problems. Immigration judges occupy positions of unhealthy dependence within the Immigration and Naturalization Service[,] . . . lack adequate support services, and frequently face debilitating conflicts with agency personnel. Board of Immigration Appeals members perform appellate functions without job security or statutory recognition. Long delays pervade the quasi-judicial hearing and appellate process. The availability of further review in federal courts postpones finality, encourages litigation, and undermines the authority of initial appellate determinations.⁴⁰

insufficient entry documents. In those cases the statute dispenses with several of the procedural ingredients otherwise required in removal proceedings, and the process is designed to be fast. *Id.* § 1225(b)(1).

35. *Id.* § 1252(a)(2).

36. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,880 (Aug. 26, 2002) (codified as amended at 8 C.F.R. pt. 1003); *see also* EOIR, U.S. DEP’T OF JUSTICE, FACT SHEET: EOIR AT A GLANCE 2 (2009), available at <http://www.justice.gov/eoir/press/09/EOIRataGlance121409.pdf> (“In most removal proceedings, individuals admit that they are removable, but then apply for one or more forms of relief.”).

37. *See* 8 U.S.C. § 1252(a)(2)(B)(ii) (exempting relief under § 1158(a)—that is, asylum—from the bar on judicial review of discretionary decisions).

38. Benson, *supra* note 7, at 425, 428; John R.B. Palmer, *The Second Circuit’s “New Asylum Seekers”: Responses to an Expanded Immigration Docket*, 55 CATH. U. L. REV. 965, 966 (2006).

39. 8 U.S.C. § 1252(b)(3)(B).

40. Levinson, *supra* note 7, at 644 (footnotes omitted).

A. *The Manifestations*

Those words were written in 1981 by former congressional counsel Peter Levinson. As this Section will demonstrate, the problems have only grown. They have manifested themselves in dubious and inconsistent outcomes; a lack of confidence in the results felt by parties, reviewing courts, and commentators; an extraordinary surge of requests for judicial review of the final administrative decisions; substantial duplication of effort; and lengthy delays.

The generic goals of adjudication are a logical starting point for gauging the effectiveness of the immigration adjudication system. Roger Cramton has posited,⁴¹ and others have refined,⁴² three such goals—accuracy, efficiency, and acceptability. I have suggested a fourth goal—consistency—that overlaps substantially but not completely with the other three.⁴³ Measured against those goals, how does the immigration adjudication system fare?

At a minimum, accuracy encompasses ultimate results that the evidence and the relevant law reasonably support. Admittedly, accuracy is hard to assess objectively. Errors are difficult to identify when, as is true in removal cases, decisions frequently require subjective judgments. Still, the unprecedented scathing criticisms that so many U.S. courts of appeals have leveled at EOIR are disconcerting.⁴⁴ Lending both credibility and relevance to these condemnations are two striking realities. First, the attacks come from many different judges with diverse political leanings. Second, the criticisms extend beyond the particular decisions under review to broad-based, systemic complaints about patterns of sloppy, poorly reasoned decisions that the courts of appeals encounter day after day.

These cases are likely only the tip of the iceberg, because they include only those that reach the courts of appeals. The vast majority of removal orders never get to that point,⁴⁵ sometimes because the individual has no convincing ground for appeal, but on other

41. Roger C. Cramton, *Administrative Procedure Reform: The Effects of S. 1663 on the Conduct of Federal Rate Proceedings*, 16 ADMIN. L. REV. 108, 111–12 (1964).

42. David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 4 (1975).

43. Legomsky, *supra* note 6, at 1313–14.

44. *See infra* note 68.

45. *See* EOIR, U.S. DEP'T OF JUSTICE, FACT SHEET: BIA RESTRUCTURING AND STREAMLINING PROCEDURES 2 (2006), available at <http://www.justice.gov/eoir/press/06/BIAStreamliningFactSheet030906.pdf> (noting that approximately 30 percent of the BIA's final orders are appealed to federal court).

occasions because the statute bars judicial review, the person lacks the resources to go to court, or the person has no access to counsel and never discovers the right to appeal. In all those instances, any errors that the courts might have corrected in appealed cases go unnoticed.

Efficiency comprises both using fiscal resources wisely and minimizing elapsed time. As for the efficient use of resources, the picture is mixed. On the one hand, the tight budgetary constraints on EOIR have forced both immigration judges and the BIA to decide massive numbers of cases.⁴⁶ Moreover, the procedural shortcuts that these caseloads prompt adjudicators to adopt have enabled them to decide cases very quickly. In those senses, efficiency might be perceived as high.

On the other hand, BIA reforms instituted in 2002 have triggered a flood of petitions for review in the courts of appeals. As a result, the courts have had to duplicate much of the BIA's appellate review—a highly inefficient result. In fiscal year 2008, the BIA handed down 34,812 appeals from decisions of immigration judges.⁴⁷ In that same year, the courts of appeals received 10,280 petitions for review of BIA decisions⁴⁸—an approximate appeal rate of 30 percent.⁴⁹ Those petitions for review comprised 17 percent of the combined caseloads of the courts of appeals⁵⁰ and have created a now well-documented crisis for the federal courts.⁵¹ The problem is not merely the

46. The data are summarized in Part II.B.1, *infra*.

47. EOIR, *supra* note 5, at S2 fig.27.

48. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2008 ANNUAL REPORT OF THE DIRECTOR app. at 96 tbl.B-3 (2009), available at <http://www.uscourts.gov/judbus2008/appendices/B03Sep08.pdf>.

49. The 30 percent figure is simply 10,280 divided by 34,812. The 10,280 court of appeals filings in fiscal year 2008 presumably include petitions for review of some 2007 BIA decisions, and conversely exclude 2009 petitions for review of 2008 BIA decisions. Thus, the two sets of cases are not 100 percent congruent, and the 30 percent figure is therefore only an estimate. It is most likely a very close estimate, however, because the petition for review must be filed within 30 days of the BIA decision. 8 U.S.C. § 1252(b)(1) (2006).

50. In fiscal year 2008 the courts of appeals received 61,104 appeals. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 48, app. at 96 tbl.B-3.

51. See DORSEY & WHITNEY LLP, *supra* note 7, at 12–13; Alexander, *supra* note 7, at 2; Benson, *supra* note 7, at 410–15; Cathy Catterson, *Changes in Appellate Caseload and Its Processing*, 48 ARIZ. L. REV. 287, 287–88 (2006); John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 13, 14, 20 (2006/07); John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 3 (2005). The Circuit Executive of the U.S. Court of Appeals for the Ninth Circuit described

overtaxing of the judges; caseload pressures have required massive increases in the legal staffs, the clerks' offices, and the circuit executives' offices,⁵² as well as government prosecutorial resources.⁵³ The Second and Ninth Circuits have been hit the hardest. In fiscal year 2008, immigration cases comprised 41 percent of the entire Second Circuit docket and 34 percent of the Ninth Circuit docket.⁵⁴ To cope with its bloated docket, the Second Circuit has had to institute a no-oral-argument system for asylum cases.⁵⁵

Adding to the inefficiency are the high remand rates reported by at least two circuits. The Second Circuit has been remanding approximately 20 percent of its petitions for review of BIA decisions, and the Seventh Circuit 40 percent.⁵⁶ (The national remand rate is murkier but almost certainly lower, a point taken up below.)⁵⁷ When the remand rates are that high, the inefficiency of a second round of appellate review is compounded by the need for the BIA to review cases a second time (and for the courts of appeals to review cases a second time when the immigrants petition for review of the second BIA decision).

Perhaps most important, "efficient" does not mean "cheap." The ideal adjudication system would churn out a high number of accurate decisions at a low cost. In algebraic terms, adjudicatory efficiency might therefore be thought of as productivity times accuracy, divided by cost.⁵⁸

the court's caseload problem succinctly: "two words: 'immigration cases.'" Catterson, *supra*, at 294.

52. Catterson, *supra* note 51, at 293 tbl.4.

53. See *infra* notes 271–75 and accompanying text.

54. In that year, 2,865 of the 6,904 cases filed in the Second Circuit were petitions for review of BIA decisions, as were 4,625 of the 13,577 cases filed in the Ninth Circuit. ADMIN. OFFICE OF U.S. COURTS, *supra* note 48, app. at 97 tbl.B-3, 100 tbl.B-3.

55. See *Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 5, 7 (2006) (testimony of John M. Walker, Jr., C.J., U.S. Court of Appeals for the Second Circuit), available at <http://www.access.gpo.gov/congress/senate/pdf/109hr/28339.pdf> (discussing the Second Circuit's "Non-Argument Calendar").

56. *Id.* at 188 (statement of John M. Walker, Jr.); see also *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005) ("In the year ending on the date of the argument, different panels of this court reversed the Board of Immigration Appeals in whole or part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits.").

57. See *infra* notes 112–15 and accompanying text.

58. This formula is meant only to capture what I see as the basic relationship among accuracy, productivity, cost, and efficiency. It is subject to important caveats. Accuracy, as just noted, is difficult to measure because the subjective nature of many decisions often leaves adjudicators with more than one "correct" answer. Also, even if every decision could be labeled definitively as right or wrong, my formula is agnostic with respect to the values to be placed on

Finally, efficiency also embraces elapsed time. As of April 30, 2009, there were 201,000 cases pending before the immigration judges, a 19 percent increase in three years.⁵⁹ The average age of the pending cases, again as of the end of fiscal year 2008, was 14.5 months, an increase of 23 percent over the same period.⁶⁰ I could not find analogous data for the BIA or for the courts of appeals, but whatever the average elapsed times are for these adjudicatory bodies, having two rounds of appellate review rather than one adds further delay. Again, when so many cases are remanded to the BIA (and some of those decisions on remand appealed once again to the courts of appeals), the delays are exacerbated.

Delay is particularly inefficient in the removal context. Individuals are routinely detained while they wait, at a great cost to both personal liberty and the public fisc.⁶¹ Those who are not detained have additional incentives to delay their removals by filing appeals, and some people believe these incentives have spawned large numbers of frivolous appeals.⁶² Moreover, immigrants are subject to forcible removal from the United States while awaiting the outcomes of their petitions for review, unless the court affirmatively directs otherwise.⁶³

accuracy and productivity. If accuracy were quantified as the ratio of correct decisions to total decisions, for example, this formula would produce some counterinstinctive results. A system that decides one hundred cases but gets only half of them right would earn the same efficiency rating as a system that, at the same cost, decides only fifty cases but gets all of them right. Yet most would regard the latter system as far more efficient. As that result suggests, the relative values that one assigns to one unit of accuracy and one unit of productivity, respectively, will influence one's assessment of efficiency.

59. Transactional Records Access Clearinghouse, Number of Immigration Judges, 1998–2008 on Payroll at End of Fiscal Year, <http://trac.syr.edu/immigration/reports/208/include/backlog.html> (last visited Mar. 28, 2010).

60. *Id.*

61. See Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 U. MIAMI INTER-AM. L. REV. 531, 542 (1999); Peter H. Schuck, *INS Detention and Removal: A "White Paper,"* 11 GEO. IMMIGR. L.J. 667, 680 (1997); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1099–102 (1995). See generally MARK DOW, *AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS* (2004) (studying detainee treatment in American immigration prisons).

62. Judge Carlos Bea of the Ninth Circuit, for example, believes that the flood of petitions for review in the courts of appeals has caused backlogs that have themselves encouraged many people to file frivolous petitions for review solely to delay their removal. Family, *supra* note 32, at 521.

63. 8 U.S.C. § 1252(b)(3)(B) (2006).

The acceptability goal reflects the familiar maxim that justice must not only be done, but be seen. Viewed in that light, acceptability has two components, one concerning the parties to the case and the other concerning the general public. An ideal justice system assures the parties that justice was carried out both substantively and procedurally. The frustrations of the parties to removal hearings are reflected in the extremely high rates of appeal from the BIA to the courts. As noted above, the courts of appeals received petitions for review in approximately 30 percent of the BIA decisions rendered in fiscal year 2008. As high as that percentage is, it understates the level of dissatisfaction with the BIA decisions because, for a number of reasons, only a fraction of the BIA decisions are appealable. First, only the immigrant, not the government, may file a petition for review.⁶⁴ Second, because the principal question in most removal proceedings is whether the immigrant should receive some form of discretionary relief,⁶⁵ and because Congress has barred the courts of appeals from reviewing most denials of discretionary relief,⁶⁶ many BIA decisions cannot be appealed even when the immigrants are the aggrieved parties. This combination means that the percentage of *reviewable* BIA decisions in which the immigrant seeks review is much higher than the already substantial 30 percent figure. Finally, even when the immigrant has lost before the BIA and the decision is reviewable, the immigrant who lacks counsel,⁶⁷ the resources to appeal, or simply knowledge that review is possible might well fail to file a petition. For all these reasons, the high rate at which immigrants seek review of BIA decisions should raise a red flag.

If there were reason to assume immigrants file petitions for review primarily to delay their removals, the high rates of these petitions would offer little probative evidence of the lack of confidence in BIA decisions. But because a petition for review no

64. The statute does not say this expressly, but under 8 U.S.C. § 1252(a)(1), judicial review “is governed only by chapter 158 of title 28.” That title, in turn, contains 28 U.S.C. § 2344, which prescribes petitions for review in the courts of appeals as the procedure for challenging various administrative agency decisions and adds “[t]he action shall be against the United States.” Because the United States presumably cannot bring an action against itself, the latter sentence implies that only the party aggrieved by government action may petition for review. In practice, the government has no need to ask a court to reverse a BIA decision because the attorney general can simply do so unilaterally. 8 C.F.R. § 1003.1(h) (2009).

65. See *supra* note 36 and accompanying text.

66. 8 U.S.C. § 1252(a)(2)(B).

67. In fiscal year 2008, 78 percent of the immigrants who appealed to the BIA had legal representation. EOIR, *supra* note 5, at W1 fig.30.

longer stays removal (unless the court, after preliminarily reviewing the merits of the case, orders otherwise), there is little reason to assume delay is the dominant motive.

The other component of acceptability is public confidence in the integrity and efficiency of the process. Though there is no evidence that the general public has any particular view of the immigration adjudication procedures, scathing criticisms are now commonplace among experts. The succession of stern rebukes from courts of appeals—often directed at systemic patterns rather than confined to the cases before them—have been well publicized.⁶⁸ Scholarly studies and commentary consistently offer similarly harsh critiques.⁶⁹ The 2002 BIA reforms have only heightened that dissatisfaction.⁷⁰

Consistency, like the other adjudication goals, is a matter of degree. Ideally, both a single adjudicator's internal body of work and the decisions of the adjudicators collectively should produce similar results on similar facts. Viewed in that light, consistency is bound up with the other adjudication goals. Inconsistent results can evidence inaccurate outcomes, diminish public confidence in the system, and generate inefficiencies such as additional appeals. Inconsistency is also independently problematic because it undermines the equal justice principle that similarly situated parties should receive similar treatment.

On this score, too, serious problems are evident. At least three recent major studies have exposed eye-popping differences in the approval rates from one asylum adjudicator to another.⁷¹ One set of

68. For lists of court decisions containing some of the more pointed language (as well as court decisions that in turn cite lists of similar court decisions), see STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 747–48 (5th ed. 2009); Benedetto, *supra* note 7, at 492–93.

69. See, e.g., Alexander, *supra* note 7, at 21, 25. In addition to direct criticisms of the process, see *supra* note 7, the ABA Commission report notes “public skepticism” about the immigration court process and, given the attorney general’s control over the procedures, perceptions that the system as a whole is unfair. COMM’N ON IMMIGRATION, *supra* note 7, at 28, 44.

70. See *supra* note 7.

71. See TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, *ASYLUM DISPARITIES PERSIST, REGARDLESS OF COURT LOCATION AND NATIONALITY* (2007), <http://trac.syr.edu/immigration/reports/183/>; U.S. GOV’T ACCOUNTABILITY OFFICE, NO. GAO-08-940, *U.S. ASYLUM SYSTEM: SIGNIFICANT VARIATION EXISTED IN ASYLUM OUTCOMES ACROSS IMMIGRATION COURTS AND JUDGES* (2008), available at <http://www.gao.gov/new.items/d08940.pdf>; see also Ramji-Nogales et al., *supra* note 7, at 296 (“[I]n one regional asylum office . . . some officers grant[ed] asylum to no Chinese nationals, while other officers granted asylum in as many as 68% of their cases. Similarly, Colombian asylum applicants whose cases were

adjudicators, the asylum officers employed by USCIS, are beyond the scope of this Article. Among the immigration judges, however, the authors observed the same spectacular disparities, even after controlling for different office locations and for the claimants' varying countries of origin. All three studies were confined to asylum cases, which possess distinctive attributes, but there is no apparent distinction between asylum cases and nonasylum removal cases that would systematically generate any greater consistency within the latter group.

B. The Causes

Measured by accuracy, efficiency, acceptability, and consistency, therefore, the current immigration adjudication system is fundamentally flawed. The next challenge is to locate the sources of these problems. The four prime suspects are (1) the extreme underresourcing of EOIR, with exceptionally high ratios of caseloads to adjudicators, support staff, and prosecutors; (2) procedural shortcuts such as making single-member decisions the norm and resorting heavily to either affirmances without opinion or other cursory opinions; (3) politicization of EOIR through a combination of partisan and ideological hiring practices (now largely corrected), continuing threats to adjudicators' job security, subjection of adjudicators' decisions to a political official with law enforcement responsibilities, and the general supervision of adjudicators and control of their resources by enforcement officials; and (4) a small but significant number of adjudicators who are not well suited to the job. One complication is that some of these causes are in turn the results of other causes.

1. *Suspect # 1: The Underresourcing of EOIR.* Massive caseloads have strained the capacities of adjudicators, their support staffs, and government prosecutors. In fiscal year 2008, immigration judges completed 278,939 removal proceedings, another 2,102 miscellaneous proceedings, 13,294 motions to reopen and other motions, and 44,736 bond redetermination hearings.⁷² Approximately 214 immigration

adjudicated in the federal immigration court in Miami had a 5% chance of prevailing with one of that court's judges and an 88% chance of prevailing before another judge in the same building.").

72. EOIR, *supra* note 5, at C4 tbl.4, B7 fig.3. The figure shown above for removal proceedings includes small numbers of exclusion and deportation proceedings—the now superseded names for what are today called removal proceedings. *Id.* at C4 tbl.4.

judges performed this work.⁷³ Taking a range of factors into account, one study estimated that over the course of fiscal year 2008, the average immigration judge completed 4.3 removal cases each day. On that assumption, the same study calculated that reducing each immigration judge's caseload by just one case per day would require seventy-six additional immigration judges; to reduce the load by two cases per day would require 204 new immigration judges.⁷⁴ Another study estimated that the average immigration judge had available only seventy-three minutes per matter (not just removal proceedings) received.⁷⁵

Those caseloads would strain the capacities of adjudicators under almost any circumstances, but the news gets worse. The support staffs of the immigration judges are exceptionally thin, a longstanding problem⁷⁶ that has worsened with today's much larger caseloads. As of August 20, 2009, the 232 immigration judges shared only fifty-six law clerks⁷⁷—approximately one for every four immigration judges.⁷⁸ There are no bailiffs; immigration judges must therefore take time for administrative chores such as arranging the recording of the hearings

73. Transactional Records Access Clearinghouse, Number of Immigration Judges, 1998–2009, <http://trac.syr.edu/immigration/reports/208/include/payroll.html> (last visited Mar. 30, 2010). The TRAC figure counts only those immigration judges who decide cases, not others who hold the title “immigration judge” but perform purely administrative functions. *See id.* As of August 20, 2009, there were 232 immigration judges (including those in administrative positions), plus twenty-one vacancies and a fiscal year 2010 budget request for twenty-eight new immigration judge positions. Elaine Komis, Pub. Affairs Officer, EOIR, EOIR's Immigration Court and Board of Immigration Appeals: Staffing, Budget, and Case Adjudications 1 (Sept. 9, 2009) (on file with the *Duke Law Journal*).

74. APPLESEED, *supra* note 7, at 10. Others have estimated the average caseload at four per day, COMM'N ON IMMIGRATION, *supra* note 7, at 28, five per day, *Immigration Litigation Reduction*, *supra* note 55, at 6, and even six per day, Alexander, *supra* note 7, at 19.

75. Transactional Records Access Clearinghouse, Maximum Average Minutes Available Per Matter Received, <http://trac.syr.edu/immigration/reports/208/include/minutes.html> (last visited Mar. 30, 2010).

76. *See* Roberts, *supra* note 7, at 16 (arguing that “[i]n considering any alternatives to the present system,” “[a]dequate support” is necessary); Leon Wildes, *The Need for a Specialized Immigration Court: A Practical Response*, 18 SAN DIEGO L. REV. 53, 55, 63 (1980) (reviewing Roberts's reform proposal and concurring with the need for increased funding and staffing to clear “the backlog of unadjudicated applications”).

77. Komis, *supra* note 73, at 1.

78. *See* Transactional Records Access Clearinghouse, Number of Judicial Law Clerks, 2006–2009, <http://trac.syr.edu/immigration/reports/208/include/lawclerks.html> (last visited Mar. 30, 2010). For similar calculations, see APPLESEED, *supra* note 7, at 11; COMM'N ON IMMIGRATION, *supra* note 7, at 28; ABA, Resolution 114B Adopted by the House of Delegates 2 (Feb. 8–9, 2010), available at http://www.abanet.org/leadership/2010/midyear/daily_journal/114B.pdf.

and keeping track of documents.⁷⁹ Many immigrants are unrepresented in removal hearings, so the immigration judge must take time to advise the immigrants of possible relief provisions, explain the procedures, and answer questions.⁸⁰ Moreover, 78 percent of individuals in removal hearings require language interpreters.⁸¹ In addition to interpreted testimony inherently consuming twice the usual time because of the need to repeat it in a second language, immigration judges must often labor to assure the accuracy of the translations.⁸²

For all these reasons, a parade of judges, commentators, and organizations have lamented the extreme underresourcing of the immigration courts.⁸³ Chief Judge Walker of the Court of Appeals for the Second Circuit, testifying before the Senate Judiciary Committee, urged a doubling of the immigration judge corps.⁸⁴ He added:

I fail to see how Immigration Judges can be expected to make thorough and competent findings of fact and conclusions of law under these circumstances. This is especially true given the unique nature of immigration hearings. Aliens frequently do not speak English, so the Immigration Judge must work with a translator, and the Immigration Judge normally must go over particular testimony several times before he can be confident that he is getting an accurate answer from the alien. Hearings, particularly in asylum cases, are highly fact intensive and depend upon the presentation and consideration of numerous details and documents to determine issues of credibility and to reach factual conclusions. This can take

79. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, CASE BACKLOGS IN IMMIGRATION COURTS EXPAND, RESULTING WAIT TIMES GROW (2009), <http://trac.syr.edu/immigration/reports/208/>.

80. *Id.*

81. *Id.*

82. Ramji-Nogales et al., *supra* note 7, at 383.

83. See *Immigration Litigation Reduction*, *supra* note 55, at 5–7; APPLESEED, *supra* note 7, at 10; Alexander, *supra* note 7, at 19–20; Benedetto, *supra* note 7, at 500; Marks, *supra* note 7, at 8, 13 (calling the case completion expectations unrealistic with present resources); Ramji-Nogales et al., *supra* note 7, at 383; TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, *supra* note 79; *cf.* COMM’N ON IMMIGRATION, *supra* note 7, at 19–21 (tracing excessive EOIR caseloads to insufficient funding, but also faulting DHS reluctance to use prosecutorial discretion in cases where transgressions were minor or chances of removal were slim).

84. *Immigration Litigation Reduction*, *supra* note 55, at 6; see also ABA, *supra* note 78, at 2 (recommending one hundred additional immigration judges and at least one law clerk per judge); COMM’N ON IMMIGRATION, *supra* note 7, at 28 (same).

no small amount of time depending on the nature of the alien's testimony.⁸⁵

The situation is no rosier at the BIA. In fiscal year 2008, fifteen BIA members decided more than 38,000 cases⁸⁶—an average of more than 2,500 appeals per member per year (more than fifty per week). As with the immigration judges, the overwhelming BIA caseload has come under strong criticism.⁸⁷

The adjudicators, however, are not the only government personnel who lack the resources to give these cases the attention they deserve. The government prosecutors are feeling the strain as well. ICE's Principal Legal Advisor reports:

Across the country our Assistant Chief Counsels [the ICE attorneys who represent the government in immigration judge and BIA proceedings] universally and passionately opine that they do not have nearly enough time to properly prepare for immigration proceedings, let alone to advise our clients or to work on appeals before the BIA. Indeed, the universal feeling is that they are woefully unprepared for immigration hearings due to the extremely large amount of individual cases they are required to cover before the immigration judges.⁸⁸

What have been the practical effects of this steadily more extreme underresourcing? I believe it has generated an intricate network of adverse causes and consequences that might be summarized as follows:

First, at least at the immigration judge level, underresourcing has contributed simultaneously to less judge time per case and longer elapsed time from filing to disposition (and therefore to steadily growing backlogs). The data confirm both results. A recent study by

85. *Immigration Litigation Reduction*, *supra* note 55, at 186–87.

86. EOIR, *supra* note 5, at S2 fig.27.

87. See, e.g., *Immigration Litigation Reduction*, *supra* note 55, at 6 (urging that the number of BIA members be doubled); APPLESEED, *supra* note 7, at 34; Alexander, *supra* note 7, at 20–21; Benson, *supra* note 7, at 418. The ABA has recommended hiring forty additional BIA staff attorneys. ABA, Resolution 114C Adopted by the House of Delegates 4 (Feb. 8–9, 2010), available at http://www.abanet.org/leadership/2010/midyear/daily_journal/114C.pdf; COMM'N ON IMMIGRATION, *supra* note 7, at 34.

88. E-mail from Peter Vincent, *supra* note 10. The previous principal legal advisor had echoed similar sentiments, adding that on average the ICE trial attorneys (as they were then called) had only twenty minutes to prepare each case. APPLESEED, *supra* note 7, at 16 (citing ICE Principal Legal Advisor William J. Howard and calling for the hiring of additional trial attorneys).

Transactional Records Access Clearinghouse (TRAC) reveals that, from 1998 to 2008, the number of immigration judges increased by only 6 percent (from 202 to 214),⁸⁹ while the total number of matters received increased by 24 percent (from 282,348 to 351,477).⁹⁰ At the same time that this increase in the caseloads was significantly outpacing the increase in the number of immigration judges, two other patterns emerged. Naturally, the average time available per matter received diminished (from an already low eighty-six minutes to seventy-three minutes).⁹¹ Even with immigration judges spending less time per case, the backlog increased from 129,482 pending cases to 186,342 cases.⁹² The average time that cases were pending increased correspondingly, from 10.8 months to 14.5 months.⁹³ From these data, it appears that immigration judges responded to the increasingly severe underresourcing both by reducing time spent per case and by increasing elapsed time from filings to final dispositions—that is, longer delays.

In addition to rushed decisions and increased delays, underresourcing has contributed to the now well-documented burnout of immigration judges. A recent empirical study has confirmed the exceptionally high stress and burnout levels of immigration judges—levels even higher than those experienced by prison wardens and emergency room physicians.⁹⁴ The authors identified several root causes of the burnout, but by far the most commonly reported problems related to the lack of sufficient time and resources to meet the case completion expectations.⁹⁵ More specifically, the immigration judges complained of too little time per case; the pressure to provide immediate, detailed, oral decisions, even in complex cases, with no time to research the law or country conditions, no time to reflect, and no transcripts; unprepared lawyers (on both sides); difficulties with interpreters; insufficient staffing,

89. Transactional Records Access Clearinghouse, *supra* note 73.

90. Transactional Records Access Clearinghouse, *supra* note 75.

91. *Id.*

92. Transactional Records Access Clearinghouse, *supra* note 59.

93. *Id.*

94. See Stuart L. Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57, 59–60 (2008) (summarizing the results of a web-based survey of immigration judges).

95. *Id.* at 64–70.

including very few law clerks; faulty and outdated computers and recording devices; and inadequate work space.⁹⁶

Finally, the underresourcing and resulting BIA backlogs drove the Justice Department's BIA procedural reforms in 2002.⁹⁷ The centerpiece of those reforms was the elimination of various procedural safeguards. The effects exacerbated some of the problems associated with the underresourcing, as the next Section explains.

In turn, these consequences of underresourcing—the reduced time per case, increased backlogs, and immigration judge burnout—have all had additional adverse effects. As Chief Judge Walker of the United States Court of Appeals for the Second Circuit has testified, “the principal reason . . . for the current backlog in the Courts of Appeals, and the reason that we have higher expected numbers of cases being remanded are a severe lack of resources and manpower at the immigration judge and BIA levels in the Department of Justice.”⁹⁸ Chief Judge Walker's conclusion is not surprising. When adjudicators are pressured to decide so many cases involving complex facts and often complex law every day, particularly with the limited resources just described, the result will inevitably be conveyor-belt justice, no matter how talented and how diligent the personnel. Immigration adjudication might not be uniquely underresourced, but in this field the problem is extreme, and both the individual and the public interests are large.

The causal links, therefore, are intricate. Rushed decisions contribute to burnout. Rushed decisions and burnout together inevitably compromise accuracy and consistency, a harm in and of itself. Reduced accuracy and consistency in turn lead to more petitions for review, which then compound the delays that the underresourcing has already caused at the administrative level. For those who believe that delays spur frivolous appeals from immigrants desirous only of prolonging their stays in the United States, the

96. *Id.* Other sources of the burnout and stress include lack of respect from the courts, the Department of Justice, and the public; post-traumatic stress from hearing a steady diet of wrenching asylum cases; and perceptions of fraud in the presentation of cases. *Id.* at 71–77.

97. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,878–79 (Aug. 26, 2002) (codified as amended at 8 C.F.R. pt. 1003) (presenting as background the problems in the adjudicatory process of immigration appeals); John D. Ashcroft & Kris W. Kobach, *A More Perfect System: The 2002 Reforms of the Board of Immigration Appeals*, 58 DUKE L.J. 1991, 1991–92, 1994 (2009) (discussing the massive backlog of immigration cases and its negative effects, as well as the regulatory goal of gradually eliminating that backlog).

98. *Immigration Litigation Reduction*, *supra* note 55, at 5.

effects are cyclical; the additional appeals cause further backlogs, which further increase the delays, which further enhance the incentive to file frivolous appeals, and so on. All of these consequences, in turn, feed the frustrations of the parties, the courts, and the general public, impairing the acceptability goal of the adjudication process. And the diminished acceptability prompts increasingly sharp and increasingly numerous criticisms that in turn aggravate the adjudicator burnout to which some of the inaccuracies and inconsistencies can be attributed in the first place.

But there is more:

2. *Suspect # 2: The Procedural Shortcuts at the BIA.* Of the various BIA procedural reforms introduced by Attorney General Ashcroft in 2002, two have generated the lion's share of the controversy. One initiative concerns the so-called "affirmances without opinion" (AWOs). These are cases in which the BIA is prohibited from giving reasons for its decisions.⁹⁹ The 2002 reforms made AWOs the norm rather than the exception.¹⁰⁰ After the resulting dramatic spike in the percentages of decisions culminating in AWOs, *formal* AWOs have now dwindled to approximately 5 percent of the BIA decisions.¹⁰¹ That decline is of small consolation, however, because "short opinions by single members are now the dominant form of decision making. . . . [T]hey can be as short as two or three sentences, even when the issues would appear to merit a longer discussion."¹⁰² The other controversial structural change was moving from three-member panel review in the vast majority of cases to single-member review in the vast majority¹⁰³ (at this writing, 94 percent)¹⁰⁴ of all BIA cases. Both elements have real costs in terms of

99. 8 C.F.R. § 1003.1(e)(4) (2009). A still-pending proposed rule would make AWOs discretionary rather than mandatory. See Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34,654, 34,663 (proposed June 18, 2008) (to be codified at 8 C.F.R. § 1003.1).

100. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,880 (Aug. 26, 2002) (codified as amended at 8 C.F.R. pt. 1003) ("The final rule establishes the primacy of the streamlining system for the majority of cases.").

101. See *infra* notes 119–20 and accompanying text.

102. COMM'N ON IMMIGRATION, *supra* note 7, at 32.

103. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,879 (asserting the rule's expansion of single-member review to "the dominant method of adjudication for the large majority of cases before the Board").

104. Komis, *supra* note 73, app. question 17. From fiscal years 2003 through 2008, this percentage remained between 93 percent and 94 percent. *Id.*

accuracy, acceptability, consistency, and even efficiency, given the resulting diversion of BIA cases to the courts.

There is ample reason to believe the 2002 BIA procedural reforms have greatly exacerbated the problems discussed in Section A. The most compelling evidence of a causal link is the absence of any other plausible explanation for the coincidence in timing. The reforms officially took effect on September 25, 2002.¹⁰⁵ The avalanche of petitions for review of BIA decisions began suddenly after that, as Table 1 demonstrates.

*Table 1. Petitions for Review of BIA Decisions Filed During Twelve-Month Periods Ending March 31*¹⁰⁶

Twelve-Month Periods Ending March 31 of Year	Petitions for Review of BIA Orders Commenced
2001	1,763
2002	1,764
2003	8,446
2004	8,720
2005	11,464
2006	13,059
2007	10,042
2008	9,761
2009	8,890

To the extent the surge in petitions for review is both problematic in and of itself and evidence of deeper problems in the tribunals whose decisions are being challenged, Table 1 compels at least a presumption that the 2002 BIA procedural reforms are, and remain, a principal cause of those problems. The number of petitions

105. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,878 (specifying effective date of Sept. 25, 2002). Some of the reforms, however, were implemented in stages in the preceding few months. *See, e.g.*, Ramji-Nogales et al., *supra* note 7, at 351–52 (describing the March 2002 expansion of affirmances without opinion); *cf.* DORSEY & WHITNEY LLP, *supra* note 7, at 24–25 (discussing the time limits added in the modified case management procedures).

106. These data are extracted from a chart provided by Cathy Catterson, Circuit Executive, U.S. Court of Appeals for the Ninth Circuit (June 9, 2009) (on file with the *Duke Law Journal*).

for review in the years ending March 31, 2001 and 2002 were virtually identical—1,763 and 1,764, respectively. During the next twelve-month period, the first year in which the BIA procedural reforms were in effect, filings almost quintupled. Filings peaked three years later at 13,059. They have since declined but still remain at more than five times the pre-BIA reform levels.

Are there alternative explanations for this sudden surge? Changes in total BIA decisions cannot explain this phenomenon. The BIA's output has fluctuated over the years, but in each of the three most recent years (ending March 31, 2009), total BIA decisions have been almost exactly the same as in the year ending March 31, 2002, the last year before the BIA reforms went into effect.¹⁰⁷ Most telling have been the dramatic changes in the rates at which immigrants have petitioned for review of BIA decisions. In the twelve-month period ending March 31, 2002 (the last twelve-month period before the reforms), immigrants petitioned for review of only 5 percent of all BIA decisions. That rate more than tripled—to 16 percent—the very next year and continued to rise steadily after that, peaking at 32 percent in the year ending March 31, 2006.¹⁰⁸

The number of BIA decisions adverse to immigrants is a truer measure of rates of petitions for review than total BIA decisions, because only immigrants—not the government—may file petitions for review.¹⁰⁹ Indeed, several studies show that the BIA procedural reforms led immediately to a significant drop in the percentage of BIA decisions favorable to immigrants.¹¹⁰ Still, although the estimates of the changes in BIA outcomes vary, none of them approaches the order of magnitude of the percentage surge in petitions for review.¹¹¹ Moreover, to the extent that the increase in progovernment BIA decisions contributed to the surge in petitions for review, the question

107. *Id.*

108. *Id.*

109. See *supra* note 64 and accompanying text.

110. See DORSEY & WHITNEY LLP, *supra* note 7, app. 24; Alexander, *supra* note 7, at 12; Palmer et al., *supra* note 51, at 94; Ramji-Nogales et al., *supra* note 7, at 358–59.

111. By way of illustration, one estimate is that the percentage of BIA decisions in favor of immigrants suddenly dropped from 25 percent to 10 percent following the procedural reforms. Alexander, *supra* note 7, at 12. If those figures are correct, then the percentage of BIA decisions in favor of the government increased from 75 percent to 90 percent. Even that substantial difference, however, would increase the pool of judicially reviewable cases by only 15 of 75, or 20 percent (all else equal)—not nearly enough to explain the quintupling in petitions for review. See Ramji-Nogales et al., *supra* note 7, at 360–61 (documenting similarly sharp drops in BIA asylum approval rates).

arises: What caused the increase in progovernment BIA decisions? Because that large and sudden change coincided with the BIA procedural reforms (as well as the personnel purge discussed in Section II.B.3), the latter would seem, in the absence of other explanations, to be the most compelling explanation. The conclusion seems irrefutable: the more time and attention the BIA was able to give to a case, whether by assigning the case to a three-member panel, providing a reasoned opinion, or both, the more likely the immigrant was to prevail. The moment these procedural safeguards were eliminated, immigrants began losing at greater rates. The correlation is troubling.

The Justice Department does not dispute the link between the 2002 BIA procedural reforms and the surge in petitions for review. Rather, it maintains that the surge simply does not evidence any decrease in the accuracy of the BIA decisions.¹¹² It argues that a truer test of the quality of the BIA decisions is the rate at which the courts of appeals have remanded decisions once petitions for review are filed, and it asserts that those remand rates have not changed significantly since the implementation of the 2002 BIA procedural reforms.¹¹³ For the latter proposition, the Department refers vaguely to “feedback” from federal courts and the Department’s Office of Immigration Litigation (OIL), the unit that argues the government’s side in petitions for review. The Department did not provide citations or specific numbers to support this claim. In fact, the data on the rates at which the courts of appeals have remanded BIA decisions (and on the changes in those rates) are murky. As noted in Section A,¹¹⁴ the remand rates are exceptionally high in the Second and Seventh Circuits, but estimates of the national rates are mixed.¹¹⁵

Moreover, if anything, one would expect a constant accuracy level at the BIA to result in *decreasing* remand rates by the courts of appeals, for three reasons. First, the relevant period (2002 through early 2009) was one in which all federal judicial appointments were those of President George W. Bush. A more conservative judiciary would have been expected to display greater deference to the BIA and less sympathy for the immigrants who were filing petitions for

112. See EOIR, *supra* note 45, at 2.

113. See *id.*

114. See *supra* notes 56–57 and accompanying text.

115. See, e.g., APPLESEED, *supra* note 7, at 32; COMM’N ON IMMIGRATION, *supra* note 7, at 33; Alexander, *supra* note 7, at 14; Ashcroft & Kobach, *supra* note 97, at 2009.

review. Second, the Justice Department believes that the new flood of petitions for review are largely frivolous, motivated principally by a desire to delay removal. If the Department is right, however, one would expect a sharp drop in the success rate for these new petitions for review—not merely the absence of significant change. Third, as the courts of appeals remand more and more cases with explanations and instructions, the BIA acquires more information and should be better able to identify patterns that permit it to head off potential court of appeals remands.

If not a drop in accuracy of BIA decisions (or at least a lessened confidence in those decisions), then what might explain the surge occurring immediately following the implementation of the 2002 BIA procedural reforms? The Justice Department offered the following theories:

[I]t is reasonable to conclude that the initial increase may have been largely attributable to challenges to the new regulation. However, new petitions for review have continued to increase despite the federal courts' uniform rejection of these challenges. It is possible that eliminating BIA adjudication delays has increased the incentive to file petitions for review in the federal courts in order to postpone deportation and remain in the United States for as long as possible.¹¹⁶

The Department thus acknowledges that the initial challenges to the validity of the 2002 BIA reforms do not explain the continuation of the surge long after those challenges had been uniformly rejected. At any rate, the Department makes no showing that petitions raising those challenges (and only those challenges) comprised a significant percentage of those early petitions for review. Its only remaining hypothesis, therefore, is that the reforms shortened the elapsed time for BIA appeals and that, as a result, those immigrants who are motivated solely by a desire to delay their ultimate deportations must now resort to filing frivolous petitions for review. This hypothesis, too, seems implausible. First, stays pending judicial review are no longer automatic; petitioners for review must persuade the reviewing courts that their petitions have enough merit to justify stays.¹¹⁷ Second and more importantly, the essential premise of the Department's

116. EOIR, *supra* note 45, at 3.

117. 8 U.S.C. § 1252(b)(3)(B) (2006); *see also* Nken v. Holder, 129 S. Ct. 1749, 1763 (2009) (prescribing a multifactor test, which includes the likelihood of success on the merits, for determining whether to stay removal pending final court decision).

speculation is that attaining one period of delay diminishes one's incentive for further delay. There is no basis for that assumption. To the contrary, if anything, one would expect the person who has already spent a lengthy period in the United States (as was true when BIA appeals were taking longer) to have deeper roots and consequently a greater incentive, not a lesser one, to seek additional delay.

Moreover, there were logical reasons to expect the procedural shortcuts implemented in 2002 to have precisely the adverse effects that occurred. The AWOs are particularly suspect. In any case in which a single BIA member determines that the immigration judge reached the correct result, that any errors were harmless, and that the issues are either "squarely controlled" by precedent or otherwise too insubstantial to warrant a written opinion, the BIA member is prohibited from giving reasons for his or her decision.¹¹⁸ In fiscal year 2002 (the year in which the BIA procedural reforms were announced), 31 percent of all BIA decisions were AWOs, in contrast to 6 percent the previous year.¹¹⁹ The corresponding percentages for the next two years were 36 percent and 32 percent, respectively, but they have since come down drastically, to 5 percent of all BIA decisions in fiscal year 2009.¹²⁰

Because writing a persuasive opinion takes time, BIA members with staggering caseload pressures and far too little time per case have a strong incentive to affirm rather than reverse. Consequently, and not surprisingly, the percentage of cases in which the BIA reversed immigration judge decisions dropped precipitously after the 2002 reforms.¹²¹ The attorney general's recent introduction of performance evaluations for both immigration judges and BIA members¹²² expands that incentive by emphasizing productivity.¹²³

118. 8 C.F.R. § 1003.1(e)(4) (2009). A still-pending proposed rule would make AWOs discretionary. See Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34,654, 34,663 (proposed June 18, 2008) (to be codified at 8 C.F.R. § 1003.1); cf. ABA, *supra* note 87, at 8–9 (also recommending that the BIA be required to respond to all nonfrivolous arguments); COMM'N ON IMMIGRATION, *supra* note 7, at 32 (same).

119. Komis, *supra* note 73, app. question 18.

120. *Id.*

121. See DORSEY & WHITNEY LLP, *supra* note 7, app. 24; Alexander, *supra* note 7, at 12; Palmer et al., *supra* note 51, app. at 96 tbl.17; Ramji-Nogales et al., *supra* note 7, at 358–59.

122. See Press Release, U.S. 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.justice.gov/opa/pr/2006/August/06_ag_520.html.

Because immigrants file the overwhelming majority of the appeals to the BIA,¹²⁴ the incentive to affirm is ordinarily an incentive to rule in favor of the government.

A reasoned opinion is valuable for other reasons as well. It requires the adjudicator to consider the arguments of the losing side with care. When reasoned opinions can be omitted, affirmance without due care becomes easier. In addition, the very process of writing an opinion forces adjudicators to confirm that their tentative conclusions are the ones most compatible with the evidence and the law.

Once an adjudicator renders a decision without explanation, the appellant also has no way to understand the rationale, less confidence that the decision was correct, and thus a greater incentive to seek judicial review. The reviewing court, for its part, then has to proceed without the starting point of a lower tribunal's opinion and thus will have to spend time doing the BIA's job. The court will also necessarily have less confidence in the BIA decision and more reason to reverse and remand to the BIA for further consideration or explanation. The cursory nature of the BIA review would be detrimental under any circumstances, but it takes on additional significance in a world in which the immigration judge decisions under review were themselves rendered under extreme time pressure and resource shortages. Moreover, reasoned BIA opinions not only

123. Copies of the separate performance evaluation forms for immigration judges and BIA members were supplied by Elaine Komis, Public Affairs Officer at EOIR, to the author on September 9, 2009. The immigration judge form includes ratings for "legal ability," "professionalism," and "accountability for organizational results." EOIR, U.S. Dep't of Justice, Performance Appraisal Record: Adjudicative Employees 1 (n.d.) (on file with the *Duke Law Journal*). That last category then breaks down into several more specific criteria, of which criteria 2 and 3 focus expressly, and criterion 1 implicitly, on productivity. *See id.* at 3–5. The form for BIA members rates "organizational results," "critical thinking and technical proficiency," and "communication and teamwork." U.S. Dep't of Justice, Senior Level & Scientific Professional Performance Plan and Appraisal 1 (July 1, 2009) (on file with the *Duke Law Journal*). Of these, "organizational results" count for 60 percent of the total score, and all of the specific criteria for evaluating "organizational results" relate to productivity. *See id.* at 2. The third category, "communication and teamwork," counts for an additional 20 percent and contains only one criterion—"takes the initiative to assist...in meeting productivity expectations." *Id.* at 4. The second criterion is the only one that seeks to measure the quality of adjudication, and it counts for only 20 percent of the final score. *See id.* at 3. Productivity, therefore, is the dominant theme.

124. The percentage of BIA decisions in which the immigrants had filed the appeals ranged from 85 percent to 93 percent during fiscal years 2001 through 2008, inclusive; the other 7 percent to 15 percent were appeals that the government had filed. Komis, *supra* note 73, app. question 24.

provide guidance to the appellants whose cases they are deciding, but also (at least in cases designated as precedents) bind immigration judges and DHS officials.¹²⁵ Without adequate guidance, DHS officials and immigration judges have to speculate about the BIA's likely future interpretations. Speculation can only increase the number of reversals and remands, and spawn inconsistent treatment of similar cases. In addition, without reasoned opinions, it becomes easy for appellate adjudicators to base their decisions, consciously or unconsciously, on visceral reactions that reflect their own political outlooks, thus further eroding both accuracy and consistency.

Single-member decisions are similarly suspect, for they, too, should be expected to engender the very problems discussed here. They will generally decrease the attention a case will receive, thereby increasing the error rate, and thus increasing the rate of further petitions to the courts of appeals. A panel of three members is less likely to miss obvious errors. Multimember panels also reduce the probability that a single individual with a strong ideology (in either direction) will reach an extreme result that the BIA as a whole would not have countenanced. They do this by diffusing subjective biases, permitting deliberation, and promoting consensus. In the process, multimember panel decisions minimize inconsistency in several ways,¹²⁶ a crucial consideration in light of the drastic levels of inconsistency that have plagued immigration adjudicators.¹²⁷ Moreover, multimember panels permit dissenting opinions that can help steer future law. The exchange of ideas and the airing of differences of opinion have particular value in an arena in which so many cases are argued pro se and without legal briefs.¹²⁸ For all these reasons, scholarly consensus has been that the 2002 BIA procedural

125. 8 C.F.R. § 1003.1(g) (2009).

126. See Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 431–32, 447–49 (2007).

127. For criticisms of the inconsistency in immigration adjudications, see *supra* note 71 and accompanying text.

128. At the BIA level, the percentage of decisions in which the immigrants were represented by counsel ranged from 69 percent to 78 percent during fiscal years 2004 through 2008, inclusive. EOIR, *supra* note 5, at W1 fig.30; see also ABA, Resolution 114E Withdrawn by the House of Delegates (Feb. 8–9, 2010), available at <http://www.abanow.org/wordpress/wp-content/themes/ABANow/wp-content/uploads/resolution-pdfs/MY2010/114E.pdf> (recommending various ways of enhancing access to counsel in removal cases); COMM'N ON IMMIGRATION, *supra* note 7, at 32 (same). The advantages of three-member panels have led the ABA to recommend requiring them in all nonfrivolous BIA appeals. See ABA, *supra* note 87, at 5–6; COMM'N ON IMMIGRATION, *supra* note 7, at 32.

reforms were chiefly responsible for the sudden surge in petitions for review.¹²⁹

3. *Suspect # 3: The Politicization of EOIR.* In addition to the underresourcing and the increased resort to procedural shortcuts, politicization has impaired the EOIR adjudicatory process. Components of this politicization include the hiring process, impediments to decisional independence, and a more general supervision and control of adjudicators by law enforcement officials.

a. Hiring. Immigration judges and members of the BIA are appointed by the attorney general.¹³⁰ All of those adjudicators are “Schedule A” (career) appointees, as distinguished from “Schedule C” (political) appointees.¹³¹ For career employees, both federal law and Justice Department policies prohibit hiring discrimination on the basis of political affiliation.¹³² Until the spring of 2004, that nondiscrimination policy was honored; EOIR’s merit-based recommendations generally played the principal role in selecting immigration judges.¹³³

In response to allegations that the Bush administration had forced several U.S. attorneys to resign for improper political reasons, the Justice Department’s Office of Professional Responsibility and its Office of the Inspector General began a joint internal investigation into whether the Department had illegally based its hiring of career employees on candidates’ political affiliations or ideologies. Testifying under a grant of immunity before the U.S. House Judiciary Committee, the Department’s former liaison to the White House, Monica Goodling, confirmed the allegations.¹³⁴ Based on her testimony and abundant additional evidence, the investigation revealed that, from 2004 to 2006, high officials from the White House

129. For a list of examples, see Alexander, *supra* note 7, at 11 n.62. A rare contrary view was expressed by former Attorney General Ashcroft, who ordered the 2002 BIA procedural reforms, and his chief immigration advisor at the time. See Ashcroft & Kobach, *supra* note 97.

130. 8 U.S.C. § 1101(b)(4) (2006) (immigration judges); 8 C.F.R. § 1001.1(l) (immigration judges); *id.* § 1003.1(a)(1) (BIA members).

131. OFFICE OF PROF’L RESPONSIBILITY & OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 70–71 (2008), available at <http://www.usdoj.gov/oig/special/s0807/final.pdf>.

132. *Id.* at 12–15.

133. *Id.* at 72.

134. *Id.* at 1–2.

and the Department of Justice had bypassed the usual application procedures to appoint immigration judges based on their Republican Party affiliations or their conservative political views.¹³⁵ In all but four cases, the hiring was accomplished without public competition, and more than half the appointees had no prior immigration experience.¹³⁶ In 2007, the attorney general instituted a new immigration judge appointment process in which EOIR would once again play the dominant role.¹³⁷ Though the hope was that the new process would eliminate improper political interference, at least one appointment made by the Bush administration after the change in procedures likely rested primarily on political affiliation.¹³⁸ At any rate, many of the illegally appointed immigration judges remain on the bench today.¹³⁹

Apart from the illegal behavior that dominated the process from 2004 to 2006, hiring procedures continue to favor the appointment of immigration judges and BIA members whose work experiences incline them to prioritize immigration enforcement. As other commentators have shown, former ICE trial attorneys and their predecessors from the now defunct Immigration and Naturalization Service (INS), as well as other attorneys working for immigration enforcement agencies, are heavily represented among immigration judges and the BIA.¹⁴⁰ These demographics are important because adjudicators with prior immigration enforcement experience are significantly more prone to rule in favor of the government than those without such experience—more so, in fact, the longer the duration of their prior INS or DHS employment.¹⁴¹

I do not suggest it would be possible, or even desirable, to avoid appointing adjudicators with preexisting views on immigration issues. If prior immigration experience is valued, as it should be, preexisting views will be inevitable. Even those who are appointed without prior

135. *Id.* at 69–124.

136. Benedetto, *supra* note 7, at 474. For additional commentary on the hiring improprieties and the accompanying changes in the appointment process, see APPLESEED, *supra* note 7, at 7–9; Marks, *supra* note 7, at 9; Emma Schwartz & Jason McLure, *DOJ Made Immigration Judgeships Political*, LEGAL TIMES, May 28, 2007, at 12.

137. See OFFICE OF PROF'L RESPONSIBILITY & OFFICE OF THE INSPECTOR GEN., *supra* note 131, at 114–15.

138. APPLESEED, *supra* note 7, at 8–9.

139. *Id.* at 7.

140. For further empirical evidence on this subject, see Ramji-Nogales et al., *supra* note 7, at 344–45.

141. *Id.* at 345–47.

immigration experience will surely have some preliminary thoughts—perhaps even well informed and strongly held—on the subject. In any case, those views will develop soon enough. Consequently, every adjudicator will bring some measure of ideology to the position sooner or later. The key is to avoid affirmatively systematizing proenforcement biases. As others have recommended, recruiting should be broadened to ensure that candidates from career enforcement positions are not overrepresented.¹⁴²

b. Threats to Decisional Independence. Targeted efforts by attorneys general or their delegates to influence specific immigration judge or BIA decisions are rare but not unknown. The most famous case was that of Joseph Accardi, an alleged mobster whose name had appeared on the attorney general’s list of “unsavory characters” whom he wished to deport.¹⁴³ Shortly after the attorney general circulated the list, the BIA affirmed a denial of discretionary relief to Accardi.¹⁴⁴ Holding that the attorney general’s regulations required the BIA to exercise independent judgment, the Supreme Court ordered the BIA to decide the case anew without considering the attorney general’s list.¹⁴⁵ On remand, the BIA reached the same conclusion, which the Supreme Court accepted as free of undue influence.¹⁴⁶

Concerns about the unhealthy marriage of law enforcement and adjudicatory responsibilities persisted, however, especially given that the immigration judges were part of, and answerable to, the INS.¹⁴⁷ In 1983, therefore, the Justice Department took a major step to separate the two functions. It created EOIR, an umbrella agency that houses both the immigration judges and the BIA.¹⁴⁸ The move insulated the immigration judges from the INS, but both immigration judges and the BIA remain accountable to the attorney general.

142. See APPLESEED, *supra* note 7, at 9.

143. United States *ex rel.* Shaughnessy v. Accardi, 347 U.S. 260, 264 (1954).

144. *Id.* at 263.

145. *Id.* at 268.

146. Shaughnessy v. United States *ex rel.* Accardi, 349 U.S. 280, 282–83 (1955).

147. For an excellent history, see Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 65 INTERPRETER RELEASES 453 (1988).

148. Board of Immigration Appeals: Immigration Review Function; Editorial Amendments, 48 Fed. Reg. 8038, 8039 (Feb. 25, 1983) (codified as amended at 8 C.F.R. § 1003.0(a)). Since then, a third unit, the Office of the Chief Administrative Hearing Officer (OCAHO), has been added. See 8 C.F.R. § 1003.0(a) (2009).

Today, as was true after *Accardi*, regulations require both immigration judges and the BIA to exercise their discretion independently.¹⁴⁹ Nonetheless, concerns occasionally arise. In 2001, an INS prosecutor who was dissatisfied with the ruling of an immigration judge in a removal case telephoned the chief immigration judge, ex parte, to complain. Rather than instruct the INS prosecutor that the proper remedy would be to appeal to the BIA,¹⁵⁰ the chief immigration judge (an administrator who reports to the director of EOIR)¹⁵¹ directed the immigration judge to change his ruling. The immigration judge recused himself in protest over the chief immigration judge's intervention.¹⁵²

These are isolated incidents. More worrisome have been the erosion of the immigration judges' and BIA members' job security and the real and perceived effects of that erosion on their decisional independence. Concerns about independence had long lingered in the background, but they emerged front and center in 2002. In February of that year (despite simultaneously introducing procedural shortcuts for the stated purpose of attacking the BIA backlog), Attorney General Ashcroft announced plans to *reduce* the number of BIA members from twenty-three to eleven.¹⁵³ The final regulations, published approximately six months later, provided no details as to the criteria he would use in deciding which Board members to cull.¹⁵⁴ Finally, about one year after the original announcement, Ashcroft

149. 8 C.F.R. §§ 1003.1(d)(2), 1003.10(b) (requiring the BIA and immigration judges, respectively, to exercise "independent judgment and discretion," subject to the orders of the attorney general); *see also* STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 287 n.97 (1987) (citing federal appellate decisions that require the BIA to independently exercise its powers).

150. *See* 8 C.F.R. § 1003.1(b)(3) (allowing appeals to the BIA from decisions of immigration judges in removal proceedings).

151. *Id.* § 1003.9.

152. *See* LEGOMSKY & RODRÍGUEZ, *supra* note 68, at 665–68 (giving the details of the case).

153. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 7309, 7310 (proposed Feb. 19, 2002) (to be codified at 8 C.F.R. pt. 1003).

154. The attorney general referred generally to "traditional" factors, "discretion," and qualities such as "integrity . . . , professional competence, and adjudicatorial temperament." Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,893 (Aug. 26, 2002) (codified as amended at 8 C.F.R. pt. 1003). Seniority might be an "experience indicator" but not "a presumptive factor." It would not be possible, the attorney general said, "to establish guidelines or specific factors that will be considered." *Id.*

announced the names.¹⁵⁵ A subsequent empirical study by former congressional counsel Peter Levinson demonstrated that the attorney general had “reassigned” (to either lower-level immigration judge positions or nonadjudicative positions on the EOIR staff) those Board members with the highest percentages of rulings in favor of noncitizens.¹⁵⁶ The study showed that the selections bore no resemblance to the general criteria to which the final rule had referred—integrity, professional competence, and temperament.¹⁵⁷ In total, five members¹⁵⁸ were excised. They included the former chair of the Board, two former full-time immigration law professors, and other experienced and highly respected BIA members with substantial seniority.¹⁵⁹

These actions were unprecedented. In the then–sixty-three–year history of the BIA, no attorney general had ever before removed one of its members for any reason.¹⁶⁰ During the one-year interval between the announcement of the impending cuts and the announcement of specific names, the effects of Attorney General Ashcroft’s decision were striking. The empirical study identified several BIA members whose percentages of rulings in favor of noncitizens dropped suddenly and substantially.¹⁶¹ The patterns of other BIA members whose rulings had historically been relatively favorable to immigrants did not change during the one-year transition period; only one of these members survived the purge.¹⁶²

155. See Ricardo Alonso-Zaldivar & Jonathan Peterson, *5 on Immigration Board Asked to Leave*, L.A. TIMES, Mar. 12, 2003, at A16 (identifying the five BIA members who were reassigned).

156. See Peter J. Levinson, *The Facade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9 BENDER’S IMMIGR. BULL. 1154, 1155–56 (2004).

157. See *id.*

158. Of the twenty-three then-authorized BIA positions, four were vacant at the time of the original 2002 announcement, and three other BIA members had left voluntarily before the announcement of names. Thus, only five “reassign[ments]” were necessary to reduce the Board to eleven members. *Id.* at 1155.

159. *Id.*; see also DORSEY & WHITNEY LLP, *supra* note 7, at 12 (summarizing the biographies of the five reassigned BIA members). Analogous events occurred a few years earlier in Australia. See Stephen H. Legomsky, *Refugees, Administrative Tribunals, and Real Independence: Dangers Ahead for Australia*, 76 WASH. U. L.Q. 243, 248–53 (1998).

160. Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 378–79 (2006).

161. See Levinson, *supra* note 156, at 1156–60 (comparing decisions before and after this downsizing).

162. See *id.* (noting that of the five Board members with the most liberal voting histories, four were reassigned).

These were only the transitional effects. Whether traceable to the elimination of the more immigrant-friendly BIA members, surviving members' fears of losing their jobs in similar ways, procedural shortcuts, or a combination of these and perhaps other causes, the postpurge outcomes in BIA cases have been significantly less favorable to immigrants.¹⁶³

Consistent with the BIA member reassignments, Attorney General Ashcroft spoke more generally about the nature of BIA member (and by logical extension, immigration judge) positions and the attorney general's powers over their continued service. The Department's commentary accompanying the final rule stated:

Each Board member is a Department of Justice attorney who is appointed by, and may be removed or reassigned by, the Attorney General. All attorneys in the Department are excepted employees, subject to removal by the Attorney General, and may be transferred from and to assignments as necessary to fulfill the Department's mission.¹⁶⁴

Although the reassignments in question were limited to the BIA, the reference to “[a]ll attorneys” makes clear that the attorney general intended the quoted language to apply to immigration judges as well.¹⁶⁵

Moreover, as Peter Levinson has noted, the same final rule specifically amended the Justice Department's regulations to downplay the significance of BIA independence. Before the new rule, the first sentence of the BIA regulations had unequivocally emphasized that BIA members were to “exercise their independent judgment and discretion in the cases coming before the Board.”¹⁶⁶ The final rule changed that sentence to make the BIA members simply

163. See DORSEY & WHITNEY LLP, *supra* note 7, app. 24 (charting the increase in affirmances after February 2002); Alexander, *supra* note 7, at 12 (noting that, among other factors, Board decisions in favor of noncitizens fell 15 percent); Palmer et al., *supra* note 51, at 96 (showing seventy-two removals compared to eighteen nonremovals from a random sample of BIA decisions in 2004); Ramji-Nogales et al., *supra* note 7, at 358–59 (showing decreased rates of favorable remands in asylum decisions between 2000 and 2003).

164. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,893 (Aug. 26, 2002) (codified as amended at 8 C.F.R. pt. 1003).

165. See *id.* (emphasis added). Further, by twice distinguishing between removal *and* transfer to other assignments, the attorney general appears to have asserted a power not only to reassign, but also to remove from office entirely—a sweeping assertion indeed, unless the attorney general had only affirmative misconduct in mind for the latter.

166. 8 C.F.R. § 3.1(a)(1) (2002).

“attorneys appointed by the Attorney General to act as the Attorney General’s delegates in the cases that come before them.”¹⁶⁷ Only much later in the regulation does the reference to BIA independence finally appear, and then only in more qualified language.¹⁶⁸ Coupled with the recently introduced performance evaluations that assess both productivity and quality of decisions,¹⁶⁹ these actions remind surviving and future BIA members and immigration judges that they hold their jobs at the discretion of one of the opposing parties in the cases that come before them.¹⁷⁰

c. General Supervision and Control by the Attorney General.

Apart from the subtle and not-so-subtle devices for influencing the adjudication of pending cases described in Section B.3.b, existing law supplies a number of other mechanisms through which attorneys general and their delegates supervise and control immigration judges and the BIA. One of the more direct instruments available for this purpose is the attorney general’s power to reverse BIA decisions

167. 8 C.F.R. § 1003.1(a)(1) (2009).

168. *See id.* § 1003.1(d)(1)(i)–(ii) (subjecting the BIA’s independent judgment to the governing standards of “the provisions and limitations prescribed by applicable law, regulations, and procedures, and by decisions of the Attorney General”); Levinson, *supra* note 156, at 1161 (discussing the changed language between the 2002 regulations and the 2003 regulations).

169. *See supra* notes 122–23 and accompanying text.

170. Russell Wheeler questions whether immigration judges’ fears of retribution are widespread. He observes that, unlike the BIA members, immigration judges have not actually been purged. Moreover, he argues, if immigration judges acted out of a pervasive fear of intrusion, one would expect uniform results in favor of the government, a phenomenon that has not occurred. Russell R. Wheeler, Response, *Practical Impediments to Structural Reform and the Promise of Third Branch Analytic Methods: A Reply to Professors Baum and Legomsky*, 59 DUKE L.J. 1847, 1851–52 (2010). It is true that immigration judges have not experienced an actual purge, and admittedly both their degree of fear and the magnitude of the effect it might have on their decisions would be nearly impossible to determine empirically. In a survey of adjudicators, acknowledgments of bending the outcomes to meet superiors’ preferences are likely to be rare, even if that has indeed been the case and even if those propensities were all conscious and deliberate. But I cannot agree that a pervasive fear would have been expected to produce a higher degree of uniformity. Many variables might influence judges’ susceptibility to political pressures: family circumstances; financial pressures; whether they desire to remain in their present positions long term; the stages of their careers; the availability of other realistic job options; their own personal levels of courage, integrity, and personal and professional pride; and their own predictions about how much their supervisors will care about the particular issue and what their supervisors’ preferences will be. The degree to which fear of adverse job consequences drives adjudicatory decisions will therefore vary from one adjudicator to another, and thus the absence of uniform outcomes tells us little or nothing about the magnitude of the problem. Legomsky, *supra* note 160, at 397–98.

unilaterally.¹⁷¹ Though I have general objections to agency head review of adjudicatory decisions,¹⁷² I must acknowledge its common use as a tool for achieving agency coherence and agency policy primacy without the logistical burdens of notice-and-comment rulemaking.¹⁷³ In the present context, agency head review is particularly troublesome because the agency head is the attorney general, who serves as the nation's chief law enforcement official. Allowing a law enforcement official to reverse the decision of an adjudicatory tribunal is problematic—particularly in proceedings in which the government is one of the opposing parties.

In theory, empowering attorneys general to review and reverse BIA decisions makes them more politically accountable for the BIA's shortcomings. In practice, that benefit is of small consolation. As the nation's chief law enforcement officer, the attorney general has an inherent incentive to care more about some shortcomings than others. The legitimate interests in enhancing the speed of the decisionmaking, and thus the productivity, of the adjudicators and staff can conflict with other legitimate interests like the accuracy of outcomes and the fairness of procedures.¹⁷⁴ The attorney general's enforcement responsibilities might well dictate the relative priorities assigned to those conflicting interests.

More generally, both the governing statute and the Justice Department's regulations prescribe attorney general supervision of immigration judges.¹⁷⁵ The attorney general appoints the director of EOIR,¹⁷⁶ who in turn is "responsible for the direction and

171. See 8 C.F.R. § 1003.1(h) (requiring the BIA to refer cases to the attorney general on demand).

172. See Legomsky, *supra* note 126, at 458–62 (refuting arguments in favor of agency head review). The U.S. Commission on Immigration Reform also objected to attorney general review of BIA decisions. See U.S. COMM'N ON IMMIGRATION REFORM, *supra* note 7, at 178 (listing the Commission's qualms with agency head review and suggesting that review should be independent of enforcement).

173. See Legomsky, *supra* note 126, at 458–62 (discussing the popularity of agency head review); Paul R. Verkuil et al., *Report for Recommendation 92-7: The Federal Administrative Judiciary*, in 2 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: RECOMMENDATIONS AND REPORTS 771, 1004 (1992) (discussing formal agency review of adjudications).

174. Several scholars have considered the phenomenon of agencies' tunnel vision. See, e.g., STEPHEN G. BREYER, BREAKING THE VICIOUS CIRCLE 11–19 (1994) (finding tunnel vision in the EPA's hazardous waste cleanup policies); Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 781 (2004) (finding tunnel vision in the EPA's general prioritization of its own programmatic goals).

175. See 8 U.S.C. § 1101(b)(4) (2006); 8 C.F.R. § 1001.1(l).

176. 8 C.F.R. § 1003.0(a).

supervision” of the BIA and the immigration judges.¹⁷⁷ The supervisory powers of the director of EOIR include the authority to set time frames for the disposition of cases and to evaluate the performances of the EOIR component parts and the individual adjudicators who staff them.¹⁷⁸ The regulations specify that neither the director of EOIR nor the chair of the BIA may “direct the result of an adjudication,” but they qualify that prohibition by providing that it “shall not be construed to limit” the management authority of either the director of EOIR or the chair of the BIA.¹⁷⁹ The qualification renders the prohibition on administrators directing the outcomes of cases ambiguous at best, and potentially meaningless at worst, as evidenced by the chief immigration judge episode outlined earlier.¹⁸⁰ Both the president of the National Association of Immigration Judges (NAIJ) and the U.S. Commission on Immigration Reform have criticized this general scheme for allowing the nation’s chief prosecutor and law enforcement officer to direct and supervise adjudicatory tribunals.¹⁸¹

The attorney general’s supervisory powers have generated several specific concerns, including the Department’s control over adjudicatory resources. Writing at a time when the immigration judges were not only within the Justice Department but also within the INS, former BIA Chair Maurice Roberts lamented a law enforcement agency’s control of adjudicatory resources. He observed that the local INS offices controlled immigration judges’ “office space, hearing facilities, equipment, supplies, clerical and transcription support, interpreter service, travel authorization and reimbursement, library and research facilities, calendars, maintenance of case files, and other services.”¹⁸² Today the immigration judges and the BIA members are within EOIR, a purely adjudicatory operation, but, as noted in this Section, the director of EOIR is still a subordinate of the attorney general. As Judge Marks, president of the

177. *Id.* § 1003.0(b)(1).

178. *Id.* § 1003.0(b)(1)(ii) (immigration judges and BIA); *id.* § 1003.1(a)(2)(i)(C)–(D) (BIA, powers subdelegated to the Chair of the BIA).

179. *Id.* §§ 1003.0(c), 1003.1(a)(2)(ii).

180. *See supra* notes 150–52 and accompanying text.

181. *See* U.S. COMM’N ON IMMIGRATION REFORM, *supra* note 7, at 178 (criticizing the agency head review model); Marks, *supra* note 7, at 3–4 (offering criticism of the system from the Honorable Dana Leigh Marks, current president of the NAIJ).

182. Roberts, *supra* note 7, at 8; *see also* Levinson, *supra* note 7, at 646 (describing immigration judges’ dependence on district directors and regional commissioners for practical necessities).

NAIJ, has pointed out, the attorney general is not only the nation's chief law enforcement officer, but also the official responsible for the Office of Immigration Litigation, the agency that represents the government against the immigrant in federal court.¹⁸³ To Judge Marks, an adjudicative tribunal's dependence on an official responsible for both law enforcement and prosecution is unhealthy.¹⁸⁴

Beyond physical resources, the present chain of command has hindered immigration judges in another important way. In 1996, Congress granted immigration judges a contempt power to be exercised "under regulations prescribed by the Attorney General."¹⁸⁵ To date, however, the attorney general has never issued the necessary regulations, apparently because the former INS and its successors did not want their trial attorneys subject to discipline by other Justice Department attorneys, even if the latter are judges.¹⁸⁶ The practical consequence has been that immigration judges have little leverage in enforcing deadlines against government attorneys, a handicap that often delays the completion of removal proceedings.¹⁸⁷

Attorney-general control over the adjudication system has also permitted the Justice Department to introduce several asymmetries, all of which consciously or unconsciously put a thumb on the scale in favor of the government and against the immigrant. The one-way effects of AWOs, which incentivize BIA affirmances, have already been noted in Section B.2.¹⁸⁸ In addition, the Justice Department's proposed Codes of Conduct expressly authorize immigration judges and BIA members to discuss pending cases *ex parte* with Department

183. Marks, *supra* note 7, at 3–4.

184. *See id.* at 4 (citing this shared responsibility as a flaw in the immigration court structure).

185. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 304, 110 Stat. 3009-546, 3009-589 (codified as amended at 8 U.S.C. § 1229a(b)(1) (2006)).

186. Marks, *supra* note 7, at 10.

187. *See Immigration Reform and the Reorganization of Homeland Defense: Hearing Before the Subcomm. on Immigration of the Comm. on the Judiciary*, 107th Cong. 75 (2002) (statement of Dana Marks Keener, President, National Association of Immigration Judges); DANA MARKS KEENER & DENISE NOONAN SLAVIN, POSITION PAPER: AN INDEPENDENT IMMIGRATION COURT: AN IDEA WHOSE TIME HAS COME 9 (2002), available at <http://www.woodrow.org/teachers/esi/2002/CivilLiberties/Projects/PositionPaperImmigrationJudges.pdf>.

188. For the observations that AWOs take less time to produce than reversals with reasoned opinions and that affirmances, in turn, systematically favor the government because 85 to 93 percent of all BIA appeals are filed by the immigrants, see *supra* notes 118–29 and accompanying text.

officials—but not with the immigrants (who are the opposing parties) or their counsel.¹⁸⁹

These various impediments to the decisional independence and neutrality of the immigration judges and the BIA are more consequential than they might first appear. The combination of the loss of decisional independence at the administrative level and the sweeping restrictions on judicial review enacted in 1996 has meant that, for broad categories of removal cases, there is no longer true decisional independence at *any* stage of the process.¹⁹⁰ Part IV.C.1 explores the implications of that loss more fully.

4. *Suspect # 4: The Bad Apples.* Every barrel of 232 people presumably has its bad apples, and the immigration judge corps is no exception. Ample anecdotal evidence demonstrates that the problem is not trivial. The courts of appeals have often issued blistering opinions not only identifying errors by immigration judges and the BIA on appeal, but also calling attention to incompetence, bias, hostility, intimidation, abuse, and other unprofessional conduct by some immigration judges.¹⁹¹ Some critics believe the problem is widespread,¹⁹² with one suggesting it has reached “crisis” proportions.¹⁹³

189. See Codes of Conduct for the Immigration Judges and Board Members, 72 Fed. Reg. 35,510, 35,511 (June 28, 2007) (“An immigration judge’s communications with other employees of the Department of Justice shall not be considered *ex parte* communications unless those employees are witnesses in a pending or impending proceeding before the immigration judge and the communication involves that proceeding.”); *id.* at 35,512 (“A Board Member’s communications with other employees of the Department of Justice shall not be considered *ex parte* communications unless those employees are witnesses or counsel involved in a pending or impending proceeding before the Board Member, and the communication involves that proceeding.”).

190. For the details of that argument, see LEGOMSKY, *supra* note 149, at 143–76.

191. See *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005) (listing eleven examples); *Qun Wang v. Attorney Gen.*, 423 F.3d 260, 267–69 (3d Cir. 2005) (discussing additional examples, and condemning “[t]he tone, the tenor, the disparagement, and the sarcasm” of the immigration judge); *Dawoud v. Gonzales*, 424 F.3d 608, 610 (7th Cir. 2005) (finding the immigration judge’s opinion “riddled with inappropriate and extraneous comments”); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1054 (9th Cir. 2005) (finding the immigration judge’s assessment of the asylum applicant’s credibility to be “skewed by prejudgment, personal speculation, bias, and conjecture”).

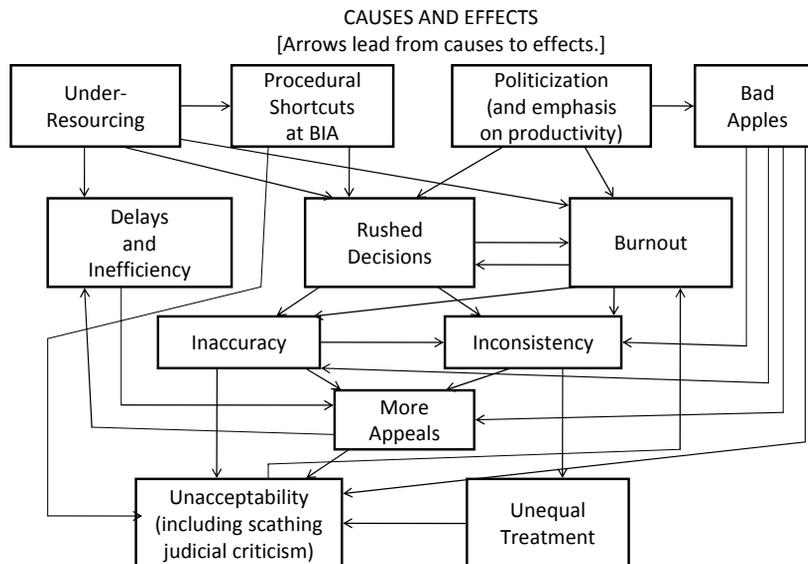
192. See, e.g., APPELSEED, *supra* note 7, at 12 (citing “a shocking number of examples of a lack of professionalism that infects Immigration Court proceedings”); Alexander, *supra* note 7, at 15–18 (giving examples and advocating for a public campaign against the worst immigration judges); Benedetto, *supra* note 7, at 492–500 (giving examples and urging ethical reforms).

193. Benedetto, *supra* note 7, at 469.

The anecdotal nature of the evidence and the inherent difficulty of quantifying subjective failings render the magnitude of the problem highly uncertain. Especially difficult is distinguishing those lapses that reflect the unsuitability of a given individual for a judicial position from those attributable to the crushing caseloads discussed earlier in this Section. In fairness to the many immigration judges whose reputations for competence and professionalism are beyond doubt, judgments about the number of true bad apples should be withheld until more systematic evidence is compiled. At present, one can reliably assume that the worst adjudicators have contributed to the problems afflicting EOIR, but the extent of that contribution is impossible to gauge responsibly.

5. *A Summary of the Causes.* This Section began with a warning that the lines between the various problems and their root causes sometimes run in two directions. Figure 1 attempts to summarize the lines of causation.

Figure 1. *Problems in the Immigration Adjudication System.*



III. THE USUAL PROPOSED SOLUTIONS

The problems highlighted in Part II are serious, but plausible solutions exist. The nature of these problems suggests that any

effective reform must incorporate at least five general principles: First, there must be realistic funding to ensure adequate quality and quantity of adjudicators and their support staffs—especially law clerks and staff attorneys—as well as adequate physical resources. Second, for reasons discussed in Part IV.C.1, those who perform adjudicatory functions must have decisional independence. Third, greater efficiencies (both fiscal efficiencies and reductions of elapsed times) are critical. Fourth, for reasons discussed in Part IV.C.2, the generalist check needs to be preserved, preferably at the highest appellate level. And fifth, the procedural safeguards must be commensurate with the important individual and public interests at stake in removal cases.

Only Congress, not the executive branch, can satisfy those principles. The funding decisions, the realignment of reviewing bodies essential to the kinds of efficiency gains I suggest in Part IV.C.4, and the retention of the generalist perspective that only the courts can supply are exclusively within the power of Congress.

So, too, is the attainment of true decisional independence. Attorney General Ashcroft's reassignment of the more immigrant-friendly BIA members in 2003, reinforced by the other components of politicization discussed in Part II.B.3, has sent a message to immigration judges and BIA members that displeasing the attorney general could cost them their jobs. In theory, any attorney general could issue a regulation intended to restore the adjudicators' job security, and I have no reason to doubt the good faith of the current attorney general. Enduring reforms, however, must focus on institutions, not individuals. No matter how much trust a given attorney general might inspire among subordinates, the genie is now out of the bottle. Every adjudicator will be aware that any action the DOJ takes to restore the adjudicators' job security can be undone at any time by a successor administration or a successor attorney general. Thus, as long as the power to reassign lies with the administration, adjudicators can never again feel confident ruling against the government in close, controversial, or high-visibility cases. Consequently, only Congress, not the executive branch, can provide the level of job security that adjudicators need and deserve if they are to discharge their functions free of political pressures.

Is there a congressional solution that would embody these five essential principles of a restructured immigration adjudication system: adequate funding, decisional independence, significantly enhanced efficiency, preservation of a generalist perspective, and sufficient

procedural safeguards? Several proposals have surfaced over time. They include an Article I immigration court; retention of the current structure but with greater job security for the adjudicators; and the conversion of EOIR into an independent tribunal outside the Department of Justice and all other executive departments. In this Part, I consider the benefits and drawbacks of each proposal.

A. An Article I Immigration Court with Trial and Appellate Divisions

Congress has created a number of Article I specialized courts, many of which remain in operation today and perform important functions.¹⁹⁴ Over the years, several individuals and organizations have proposed converting the current immigration judges and BIA into an Article I immigration court with a trial division and an appellate division.¹⁹⁵ The idea is commendable and in my view would be an improvement over the status quo. Nonetheless, I have two concerns:

The first concern is a relative one. If the immigration judges and BIA members become Article I judges, it is safe to assume that Congress would not grant them the life tenure enjoyed by Article III judges. Presumably they would have fixed terms, like the judges on existing Article I courts.¹⁹⁶ A fixed term, however, could theoretically be either renewable or nonrenewable. If it were nonrenewable, few accomplished people would aspire to these positions unless they were already immigration adjudicators or were nearing retirement, as their midcareer options would be limited when their terms expire. Renewable terms thus make more sense; in fact, fifteen-year renewable terms appear to be the norm for Article I courts.¹⁹⁷ But if the terms are renewable, someone must exercise discretion about whether to renew a particular judge's term (unless renewal were made statutorily pro forma in the absence of misconduct). And once renewal hinges on someone's subjective judgment, the same fear that arose after Attorney General Ashcroft's reassignments—that controversial, unpopular, or consistently pro-immigrant decisions

194. For a thorough summary, see Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731, 744–51 (2003).

195. See *supra* note 7.

196. For statutes establishing term lengths for Article I judges, see *infra* note 197.

197. See 10 U.S.C. § 942(b)(2) (2006) (U.S. Court of Appeals for the Armed Forces); 26 U.S.C. § 7443(e) (2006) (U.S. Tax Court); 28 U.S.C. § 172(a) (2006) (U.S. Court of Federal Claims); 38 U.S.C. § 7253(c) (2006) (U.S. Court of Appeals for Veterans Claims).

would displease the repository of that discretion and trigger nonrenewal—could reemerge in another form. This vulnerability is at its peak when the decisionmaker is politically accountable, but even if the decisionmaker is an Article III judge relatively insulated from the political process, vulnerabilities would persist because, like anyone else, judges have ideological views and personality conflicts. In contrast, Administrative Law Judges (ALJs) can be removed only for “good cause” and then only after evidentiary hearings before the Merit Systems Protection Board.¹⁹⁸ Thus, though Article I judges might enjoy greater job security than immigration judges currently do, they might actually have less job security than they would under an ALJ model.

If that were the only concern, one might find reassurance in the various other specialized Article I court models that rely on nonautomatic renewals.¹⁹⁹ The larger concern is judicial review by the regional courts of appeals. Recent proposals by the National Association of Immigration Judges and the ABA for an Article I immigration court would preserve review by the regional courts of appeals.²⁰⁰ There is no guarantee, however, that Congress will accept these proposals in their entirety. In particular, it is not at all certain that Congress would preserve court of appeals review if it were to make EOIR an Article I court with its own appellate division. Congress has shown no compunctions about eliminating huge swaths of judicial review of deportation orders in the past, even without an Article I substitute.²⁰¹ One worries that an Article I court with an appellate division would be the impetus to jettison regional court of

198. See 5 U.S.C. § 7521(a) (2006); Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L. REV. 65, 72–74 (1996) (presenting a good summary of the statutory provisions governing appointment and terms of office of ALJs); Jeffrey Scott Wolfe, *Are You Willing to Make the Commitment in Writing? The APA, ALJs, and SSA*, 55 OKLA. L. REV. 203, 226 (2002); U.S. Office of Pers. Mgmt., Qualification Standard for Administrative Law Judge Positions, <http://www.opm.gov/qualifications/alj/alj.asp> (last visited Mar. 28, 2010).

199. See, e.g., 38 U.S.C. § 7253(c) (expressly contemplating additional fifteen-year terms for the judges of the U.S. Court of Appeals for Veterans Claims). For each of the other specialized Article I courts, renewability must be assumed; the statute authorizes appointments for fifteen-year terms and contains no prohibition on appointment of a judge who has already served one such term. 10 U.S.C. § 942(b)(2); 26 U.S.C. § 7443(e); 28 U.S.C. § 172(a).

200. COMM’N ON IMMIGRATION, *supra* note 7, at 43–48; Marks, *supra* note 7, at 3, 15; see also Fitz & Schrag, *supra* note 7, § 101(a) (proposing a draft of a bill that would create an “independent, professional immigration court system”).

201. Most of the existing restrictions on judicial review of immigration decisions appear in 8 U.S.C. § 1252(a)(2), and in other subsections of § 1252. For a summary of congressional efforts to trim judicial review of immigration decisions further, see Benson, *supra* note 7, at 413–14.

appeals review of deportation orders entirely. In that scenario, the generalist perspective would be lost. Indeed, the absence of a provision for review by generalist judges was the principal objection leveled against one of the early leading proposals for an Article I immigration court.²⁰²

But suppose Congress were to replace EOIR with an Article I court that houses both trial and appellate divisions, and further suppose Congress preserves court of appeals review. Is even that the optimal solution? It would satisfy at least two of the five vital reform principles—decisional independence and the retention of a generalist perspective. If Congress were also to appropriate adequate funds and mandate sufficient safeguards, it could satisfy two additional principles. But it would not offer significant efficiency gains, for it would perpetuate a system that tolerates two largely duplicative rounds of appellate review.

At first blush, one might question how duplicative these functions really are. After all, specialist tribunals and generalist courts offer different advantages. I have suggested elsewhere that, at least when the specialized forum is an administrative tribunal, it is usually “faster, cheaper, and procedurally simpler and less formal than courts.”²⁰³ Further, regardless of whether it is an administrative tribunal in the executive branch or a court in the judicial branch, specialized expertise is a valuable commodity. Courts, on the other hand, generally offer greater stature and decisional independence than administrative tribunals, in addition to contributing a valuable generalist perspective.²⁰⁴ Thus, a system that combines appellate review by a specialist tribunal with a right of review in a court of general jurisdiction admittedly offers advantages over a system that provides only one level of appellate review.²⁰⁵

Moreover, one might argue, a second opportunity to spot errors has intrinsic value. On the surface, this assumption sounds reasonable enough, but the question remains why one should assume that, in cases in which the specialist tribunal and a generalist court disagree,

202. See Timothy S. Barker, *A Critique of the Establishment of a Specialized Immigration Court*, 18 SAN DIEGO L. REV. 25, 25–27 (1980); Robert E. Juceam & Stephen Jacobs, *Constitutional and Policy Considerations of an Article I Immigration Court*, 18 SAN DIEGO L. REV. 29, 33–34 (1980); James J. Orlow, *Comments on “A Specialized Statutory Immigration Court,”* 18 SAN DIEGO L. REV. 47, 50 (1980); Wildes, *supra* note 76, at 60–62.

203. LEGOMSKY, *supra* note 149, at 283.

204. The benefits of the generalist perspective are elaborated in Part IV.C.2, *infra*.

205. See LEGOMSKY, *supra* note 149, at 280–98.

the latter is more likely to be right. Do the benefits of generalist experience usually outweigh the benefits of specialized expertise? Is the reviewing court more likely to follow more elaborate procedures, proceed more deliberately, or have more decisional independence?

Perhaps the answer to each of these questions is “yes, sometimes.” If the tribunal’s rationale is communicable in writing, then the court can receive the benefits of the tribunal’s accumulated specialist wisdom while also bringing the court’s own generalist perspective to bear on the issue. Unlike the administrative tribunal, which will not have had the benefit of the court’s generalist perspective, the court of appeals will have the best of both worlds. Admittedly, not all insights are fully communicable. Suppose, for example, the tribunal’s decision reflects its predictions, grounded in its practical experience, of the likely effects of a proposed decision. If those predictions are largely intuitive, its reasoning might not be easily transmitted. Even then, however, the combination of the court’s generalist perspective and due deference to the specialized practical experience of the tribunal might, at least theoretically, produce a better decision than if appellate review were limited to either a single specialized tribunal or a single generalist court. Thus, transmissible or not, the tribunal’s experiential insights and the court’s generalist perspective might make for a better decision than either forum would have been able to produce on its own.²⁰⁶

Given these typically differing and often complementary properties of specialized tribunals and generalist courts, I must concede that a second appellate round can add value. Still, there will always be at least *partial* duplication of effort. I do not wish to exaggerate the duplication, given that some unknowable percentage of the second appeals will be easy cases capable of quick resolution. But the duplication will still be substantial, and, as I argue in Part IV, there is a way to realize the benefits of both kinds of adjudicative bodies without the inefficiency of a second appellate round.

B. Legislating More Job Security within the Department of Justice

Short of creating an Article I court, Congress could retain the existing structure of EOIR and simply legislate greater job security for the immigration judges and BIA members. Congress could, for example, make EOIR an independent tribunal within the

206. *See id.* at 292–98.

Department of Justice, as it did with the U.S. Parole Commission.²⁰⁷ Either alternatively or additionally, Congress could make the immigration judges and the BIA members ALJs.²⁰⁸ The ALJ appointment process is freer of political influence, the ALJs' grade levels and pay scales are set by the Office of Personnel Management (OPM) rather than by political actors, and they cannot be removed from office except for good cause found after an evidentiary hearing before the Merit Systems Protection Board.²⁰⁹ Any of these options would restore the adjudicators' decisional independence. If accompanied by both adequate funding and appropriate hearing and appellate procedures, they would satisfy other essential reform criteria as well.

Like the Article I court proposal, however, each of these options would require either preserving the inefficiency of two levels of appellate review or eliminating the only generalist check on the process. Moreover, keeping EOIR within the Department of Justice, even under another name, would continue to subject adjudicators to the budgetary and other logistical decisions of the Department. At one time, I did not find this arrangement disturbing.²¹⁰ Similarly, the president of the National Association of Immigration Judges, though preferring that EOIR be transferred to an independent executive branch agency, found its Justice Department location at least preferable to the then-contemplated transfer of EOIR to DHS.²¹¹ The 2003 purge of BIA members and its ominous implications for adjudicators' decisional independence from law enforcement superiors have forced both of us to eat our words and prescribe stronger medicine.²¹² Adjudicators' dependence on law enforcement officials for not only job security but also daily office needs and procedural direction is highly problematic for all the reasons discussed earlier.²¹³ When the former INS was part of the Department

207. Other commentators considered but ultimately rejected that possibility (at a time when the U.S. Parole Commission was a larger and more permanent agency). *See, e.g.*, Levinson, *supra* note 7, at 650–51; Roberts, *supra* note 7, at 17–18.

208. This option, too, has been considered by others. *See, e.g.*, Levinson, *supra* note 7, at 649; Roberts, *supra* note 7, at 16–17.

209. *See supra* note 198.

210. *See Legomsky, supra* note 6, at 1378–80.

211. *See Immigration Reform and the Reorganization of Homeland Defense, supra* note 187, at 76.

212. *See Legomsky, supra* note 160, at 405 (favoring an independent executive branch tribunal); Marks, *supra* note 7 (favoring an Article I immigration court).

213. *See supra* Part II.B.3.c.

of Justice, there might have been some reason to keep EOIR there as well, on a theory of agency policy coherence. Now that the INS is defunct, and its functions transferred to DHS, keeping EOIR in the Justice Department lacks even that advantage.

C. Converting EOIR into an Independent Tribunal outside the Justice Department

Another option is to make EOIR an independent tribunal, with trial and appellate divisions, but house it outside the Department of Justice and all other departments. Other such tribunals exist,²¹⁴ and some have urged this model for what is now EOIR.²¹⁵ Again, the immigration judges and BIA members could become ALJs in this new tribunal.

In many ways, an independent adjudicatory tribunal is just an Article I court by another name. Both perform solely adjudicatory functions, both are in the executive branch, and both are independent of all existing government departments. Moreover, adjudicators in both bodies would be immune from the threat of removal from office because of disagreements over outcomes. By simultaneously providing job security to adjudicators and preventing the attorney general from exerting budgetary and logistical leverage or regulating their procedures, both models would avoid the major disadvantages of the internal Department of Justice option.

Still, there are some differences between these two models.²¹⁶ An Article I court would offer greater stature to adjudicators. Stature and respect might restore the existing immigration judges' morale (if they are grandfathered or reappointed), and perhaps it would expand the pool of future applicants by making the positions more attractive. But an Article I court would also have comparative disadvantages. One writer fears that an Article I immigration court would require an

214. Examples include the Occupational Safety and Health Review Commission and the Federal Mine Safety and Health Review Commission. *See* Levinson, *supra* note 7, at 649 n.39, 651; Verkuil & Lubbers, *supra* note 194, at 773.

215. *See, e.g.*, U.S. COMM'N ON IMMIGRATION REFORM, *supra* note 7, at 178–82; Orlow, *supra* note 202, at 50. The ABA Commission, which favors an Article I immigration court, has proposed the independent tribunal model as a fallback position. ABA, Resolution 114F Adopted by the House of Delegates 13–15 (Feb. 8–9, 2010), *available at* http://www.abanet.org/leadership/2010/midyear/daily_journal/114F.pdf; COMM'N ON IMMIGRATION, *supra* note 7, at 43–48.

216. *See* ABA, *supra* note 215, at 8–9 (emphasizing the stature and prestige of Article I judgeships); COMM'N ON IMMIGRATION, *supra* note 7, at 45 (same).

“overjudicialized, formal process attendant to the to-be-created agency’s status as ‘court[,]’” thus sacrificing speed and flexibility.²¹⁷ This problem, however, could be solved simply by drafting rules of procedure that take into account the particular subject matter and any special needs it presents for procedural simplicity.

Other considerations could become more consequential. The concern expressed in Section A—that an independent entity with an appellate division might prove too tempting a justification for Congress to abolish Article III review—might be exacerbated if the new entity is called a court, albeit one established under Article I. In addition, the usual selection process for an Article I court is presidential appointment followed by Senate confirmation,²¹⁸ a process that some have specifically urged for an Article I immigration court.²¹⁹ Each of the other Article I courts, however, has only between three and nineteen judges.²²⁰ A court with more than two hundred judges²²¹ would constantly produce far more vacancies and thus require many more presidential appointments and Senate confirmation hearings. This volume would have taxed the Senate even in the past; it seems particularly ill suited to the highly charged current congressional climate, in which every confirmation hearing is a potential food fight. If Congress were to create an Article I immigration court but dispense with the usual presidential-Senate appointment process, however, this problem would not arise. Similarly, if the presidential-Senate appointment procedure were confined to the appellate stage, the problem would remain but the number of senatorial stalemates would be greatly reduced.²²²

Finally, like both of the preceding options, the independent tribunal model would entail either entrenching the two largely

217. Orlow, *supra* note 202, at 49.

218. See 10 U.S.C. § 942(b)(1) (2006) (U.S. Court of Appeals for the Armed Forces); 26 U.S.C. § 7443(b) (2006) (U.S. Tax Court); 28 U.S.C. § 171(a) (2006) (U.S. Court of Federal Claims); 38 U.S.C. § 7253(b) (2006) (U.S. Court of Appeals for Veterans Claims).

219. See, e.g., Marks, *supra* note 7, at 3; Roberts, *supra* note 7, at 19; cf. Wildes, *supra* note 76, at 54–55, 62 (lauding the presidential appointment process, though favoring either ALJs or an independent tribunal over an Article I immigration court).

220. See 10 U.S.C. § 942(a) (five judges); 26 U.S.C. § 7443(a) (nineteen judges); 28 U.S.C. § 171(a) (sixteen judges); 38 U.S.C. § 7253(a) (three to seven judges).

221. As of August 20, 2009, there were 232 immigration judges. Komis, *supra* note 73, at 1.

222. The ABA Proposed Resolutions and Fitz and Schrag have proposed this arrangement. ABA, *supra* note 215, at 10; COMM’N ON IMMIGRATION, *supra* note 7, at 68; Fitz & Schrag, *supra* note 7, § 102(a)(4).

duplicative rounds of appellate review or sacrificing the generalist Article III check on the process.

IV. AN ARTICLE III IMMIGRATION COURT STAFFED BY GENERALIST JUDGES

Look for items that are of low cost to you and high benefit to them, and vice versa.²²³

As one icon of negotiation theory emphasizes, a successful negotiator looks beyond positions to identify the motivating interests.²²⁴ Moreover, even when the interests of two negotiating parties conflict, a particular item might have a high benefit to one party and a low cost to the other.²²⁵

Can these principles possibly be of use in a battlefield like immigration adjudication, in which the opposing sides seem so hopelessly at odds over both factual perceptions (are most asylum claimants genuine refugees or just people looking for a way to stay in the United States?) and priorities (do I care more about ensuring fair and accurate outcomes, or about speeding up the process and eliminating the backlogs at low fiscal cost?)? I argue here that, especially in this highly charged debate, focusing on the interests and priorities of the typically opposing sides can produce an agreement in which each side achieves what is most important to it while sacrificing only what is least important to it.

What I have posited as the five critical elements of any effective reform of immigration adjudication—adequate funding, decisional independence, enhanced efficiency, the preservation of a generalist check, and fair procedures—are goals to which different actors assign different priorities. Each of them, however, is of vital importance to some. Consequently, a proposed reform that leaves any of these elements unsatisfied is likely to go nowhere. As Part III illustrates, although any number of reform models would represent substantial improvements over the status quo, each of the proposals considered to this point fails to meet at least one of these criteria. Among other things, each of them requires a choice between losing what remains of

223. ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 79 (2d ed. 1991).

224. *Id.* at 42.

225. *Id.* at 76.

a generalist, Article III check versus retaining a largely superfluous second round of appellate review.

A. *The Proposal*

As an alternative, I propose (a) converting the immigration judges into ALJs housed in an independent executive branch tribunal and (b) replacing both the BIA and review by the regional courts of appeals with an Article III immigration appellate court staffed by generalist judges. The details of this proposal and their rationales appear in Part IV.D, but the key elements can be summarized as follows:

1. With respect to the immigration judges, I would adopt any one of the reform proposals discussed in Part III. The benefits of insulating these adjudicators from the Justice Department's budgetary and logistical pressures inform my preference to convert the Office of the Chief Immigration Judge into a new, independent adjudicatory tribunal located within the executive branch but outside all departments. I would make the immigration judges ALJs because of the advantages of that arrangement over an Article I court.²²⁶ Until a more euphonious name is devised, the new tribunal could be called the Office of the Administrative Law Judges for Immigration (OALJI), and the adjudicators would be Administrative Law Judges for Immigration (ALJIs). My proposal calls for a qualified grandfathering of the current immigration judges. Subsequent appointments would be made by a special Commission described in Section D.1.a.

2. This proposal would establish a new Article III United States Court of Appeals for Immigration to replace *both* the BIA and the current role of the regional courts of appeals in immigration cases. The jurisdiction of the new court would generally track that of the current BIA, thus indirectly repealing the 1996 bars on Article III review of large categories of removal orders. The new court could sit in one centralized location or have multiple seats, as discussed in Part IV.B.7.

3. I would staff the new court with generalist Article III judges drawn from the U.S. district courts and regional courts of appeals for fixed terms, for example two years. For this purpose, each circuit would contribute district and circuit judges proportionately to the

226. See *supra* notes 208–09 and accompanying text.

total number of district and circuit judges in that circuit. The Judicial Council of each circuit would make selections from the pool of eligible judges. Only active Article III judges with a minimum number of years of service on federal courts of general jurisdiction (I propose three years) would be eligible for the regular two-year assignments to this new court. To fill a temporary need for additional judges, it would be possible to assign other active judges and senior judges to the new court on an ad hoc basis.

4. The new court would have its own support staff, including both permanent and term law clerks and staff attorneys.

5. Both parties—the immigrant and DHS—would have the statutory right to appeal the decision of the ALJI to this new court, just as they now both have the right to appeal to the BIA. The new court would also have jurisdiction over several miscellaneous orders that roughly parallel the current jurisdiction of the BIA.

B. Constitutionality

Before assessing the policy implications of this proposal, it is necessary to address one preliminary question: is it constitutional? Article III, Section 1 of the United States Constitution vests the federal judicial power in a supreme court and any inferior courts that Congress chooses to establish.²²⁷ It then provides that the judges of both the supreme and inferior courts “shall hold their Offices during good Behaviour” and that their compensation shall not be reduced while they remain in office.²²⁸ These provisions protect federal judges’ decisional independence by insulating them from political pressures.

Nowhere, however, does the constitutional text say that all federal adjudication must be by Article III judges. Otherwise all federal administrative adjudicatory tribunals would be unconstitutional. Rather, the Supreme Court has marked out the limitations on non–Article III adjudication. In three leading cases,²²⁹ the Court has held that non–Article III courts and tribunals may adjudicate public rights, and that they apparently may adjudicate

227. U.S. CONST. art. III, § 1.

228. *Id.*

229. See *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 853–56 (1986); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68–71 (1982); *Crowell v. Benson*, 285 U.S. 22, 48–53 (1932). See generally MICHAEL ASIMOW & RONALD M. LEVIN, *STATE AND FEDERAL ADMINISTRATIVE LAW* § 7.3 (3d ed. 2009) (examining Congress’s power to delegate adjudicatory authority to agencies).

even private rights provided that an Article III court has independent power to decide all questions of law and jurisdictional fact. Although the line is not entirely clear, it appears that for these purposes, public rights are those arising between the government and private persons, whereas private rights are those that involve the liability of one individual to another.²³⁰

Thus, there is no apparent Article III problem here. First, whatever ambiguities the distinction between private rights and public rights might generate in other contexts, the rights adjudicated in removal proceedings are public rights under any imaginable standard, because they arise as between the individual immigrant and the government. Indeed, in *Crowell v. Benson*,²³¹ the Supreme Court specifically mentioned immigration as a “familiar” example of a public right.²³² Second, my proposal encompasses independent review by an Article III court. Third, the current system already lodges the adjudicatory power in an administrative tribunal (EOIR), and the only issue is whether to transfer that authority to either a *more* independent adjudicatory tribunal within the executive branch or (for appellate review) an Article III court. As such, my proposal does not raise any constitutional issues not already present in the seemingly uncontested existing structure. To the contrary, it expands the role of Article III judges in immigration cases. From this point on, therefore, constitutionality will be assumed.

C. *Policy Benefits and Costs*

The adjudication model urged in this Article has several important policy advantages over both the status quo and the other reform proposals discussed in Part III. It would depoliticize what is, and should be, an adjudicatory process. Further, it would preserve both specialized expertise and the generalist perspective in appellate review. Additionally, it would repeal the principal restrictions that Congress placed on Article III judicial review of removal orders in 1996. By consolidating the current two rounds of largely duplicative appellate review into one, this proposal would promote fiscal efficiency and speed final dispositions. Because the judges assigned to the new court would be generalists drawn from the district courts and the courts of appeals, this proposal would offer judicial councils the

230. *N. Pipeline*, 458 U.S. at 69–70.

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

232. *Id.* at 50.

flexibility to reassign judges to their original posts if caseload fluctuations warrant.

Costs must be acknowledged. Centralization, though possibly contributing to more uniform results, lessens the opportunity for beneficial cross-court discourse, creates various logistical challenges concerning panel deliberation and oral argument, and potentially concentrates more than optimal power in a single institution. Moreover, some significant percentage of the federal district and circuit judges are likely to be unenthusiastic about the prospect of a two-year assignment to the new court. The discussion in the remainder of this Section suggests that these costs, although real, are either minor or easily mitigated.

1. *Depoliticization.* This proposal aims to depoliticize the immigration adjudication process in several ways. At the hiring stage, the proposal would substitute ALJs for the current immigration judges and Article III judges for BIA members. The tawdry hiring practices that so badly tarnished EOIR and other components of the Department of Justice have since been corrected,²³³ but without congressional action, nothing prevents future Justice Department and White House officials from lapsing. The ALJI hiring process proposed here is merit based. Similarly, BIA review would give way to review by Article III judges. Appointments of federal judges are admittedly political, but the requirements of presidential nomination and Senate confirmation provide transparency and at least some degree of merits scrutiny.

One special problem deserves mention. The Article III judges who are assigned to the Court of Appeals for Immigration would ultimately be selected by other judges.²³⁴ As Professor Theodore Ruger has observed, assignments of judges by other judges are not without problems.²³⁵ Several statutes, for example, have authorized the Chief Justice of the United States to reassign judges temporarily to different courts.²³⁶ These arrangements eliminate the democratic safeguards of appointment by politically accountable actors—the president and the Senate. Moreover, a Chief Justice can select judges

233. See *supra* notes 134–40 and accompanying text.

234. The proposed assignment procedure is detailed in Part IV.D.2.a, *infra*.

235. Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341, 343–47 (2004).

236. *Id.* at 343 nn.5–8, 359–67.

with particular political viewpoints. That power is especially problematic when an assignment is to a specialized court, because it permits the appointment of judges who hold particular views concerning the particular subject matter—a virtual recipe for manipulating the outcomes of cases.²³⁷ By matching specific judges to specific subject matters, this practice also violates the norm of random assignment of judges to cases.²³⁸ The problem is not academic. As Ruger shows, at least two Chief Justices (Rehnquist and, to a lesser extent, Burger) often made strategic assignment choices based on their own substantive preferences.²³⁹

My proposal does not eliminate these dangers, as some judges would still appoint or assign other judges. At both the trial level and the appellate level, however, the proposal diffuses the selection power by spreading it out among a collective group, thus greatly diminishing these various concerns.

Hiring aside, my proposal is designed to restore decisional independence at both the trial and appellate levels of immigration adjudication, principally by enhancing the job security of adjudicators. Unlike the current immigration judges and BIA members, the ALJIs and Article III judges of the Court of Appeals for Immigration need not be concerned that one of the opposing parties is a law enforcement agency. That party would no longer have the power to terminate their employment if it were unhappy with the decision.

Admittedly, decisional independence—meaning adjudicators' freedom to decide cases as they believe the evidence and the law dictate—has costs. As discussed in more detail elsewhere,²⁴⁰ these costs relate to the inherent absence of political accountability, inappropriate judicial activism, potential public backlash, and possible impediments to agency policy coherence.

When the function of a public actor falls clearly within the realm of adjudication, however, the usual assumption has been that the

237. *Id.* at 343–44.

238. *Id.* at 372. *See generally* Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 6–8 (2009) (defending random assignments of cases to judges).

239. Ruger, *supra* note 235, at 390–95; *see also* Theodore W. Ruger, *Chief Justice Rehnquist's Appointments to the FISA Court: An Empirical Perspective*, 101 NW. U. L. REV. 239, 240 (2007) (demonstrating empirically that Chief Justice Rehnquist disproportionately assigned to the Foreign Intelligence Surveillance Court (FISA) those judges who held conservative views on the specific fourth amendment issues that FISA was charged with deciding).

240. Legomsky, *supra* note 160, at 392–94.

benefits of decisional independence outweigh its costs. If “adjudication” is “the power to determine the rights or duties of particular persons based on their individual circumstances,”²⁴¹ then the decisions that immigration judges, the BIA, and the courts of appeals now make in removal cases obviously qualify.

The benefits of decisional independence in an adjudicative context are compelling. Most importantly, decisional independence is rooted in theories of procedural justice. People who decide cases should base their decisions on their honest assessments of the evidence and their honest interpretations of the relevant law, not on the basis of which outcomes are most likely to please the officials who have the power to fire them. In addition, decisional independence serves to avoid defensive judging (playing it safe); to protect unpopular individuals, minorities, and viewpoints; to operationalize separation of powers; to nourish public confidence in the integrity of the justice system; to prevent “reverse social Darwinism,” in which the most honest and most courageous adjudicators are the ones first culled from the herd; to make the positions attractive enough to recruit the most talented candidates; and to sustain a continuity of interpretation from one administration to the next.²⁴² To be clear, none of these considerations should immunize an adjudicator from discipline or even removal for unprofessional conduct. But sanctions grounded in policy-based or ideological differences with one’s superiors are another matter.

Finally, this proposal seeks to end the general supervision and control of an adjudicative body by a law enforcement agency. As discussed in Part II.B.3.c, allowing law enforcement officials not only to reverse the decisions of adjudicators, but also to control staffing and other resources that adjudicators require, has created an unhealthy state of dependency.

All these effects of depoliticization assume larger significance when one considers that existing law bars judicial review of large categories—perhaps a majority—of final removal orders.²⁴³ This proposal, therefore, neutralizes the 1996 court-stripping legislation. Instead of a right to appeal all immigration judge removal orders to

241. ASIMOW & LEVIN, *supra* note 229, at 398.

242. These and other theories of decisional independence are discussed in Legomsky, *supra* note 160, at 394–401.

243. For a summary of the more important 1996 constraints on judicial review of removal orders, see *supra* notes 34–38 and accompanying text.

the BIA, this proposal would create a right to appeal those same decisions to an Article III Court of Appeals for Immigration. Thus, all removal orders, including those that rest on discretionary decisions and those involving the crime-related deportability grounds, would again become reviewable by independent, Article III judges with generalist backgrounds—but instead of, not in addition to, review by the BIA.

2. *Generalists and Specialists.* Assigning federal district and circuit judges to two-year rotations on a new U.S. Court of Appeals for Immigration is a have-your-cake-and-eat-it-too solution. In the past, one of the most serious objections to replacing the regional courts of appeals with a single specialized immigration appellate court has been the loss of the generalist perspective.²⁴⁴ At the same time, my proposed abolition of the BIA—essential if the present two rounds of appellate review are to be consolidated into one—necessitates some alternative source of specialized expertise. This proposal addresses both needs by staffing a specialized court with judges who have had several years of experience on federal courts of general jurisdiction. Rotational assignments to specialized courts are not a novel idea, but the few known examples have entailed only standby arrangements, in which judges continue to serve full time on their home courts except when particular cases require their temporary services on the specialized courts.²⁴⁵ In those regimes, the judges have had far less opportunity to develop significant specialized expertise.

Professor Lawrence Baum makes the excellent point that some judges on the existing regional courts of appeals have already acquired a good deal of specialized expertise simply by having

244. See Barker, *supra* note 202, at 27; Juceam & Jacobs, *supra* note 202, at 33–34; Orlow, *supra* note 202, at 60–62.

245. FISA is the most significant example. The Chief Justice of the United States assigns eleven district judges, at least three of whom must live within twenty miles of Washington, D.C. They travel to the court as needed. Fed. Judicial Ctr., Foreign Intelligence Surveillance Court, http://www.fjc.gov/history/home.nsf/page/fisc_bdy (last visited Mar. 30, 2010); U.S. Courts, The Foreign Intelligence Surveillance Court and the Court of Review, <http://www.uscourts.gov/outreach/topics/fisa/courtofreview.html> (last visited Mar. 30, 2010). The Temporary Emergency Court of Appeals was the other major example. The Chief Justice was authorized to appoint three or more district or circuit judges to serve part time for indefinite terms. It was abolished in 1992 and its jurisdiction was transferred to the U.S. Court of Appeals for the Federal Circuit. Fed. Judicial Ctr., Temporary Emergency Court of Appeals, 1971–1992, http://www.fjc.gov/history/home.nsf/page/temp_appeals!OpenDocument&Click= (last visited Mar. 30, 2010).

handled a large number of immigration cases.²⁴⁶ Outside the Second and Ninth Circuits, however, the number of judges who could realistically claim that kind of expertise is small.²⁴⁷ At any rate, the court I am proposing would be a different animal entirely. The judges would be totally immersed in immigration law for two years. They would constantly learn from one another, from a specialized support staff with institutional memory, and from specialized books and other resources. Moreover, because the judges will be adjudicating nothing but immigration cases for two years, it will be worthwhile to invest in their continuing specialized education.

What, precisely, does specialized expertise contribute to adjudication?²⁴⁸ In several ways, it enhances the quality of the final decisions. Specialists' knowledge of the governing statutory scheme and their repeated exposure to the practical consequences of past interpretations can help them reach results that are both faithful to the law and pragmatic.²⁴⁹ Experts should be well equipped to identify the right questions; they will also be more familiar with recurring legislative facts and related statutory provisions that add context to the provisions they are interpreting. This knowledge lessens their dependency on counsel and staff for basic information and mitigates the risk that a party will win or lose because of an imbalance in the skills or efforts of the opposing attorneys. When parties appear pro se, the expertise of the adjudicator can be at least a partial substitute for counsel. In addition to the knowledge that the adjudicators themselves furnish, the structure of a specialized court enables judges to draw on the collective wisdom of their specialized colleagues, a

246. Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501, 1550–51 (2010).

247. *Id.* at 1550–52.

248. For a more comprehensive catalog of the benefits and costs of specialized adjudication, see STEPHEN H. LEGOMSKY, *SPECIALIZED JUSTICE: COURTS, ADMINISTRATIVE TRIBUNALS, AND A CROSS-NATIONAL THEORY OF SPECIALIZATION* 7–19 (1990).

249. David R. Woodward & Ronald M. Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 ADMIN. L. REV. 320, 329, 332 (1979). Others have similarly hailed specialists' "superior degree of technical competence," as well as their abilities to predict pragmatically whether nonliteral interpretations would "unsettle the statutory scheme." Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 928 (2003). As an argument for affording specialist decisionmakers more leeway than generalist judges to depart from the literal statutory text, these latter assertions have drawn a sharp rebuke from Judge Richard Posner. He argued that specialized expertise can lead to loose construction (a result he disfavors) and that many "generalist" judges also possess specialized expertise, for example in evidence law or criminal law. Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 MICH. L. REV. 952, 964 (2003).

specialized support staff, and specialized books and other resources. Familiarity with the relevant cases can help create a consistent body of case law—by reducing the chance of overlooking a case on point, by avoiding unintentionally broad or misleading language in opinions, and by affirmatively contributing helpful dicta. Specialized courts can further enhance consistency by concentrating decisionmaking in a smaller number of individuals.

These benefits assume particular importance in immigration. As the Introduction to this Article points out, the statutes, regulations, and case law that govern U.S. immigration law are exceptionally large, complex, and organizationally intricate. The law is also unusually dynamic. Understanding the overall design of the statutory scheme and keeping up with developments are correspondingly challenging in this field. Moreover, many fact patterns recur. Those who adjudicate asylum cases, for example, must often assess the human rights practices that prevail in the particular countries from which the applicants are fleeing.²⁵⁰ Familiarity with common fact patterns facilitates both broader understanding and consistent outcomes.

Apart from its contribution to accurate decisions, specialized expertise enhances the efficiency of the process. All else equal, for a given level of accuracy, one who is familiar with the general legal backdrop should require less time to decide cases than one who has to start from scratch. The specialized adjudicator should also need less background information from counsel. These efficiencies allow the tribunal and the parties to devote their time and resources to less repetitive and more productive tasks.

Specialization also has costs, but my proposal largely eliminates them. The most obvious cost is the loss of the generalist perspective; the present proposal preserves the generalist perspective by insisting on a minimum amount of experience on a federal court of general jurisdiction. Views and attitudes might ossify more readily among specialists, who have had abundant time and occasion to develop their views, and cynicism might develop over time. The generalist judges who would staff the new U.S. Court of Appeals for Immigration will arrive without the same opportunities to have

250. Protection will generally hinge on whether an applicant's fear of persecution in another country is "well-founded," 8 U.S.C. § 1158(a) (2006), or on whether the applicant's life or freedom "would be threatened" in a particular country, *id.* § 1231(b)(3). Those determinations require assessments of relevant country conditions.

formed those biases and rigidities, and at any rate they will rotate out after two years.

Finally, one persistent fear concerning specialized tribunals and courts is that their specialization gives unhealthy incentives to others to influence their selection and subsequently their decisions. When a person's full-time job will be the adjudication of cases within one narrowly defined subject area, special interests have a greater incentive to lobby for or against appointment, and the authorities who make the appointments have a greater incentive to choose someone who is similarly minded. After appointments, the danger of capture by special interests becomes more evident.²⁵¹ Again, the proposed reform would greatly minimize those problems. Potential lobbyists will not know in advance which federal judgeship nominees will one day serve on the U.S. Court of Appeals for Immigration. The judges would not occupy those roles until at least three years in the future, their assignments to the new court would be in the hands of a collective group of judges rather than a single individual, and the short duration of the assignment (two years) further minimizes both the profit in lobbying and the opportunity for capture.

There are also important affirmative advantages to adjudication by generalists.²⁵² Judges with generalist experience can draw guidance, analogies, and inspiration from other judicial contexts and can approach cases with fewer and less-entrenched biases and preconceptions. A more varied diet of cases might also expand the recruitment pool by inducing talented individuals to seek out judgeships or professional staff positions. All of these advantages have special salience in immigration law, because liberty interests are at stake and the complex agency framework makes a broad knowledge of administrative law exceptionally useful. Again, the proposed framework would utilize that generalist experience by limiting eligibility for service on the new court to those judges who

251. See LEGOMSKY, *supra* note 248, at 16; Verkuil & Lubbers, *supra* note 194, at 756–58 (discussing the effects of specialization on lobbying); *Id.* at 767 n.181 (acknowledging concerns that veterans' groups have captured the Board of Veterans' Appeals and the Article I U.S. Court of Appeals for Veterans Claims).

252. See Jason Rathod, Note, *Not Peace, but a Sword: Navy v. Egan and the Case Against Judicial Abdication in Foreign Affairs*, 59 DUKE L.J. 595, 617–18 (2009) (invoking the benefits of a generalist perspective as part of an argument for judicial review of agency security clearance determinations). See generally LEGOMSKY, *supra* note 248, at 7–19 (discussing the benefits and costs of judicial specialization).

had accumulated the requisite experience on a federal court of general jurisdiction.

3. *Fix '96.* As discussed in Section D.2.b, this proposal would give the new immigration court jurisdiction that roughly parallels that of the current BIA. By doing so, it would effectively negate some of the more severe constraints that Congress placed on judicial review of removal orders in 1996. Until that year, virtually all administratively final deportation orders (as they were then called) were reviewable in the courts of appeals.²⁵³ In 1996, however, Congress slashed judicial review in numerous ways. Among the most important of these restrictions were the bars on review of most discretionary decisions and most crime-related removal orders.²⁵⁴ The inability to appeal discretionary decisions has had special impact, because, as noted earlier, the vast majority of noncitizens in removal proceedings apply for various forms of discretionary relief.²⁵⁵

Because my proposed Court of Appeals for Immigration would assume essentially the same jurisdiction as the current BIA, the practical effect would be to restore the Article III judicial review that was lost in 1996. The familiar benefits of Article III judicial review of administrative tribunal decisions, in turn, are ample and discussed elsewhere.²⁵⁶

4. *Fiscal Cost and Waste.* This proposal substantially reduces fiscal waste and, most likely, overall fiscal costs. Initially, that claim might seem counterintuitive. After all, the time of federal judges is typically more costly than the time of the BIA members who decide these cases today. Nonetheless, the proposed new system would reduce costs in four ways:

First, for a given number of cases per adjudicator and cases per law clerk, the costs actually turn out to be lower for the federal courts than they are for the BIA. Federal judges' salaries are higher than

253. 8 U.S.C. § 1105(a) (1994).

254. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 306, 110 Stat. 3009-546, 3009-607 to -608 (codified as amended at 8 U.S.C. § 1252(a)(2)(B)-(C) (2006)) (amending section 242(a)(2)(B)-(C) of the Immigration and Nationality Act). The REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 302 (codified in scattered sections of 8 U.S.C.), clarified that both of these bars were subject to exceptions for questions of law. 8 U.S.C. § 1252(a)(2)(D).

255. See *supra* notes 34-38 and accompanying text.

256. See LEGOMSKY, *supra* note 149, at 272-98.

those of BIA members, but only slightly. The current salaries of circuit judges and district judges are \$184,500 and \$174,000, respectively;²⁵⁷ BIA members' salaries range from \$162,900 to \$171,180²⁵⁸—very close to the salaries of the district judges who would make up the vast majority of the new appellate adjudicators under my proposal. More than offsetting that small differential is the fact that the salary range of the BIA staff attorneys (formally called attorney advisors) is much *higher* than that for federal court law clerks. The BIA attorney advisors earn between \$86,927 and \$153,200 per year.²⁵⁹ For federal law clerks, the salary varies with location, but in cities other than those specifically designated, the usual starting salary is \$56,411 (including a cost of living allowance).²⁶⁰ For the minority of federal law clerks who serve a second year (and who have been admitted to Bar membership), the salary, in cities other than those designated, is \$67,613.²⁶¹ And in both the BIA and the federal courts, the law clerks (or attorney advisors at the BIA) far outnumber the judges (BIA members).²⁶² Thus, the much higher clerk salaries at the

257. *COLA for Federal Judges in 2009*, THE THIRD BRANCH (U.S. Courts, Wash., D.C.), Mar. 2009, at 3, available at http://www.uscourts.gov/ttb/2009-03/article03.cfm?WT.cg_n=TTB_Mar09_article03_tableOfContents.

258. *Komis*, *supra* note 73, at 2.

259. *Id.*

260. Recent law school graduates usually qualify for grade JSP-11, step 1 appointments; after one year of postgraduation experience and Bar membership, the grade is usually JSP-12, step 1. Online System for Clerkship Application and Review, Qualifications, Salary and Benefits, <https://oscar.uscourts.gov/drupal/print/18> (last visited Mar. 30, 2010). Including the cost of living allowance for all cities other than those specifically listed, the 2009 annual salary for JSP-11, step 1 is \$56,411; for JSP-12, step 1, it is \$67,613. U.S. COURTS, JUDICIAL SALARY PLAN PAY RATE TABLE 01: REST OF THE UNITED STATES (2009), http://www.uscourts.gov/careers/Pay_Tables/2009_Pay_Tables/Judiciary_Salary_Plan_Pay_Tables/Base_and_Locality_Pay_Tables/JSP01.pdf. For salaries for specific cities, see, for example, U.S. Courts, Judicial Salary Plan Locality Rate Pay Tables 2009, http://www.uscourts.gov/careers/Judicial_Salary_Plan_Locality_Rate_Pay_Tables_2009.cfm (last visited Mar. 30, 2010).

261. See *supra* note 260.

262. The number of authorized federal judgeships for each court is set by statute. See 28 U.S.C. § 44 (2006) (authorizing judgeships for the courts of appeals); *id.* § 133 (authorizing judgeships for district courts). As of March 30, 2010, there were 167 authorized active judgeships in the regional courts of appeals (excluding the Court of Appeals for the Federal Circuit) and 667 in the district courts. U.S. Courts, Federal Judiciary Judges and Judgeships, <http://www.uscourts.gov/judges.htm> (last visited Mar. 30, 2010) (linking to Authorized Judgeships). In contrast, as of August 16, 2009, the active circuit judges employed 468 full-time equivalent law clerks (410 term law clerks, fifty-eight career law clerks). E-mail from Gary Bowden, Admin. Office of U.S. Courts, to author (Sept. 20, 2009) (on file with the *Duke Law Journal*). Active circuit judges also employed approximately five hundred staff attorneys. See Office of the Circuit Exec., U.S. Court of Appeals for the Ninth Circuit, Staff Attorneys' Offices: Allocation of Work Units FY 2009 (Mar. 4, 2009) (on file with the *Duke Law Journal*).

BIA easily outweigh the slightly higher adjudicator salaries in the federal courts.

I am not suggesting that the cost per case is *currently* greater at the BIA than in the courts of appeals. Because the current norms are single-member decisions at the BIA and three-judge panels in the courts of appeals, and because the BIA members and their staff attorneys have been assigned far heavier caseloads than their respective counterparts in the courts of appeals, any comparison based on current staffing arrangements and panel sizes would be skewed. Those arrangements are themselves the products of conscious policy choices. Whether appellate adjudication of removal orders lies with the BIA, the courts of appeals, my proposed Article III Court of Appeals for Immigration, or any other tribunal to which Congress wishes to grant jurisdiction, Congress could choose whatever staffing levels and panel sizes it thinks optimal. A fair comparison, therefore, must assume a constant caseload per adjudicator, a constant caseload per staff attorney or law clerk, and a constant panel size. Of course, except for the salaries of the federal Article III judges, the salary ranges of the relevant personnel could also be changed. At least under the current salary ranges, the data supplied above demonstrate that, for a given total caseload, a given number of adjudicators and support staff, and a given panel size, BIA review, surprisingly, is more expensive than court of appeals review.

Positing a given total caseload, however, assumes that the current rate of appeal from the immigration judges' decisions to the BIA (approximately 30 percent in fiscal year 2008)²⁶³ will carry over to appeals from the proposed ALJs for Immigration to the proposed U.S. Court of Appeals for Immigration. In fact, the rate at which the decisions of immigration judges or their successors are appealed might either increase or decrease. On the one hand, future increases in immigration enforcement could increase the total number of immigration judge decisions and therefore the total number of appeals. In addition, the drop in the rate of appeals from immigration judge decisions to the BIA from fiscal year 2004 to fiscal year 2008 (from 16 percent to 9 percent)²⁶⁴ might reflect the current economic

The active district judges employed another 1,379 full-time equivalent law clerks (936 term and 443 career). E-mail from Gary Bowden, *supra*. The Board of Immigration Appeals has only fifteen members, 8 C.F.R. § 1003.1(a)(1) (2009), but 114 staff attorneys, known as attorney advisors, Komis, *supra* note 73, at 2.

263. *See supra* note 49.

264. EOIR, *supra* note 5, at Y1 fig.32.

downturn, which presumably diminishes the incentive to fight for the right to remain at the same time that it renders legal services less affordable. If this theory is accurate, then future economic recovery could restore the appeal rate to its historic levels. Alternatively, perhaps the drop in the rate of appeals to the BIA reflects the faster BIA turnaround time, which arguably has dampened the incentive to file BIA appeals for the purpose of delaying removal. If so, then any increase in the future appellate turnaround time could trigger a rise in the appeal rate. Still another possibility is that immigration judges, stung by the criticisms of their inconsistent asylum approval rates, have responded with more favorable asylum rulings, in which event one would expect the pool of asylum denials to decrease generally and, moreover, for those asylum applications that immigration judges deny to be less likely to contain a basis for appeal. In that scenario, a future decrease in immigration judges' asylum approval rates could raise the rate of appeals. Finally, as Professor Lenni Benson has suggested, perhaps the drop in the rate of appeals reflects an increase in the number of in absentia removal orders entered by immigration judges. In absentia orders are less likely to be appealed because the immigrant might not learn of the order in time to appeal.²⁶⁵ If so, then a change in the proportion of in absentia orders could trigger a corresponding change in the appeal rates.

The relevant question, however, is not whether the rates of appeals from the decisions of immigration judges or their successors are likely to increase or decrease in the future. Rather, the critical question is whether the rate of appeals is likely to be greater if the BIA is replaced by the proposed Court of Appeals for Immigration than it would be if appeals remain with the BIA. The answer to that question is uncertain. On the one hand, perhaps the drop in the rate of appeals to the BIA from 2004 to 2008 reflects a lack of confidence in that tribunal; based on that assumption, substituting an Article III court for the BIA might increase the rate of future appeals. That causal link seems shaky, however. The two major events that might be expected to have diminished immigrants' confidence in the BIA were the 2002 BIA procedural reforms and the purge of the more immigrant-friendly BIA members in 2003. As discussed earlier,²⁶⁶ the effects of that loss of confidence manifested themselves in dramatically higher rates of petitions for review of BIA decisions

265. See Benson, *supra* note 7, at 417.

266. See *supra* notes 105–08.

from just before to just after those years—not in the period 2004 to 2008. There is no evidence that confidence in the BIA further eroded during the latter period.

On the other hand, there are reasons to expect a lower rate of appeals under my proposal than under the current system. First, converting the current immigration judges, who work under the supervision of one of the opposing parties—the U.S. government—into an independent adjudicatory tribunal should bolster confidence in the original decisions.²⁶⁷ Second, those who lack access to counsel might find it more intimidating to appeal to a full-fledged federal court than to appeal to an administrative tribunal. As discussed in Section D.1.c, the goal will be to make the procedures of the new court informal and accessible, but whether the perception will track the reality is uncertain. I therefore assume that, *with a constant caseload and constant total staffing*, the existing salary structure would make review by the proposed Article III immigration court more economical than review by the BIA.

A second, and perhaps even more compelling, source of savings is that the proposed bill would reduce the number of appellate rounds from two to one. Thus, it is not just a matter of substituting one round for a more expensive round; the one round of review would replace a more expensive round *plus* another round.

The precise amount of savings from eliminating the BIA is hard to estimate. Regrettably, EOIR is unable to disaggregate its approximately \$300 million budget into component units.²⁶⁸ In a carefully prepared estimate, however, Russell Wheeler has estimated the fiscal year 2010 cost of the BIA at \$96 million.²⁶⁹ Even so, he is skeptical that these savings would exceed the annual cost of a new U.S. Court of Appeals for Immigration, if it is staffed with enough judges to handle its expected caseload. He estimates the latter cost at between \$92 million and \$105 million under different sets of assumptions,²⁷⁰ and he is very likely right. Again, however, those estimates reflect Congress's historic willingness to give the federal

267. Judge Marks has offered a variant of this argument. She has suggested that restoring the independence of the immigration judges (through creation of an Article I immigration court) should enhance immigrants' confidence in the original decisions, thus decreasing the rate of appeals from the BIA (or a successor tribunal) to the courts of appeals. Marks, *supra* note 7, at 4.

268. Komis, *supra* note 73, at item 11.

269. Wheeler, *supra* note 170, at 1862.

270. *Id.* at 1862–63.

courts more resources per case than the BIA. If the cost per case is currently lower at the BIA than it is in the courts of appeals, it is because of conscious policy choices. For a given caseload per judge and a given ratio of law clerks and staff attorneys to judges—which I maintain is the relevant consideration—it remains true that BIA adjudication is more expensive than federal court adjudication because of the salary structures just discussed. A fortiori, the combination of BIA adjudication and federal court adjudication is more expensive than the latter would be if it were the sole round of appellate review.

At any rate, the present proposal contains a third source of cost savings. One fewer round of adjudication also means fewer prosecutorial expenses. The annual salary range of the ICE assistant chief counsels who currently represent the government in BIA appeals is \$49,544 to \$127,604,²⁷¹ plus locality pay.²⁷² There are 712 full-time equivalent ICE assistant chief counsels handling removal hearings and BIA appeals, and the bulk of their time is spent on removal hearings before the immigration judges.²⁷³ Under the present proposal, that use of their time would not change, but they would no longer need to spend additional time on BIA appeals. Wheeler predicts that, even if the Justice Department no longer prosecutes BIA appeals, it would argue that its current staffing levels will still be required for other immigration-related matters.²⁷⁴ I agree. If that prediction pans out, however, it would not destroy anticipated savings. It would mean only that the resources saved from the elimination of BIA appeals could be reallocated to more productive work, such as litigating the appeals that would now be filed in the new appeals court. At present, 239 attorneys situated in the Justice Department's Office of Immigration Litigation, with average annual salaries of \$123,000, litigate immigration cases in the federal courts.²⁷⁵

271. The pay grades of the ICE assistant chief counsels range from GS-11, step 1 to GS-15, step 10. E-mail from Peter Vincent, *supra* note 10. Effective January 2009, the annual salaries for those ranks are \$49,544 and \$127,604, respectively. U.S. OFFICE OF PERS. MGMT., SALARY TABLE 2009-GS (2009), available at <http://opm.gov/flsa/oca/09tables/pdf/gf.pdf>.

272. See U.S. OFFICE OF PERS. MGMT., COMPLETE SET OF LOCALITY PAY TABLES (2009), available at <http://opm.gov/flsa/oca/09tables/pdf/saltbl.pdf>.

273. E-mail from Peter Vincent, *supra* note 10.

274. Wheeler, *supra* note 170, at 1863.

275. Telephone Interview with Juan P. Osuna, Deputy Assistant Attorney Gen., Civil Div., U.S. Dep't of Justice (Aug. 26, 2009).

Fourth, as discussed later in this Section, the elimination of one appellate round would shorten the elapsed time from the start of removal proceedings to the finish. In fiscal year 2008, some 48 percent of all the immigrants in completed removal proceedings were being detained at government expense.²⁷⁶ As noted later in this Section, the average elapsed time for BIA appeals in which the immigrants are detained is ninety-five days. Thus, the dropoff in elapsed time from eliminating the BIA would reduce detention costs significantly.

This cost analysis is crude, but it suggests that the proposal would substantially reduce the total fiscal cost of appellate review of removal orders. What could be done with these cost savings? One option is to do nothing. The consolidation could simply be conceived as a cost-cutting device or as a way to free up funds for unrelated national needs. My view is that even under that approach the other benefits described in this Section would make the immigration adjudication system stronger than it is today. Given the extreme underfunding of the system, however, increasing the numbers of both adjudicators and law clerks should be a high priority. The high stakes for both the individuals and the general public demand no less. The hope, therefore, would be that the savings from the elimination of the BIA and other associated reductions in expenditures would be reinvested in either the Office of Administrative Law Judges, the United States Court of Appeals for Immigration, or both.

It is possible, as Wheeler points out, that Congress would be stingier in providing resources for a freestanding immigration adjudication system than the Department of Justice currently is in allocating resources to EOIR.²⁷⁷ Precisely the opposite, however, is also possible. Much would depend on the compositions of the particular Congresses and the particular administrations in power at given times. Considering the Justice Department's law enforcement mission, I am not convinced that there exist systematic institutional reasons to expect the former scenario to occur more frequently than the latter.

Finally, I cannot claim that these savings alone would be enough to raise the quality of the immigration adjudication system to an acceptable level. The current underresourcing is so severe that a more realistic funding level would be required under any set of reforms. But even the revenue-neutral approach described here would permit

276. EOIR, *supra* note 5, at O1 fig.23.

277. Wheeler, *supra* note 170, at 1853–54.

significant enhancements. The funds could be redirected to increasing the number of adjudicators or increasing the number of law clerks at either the trial level, the appellate level, or both. At the appellate level, an enlarged corps of either adjudicators or law clerks could be directed toward reducing individual caseloads or expanding the use of multimember panels, or both. I express no view here regarding the optimal use of those funds; I suggest only that any of these strategies would restore some of the lost quality to the immigration adjudication system. Instead of two highly flawed rounds of review in which appellate authorities are forced to decide cases after little more than quick glances at the files and dangerous shortcuts, Congress should redirect the same funds (and ideally additional funds) to a single round of high-quality review.

5. *Elapsed Time.* By eliminating one step in the process, this proposal would do more than save money. It would also reduce the elapsed time from the start of proceedings to their conclusion. Elapsed time is important for several reasons. As previously noted, 48 percent of the immigrants in removal proceedings are detained pending final determinations.²⁷⁸ EOIR prioritizes these cases,²⁷⁹ but priorities that encompass almost one-half of the cases can have only limited effects. Former BIA Chair Juan Osuna has noted that BIA policy is to decide all appeals involving detained immigrants within 150 days and has said that, in practice, appeals by detained immigrants have taken an average of ninety-five days to complete.²⁸⁰ Eliminating BIA review would thus save substantial time. Reducing time in detention, in turn, has obvious benefits. In addition to reducing fiscal costs and minimizing the loss of individual liberty, decreasing detention times would free up beds that could be used for immigrants who are most likely either to abscond or to threaten public safety.

Moreover, whether an immigrant is in detention or not, delay is detrimental to the public interest. If the individual is indeed deportable, and is either ineligible for, or undeserving of,

278. See *supra* text accompanying note 276.

279. See Maria Baldini-Potermin, *Practice Before the Board of Immigration Appeals: Recent Roundtable and Additional Practice Tips*, 86 INTERPRETER RELEASES 2009, 2010 (2009) (summarizing information shared by Juan Osuna, the then-chair of the BIA); cf. Komis, *supra* note 73, at 4 (listing variables, including detention, that affect the processing times for removal proceedings).

280. Baldini-Potermin, *supra* note 279, at 2010.

discretionary relief, the public has an interest in speeding removal. If the person is detained, delay increases the public cost. If the person is at large, that person's continued presence in the United States is detrimental to the public interest for whatever reasons prompted Congress to make the particular conduct a ground for deportation. Conversely, if the removal order is ultimately determined to be erroneous and the individual in fact has a legal right to remain, the person deserves freedom as soon as possible. Either way, delay is harmful.

6. *Flexibility.* The variability of appellate caseloads demands flexibility in the system for assigning judges to cases. Appellate caseloads fluctuate for numerous reasons.²⁸¹ The total number of appealable trial-level decisions can increase or decrease with changes in migration flows or changes in the law enforcement priorities of particular administrations. Thus, even a constant rate of appeal will lead to either more or fewer total appeals. The rate of appeal can also change. The resources allocated to the trial phase of the process, as well as the composition of the trial bench, might influence the outcomes of trial-level decisions or the parties' perceptions of either the accuracy of those outcomes or the fairness of the procedures. Any of these factors has the potential to alter the parties' inclinations to appeal. Consequently, long-term future immigration appellate caseloads are impossible to predict.

Flexibility, therefore, is critical. A court staffed by specialized Article I judges would be hard pressed to supply that flexibility, because specialist adjudicators are not easily transferred to other adjudicative roles. The same would be true if an immigration appellate court were staffed by specialized Article III judges who were originally appointed specifically to that court and permanently assigned there. The present proposal, in contrast, offers the requisite flexibility. If future immigration appellate caseloads substantially decline, fewer judges would be designated for the temporary assignments to the new court, and at any rate those already assigned would soon return to their district or regional appellate courts.

7. *Centralization.* The effects that have been described to this point—the depoliticization of the entire adjudication process, the retention of both generalist and specialist insights at the appellate

281. See *supra* notes 263–67 and accompanying text.

level, the cost savings and efficiencies, the speeding of the process, and the flexibility of arrangements—have all been presented as important benefits of the proposed restructuring. One other element of this proposal, appellate centralization, has more mixed effects. At present, all appeals go to a single tribunal (the BIA), and some of them are further reviewed by a network of nationally dispersed courts of appeals. My proposal would direct all appeals to a single centralized court. Centralization would bring additional benefits, but it would also impose costs.

On the benefit side, routing all appeals to the same court would theoretically promote uniform outcomes. When the regional courts of appeals share jurisdiction over the same subject matter, as they do today, splits of authority inevitably occur. To that extent, the principle of equal treatment for similarly situated individuals is sacrificed. In immigration law, a field in which courts like to emphasize the importance of the nation speaking with a single voice, divergent outcomes are sometimes assumed to have adverse foreign policy implications.²⁸² In asylum cases, the extreme inconsistency that recent empirical studies have revealed provides another reason to seek out centralizing influences.²⁸³

Still, I resist the temptation to tout the uniformity benefits of my proposal. Though the immigration opinions of the various regional courts of appeals can indeed diverge, the same is true of all the other subject areas over which those courts have jurisdiction. There is no reason to expect greater divergence in immigration than in other areas. The notion that divergence is especially problematic in immigration cases because of their potential to affect foreign relations is plausible in theory, but I have argued in a different context that the likelihood of a given immigration case interfering significantly with U.S. foreign relations is highly remote in practice.²⁸⁴ And although the inconsistency in the asylum context is quite real, there is little likelihood that divisions among the circuits on questions of law are

282. To hold that the federal government (not the states) has the exclusive power to regulate immigration, for example, the Supreme Court has extolled the importance of nationwide uniformity. *See, e.g.,* *Henderson v. Mayor of N.Y.*, 92 U.S. 259, 273 (1876) (arguing that the immigration laws should be the same in all cities); *Chy Lung v. Freeman*, 92 U.S. 275, 279–80 (1876) (arguing that a lack of uniformity in immigration laws could result in one state embroiling the entire nation in disputes with other nations).

283. *See supra* note 71 and accompanying text.

284. *See* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 261–69.

major culprits. First, the asylum inconsistencies have occurred within the same circuits and even among judges within the same immigration courts.²⁸⁵ Further, the main issues in asylum cases have been fact questions—in particular, assessments of the applicants' credibility—not questions of law that can generate circuit splits.²⁸⁶

Moreover, circuit splits can have positive benefits. They can foster healthy discussions of opposing viewpoints and a productive maturation process. They can also help avoid dangerous concentrations of power in a single body.²⁸⁷ In addition, circuit splits can prompt definitive, authoritative rulings from the Supreme Court. Substituting a single appellate court sacrifices these advantages to some extent.

Another cost of centralization is that oral argument will be less practicable when counsel lives far away. A system of dispersed courts reduces the average time, distance, and cost of travel for counsel. Because the present proposal calls for temporary assignments of district and circuit judges to a new immigration court, the assigned judges would either have to move temporarily to a new location, travel periodically to the immigration court, or forgo personal interaction with their colleagues on the new court and with counsel. Moving one's residence for two years would disrupt the personal lives of many judges, traveling periodically to the court adds fiscal costs, and dispensing with either panel deliberations or oral argument would diminish the quality of the appellate process.

My view is that some of these disadvantages are minor and that the others are easily remedied. In the present context, the dangerous concentration of power in a single court is less serious than it first appears. First, the status quo effectively embodies the same feature. The vast majority of BIA decisions are never appealed; thus, the BIA typically has the last word.²⁸⁸ Even when a BIA decision is challenged

285. See Ramji-Nogales et al., *supra* note 7, at 328–39. Because the petition for review must be filed in the circuit in which the removal hearing was held, 8 U.S.C. § 1252(b)(2) (2006), circuit splits would not explain these inconsistencies.

286. See Palmer, *supra* note 38, at 977.

287. See S. Rep. No. 111-101, at 23–26 (2009), available at http://www.fas.org/irp/congress/2009_rpt/whistle.pdf (expressing dissatisfaction with restrictive interpretations of the Whistleblower Protection Act by the U.S. Court of Appeals for the Federal Circuit, which has exclusive jurisdiction, and proposing to extend jurisdiction to other courts).

288. As noted earlier, immigrants petition for review in approximately 30 percent of BIA decisions. See *supra* note 49.

in court, the combination of *Chevron* deference²⁸⁹ to BIA interpretations of law and the limited scope of judicial review on questions of fact and discretion²⁹⁰ results in a highly concentrated BIA power not only to decide cases but also to shape future law. As a result, the proposed centralization of judicial review would alter the extent of the concentration of adjudicatory power only marginally. Second, even if there is only one court, the heavy volume of immigration appeals virtually guarantees that the decisions of the new court would be diffused among a large number of judges, presumably spanning a broad ideological spectrum.

As for the logistics, it must be remembered that the current BIA sits in only one location, and not a very central location at that: Falls Church, Virginia. Again, however, only a minority of the BIA decisions are further appealed. The proposed restructuring would therefore leave the appellate tribunal only marginally less accessible than it is today—perhaps even more accessible if the court is situated nearer to the geographic center of the United States and definitely more accessible if, as suggested below, the court sits in multiple venues. With respect to oral argument, the new arrangement also concedes very little, because the BIA heard oral argument in only one case in fiscal year 2009.²⁹¹ Again, given that only a minority seeks further review of BIA decisions, the vast majority of immigrants who appeal immigration judge decisions receives no oral argument at all under the current structure.

My proposal would allow the new court to formulate its own criteria for oral argument, based on resources, caseload, and any other relevant factors. If the judges choose to remain based in their home cities rather than move temporarily to the site of the new court, they could bunch the cases that require oral argument and travel periodically to the new court to hear them. Judges of the regional courts of appeals must currently do precisely that, and several circuits encompass vast geographic areas. The Ninth Circuit ranges from Hawaii to Alaska to Arizona, the Eighth Circuit from North Dakota to Arkansas, the Tenth Circuit from Wyoming to Oklahoma. With only one centralized appellate court, the travel distances admittedly

289. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 841, 862–63 (1984).

290. See 8 U.S.C. § 1252(b)(4) (making BIA factfinding “conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,” and the attorney general’s discretion regarding relief “conclusive unless manifestly contrary to the law and an abuse of discretion”).

291. *Komis*, *supra* note 73, at 3.

would be even greater, but that marginal difference must be balanced against the reality that, for the vast majority of BIA litigants, there is currently no oral argument at *any* stage of the appellate process. Indeed, as a result of the current restrictions on judicial review,²⁹² many litigants lack access not only to oral argument but also to any judicial review at all. The proposed restructuring would plug that gap.

Finally, if either travel logistics or the concentration of adjudicatory power in a single court is nonetheless considered problematic, Congress can choose to situate the new court in multiple cities (perhaps three). Judges might be more inclined to relocate temporarily if given a choice of cities. Even if they choose not to relocate, a thoughtful selection of venues would reduce travel times for both judges and counsel. The resulting travel burdens would thus approach, if not quite equal, those which they experience today for oral argument in the various regional courts of appeals. If Congress were to establish multiple sites, it would have at least two options. It could create multiple U.S. Courts of Appeals for Immigration, empowering each to develop its own precedents, as the regional courts of appeals now do, or it could simply establish multiple venues for the same court, in much the same way each regional court of appeals now operates internally. The former arrangement would better address the dangerous concentration of power problem, and either arrangement would ease the travel burdens for oral argument or for panel deliberation. There are alternative solutions to the logistical issues as well. One option is for the judges to ride circuit when the occasion so demands. Videoconferencing and other technology could address some of the distance issues.

8. *Potential for Consensus.* It is perhaps naïve to expect *any* meaningful reform of immigration adjudication to command consensus in the present highly charged partisan climate. This proposal, however, presents tradeoffs that the typical opposing sides in this debate might find worthwhile. In exchange for minor sacrifices, each side would achieve what is most important to it.

Those who tend to prioritize the interests of the immigrant should be pleased with the decisional independence for immigration judges. Moreover, instead of appellate review by an administrative tribunal whose members are appointed by, and restrained by, the attorney general, there is a right of review by Article III judges with

292. 8 U.S.C. § 1252(a)(2); *see also supra* notes 34–35 and accompanying text.

real independence. In the process, the 1996 court-stripping legislation would be effectively neutralized, because there would be a right of review by Article III judges in all removal cases. There are also the combined benefits of specialized expertise and a generalist perspective at the appellate level, again for all cases.

Those who generally prioritize the interests of the government should similarly be receptive, because this proposal offers much of what they have long said they want. With only one appellate round rather than two, the process is shorter and cheaper. The neutralization of the 1996 court stripping should not be troubling, because review by the new court in those cases will simply replace BIA review of those cases. Instead of every party having a right to one round of review and some having the right to a second round, every party will be limited to one round. The elimination of the second round not only saves taxpayer funds, but also reduces the delays that some believe incentivize frivolous appeals.²⁹³

I predict that the federal judges themselves will be less than enthusiastic about this proposal, at least initially. Some might specifically dislike immigration cases. Specific likes and dislikes aside, federal judges did not sign up to be specialists. Part of the lure of the job might well have been the interesting diversity of subject matter to which their cases would expose them. Still, at present, the circuit judges bear the entire responsibility for deciding immigration appeals;²⁹⁴ my proposal would distribute the immigration caseload more equitably among the district judges and circuit judges. Moreover, even those judges who are assigned to the new immigration court despite a preference to be elsewhere will not necessarily be hearing more immigration cases than they would otherwise hear. They will simply be hearing the immigration cases in a more compressed time frame. Finally, those who specialize in immigration law know firsthand the fascinations of this extraordinary field. After significant exposure to immigration law and an opportunity to master its nuances, many of the judges who would not

293. As Wheeler points out, the creation of new federal judgeships, with the resulting opportunity for one president to substantially alter the composition of the federal bench, could pose particular political problems in an era of intense congressional partisanship. Wheeler, *supra* note 170, at 1863–64. As he further notes, however, an omnibus judge bill might attract bipartisan support if the effective date is deferred to the start of the next presidential term and the bill is voted on before anyone could reliably predict the outcome of the next presidential race. *Id.* at 1863.

294. See 8 U.S.C. § 1252.

have chosen two-year rotations to an immigration appeals court undoubtedly will develop a new appreciation for the subject matter and genuine fulfillment in their experiences.

No one could responsibly argue that the BIA has contributed nothing to the immigration adjudication process. It has disposed of large numbers of cases cheaply and speedily, and in the process it has provided twenty-five volumes of published precedent decisions²⁹⁵ that have guided immigration judges and administrative officials for seventy years.²⁹⁶ The question I pose, however, is whether the value added by the BIA can match the gains from redirecting the funds currently spent on two badly underresourced rounds of appellate review into a single round of careful, high-quality review by independent judges who combine specialist and generalist perspectives. I believe it cannot and thus favor the consolidation the proposal offered here would permit.

D. The Details

At the request of the U.S. Senate Subcommittee on Immigration, Refugees and Border Security, I have prepared a draft bill that would embody the proposal made in this Article.²⁹⁷ For the trial phase, the more significant details of the draft bill concern the appointments of the adjudicators, their jurisdiction, and the trial procedures. For the appellate phase, the main details relate to the assignments of the judges, their jurisdiction, the scope of review, the appellate procedures, filing deadlines, and stays of removal pending review.

1. The Trial Phase

a. Appointments of Adjudicators. The draft bill would establish, as an independent executive branch tribunal outside all departments of government, the Office of the Administrative Law Judges for Immigration (OALJI). In most respects, this office is analogous to the existing Office of the Chief Immigration Judge. The president would appoint, with the advice and consent of the Senate, a Chief

295. See EOIR, U.S. Dep't of Justice, Virtual Law Library, <http://www.justice.gov/eoir/vll/libindex.html> (last visited Mar. 30, 2010) (containing published BIA decisions).

296. See Regulations Governing Departmental Organization and Authority, 5 Fed. Reg. 3502, 3503 (Sept. 4, 1940) (codified as amended at 8 C.F.R. pt. 1003) (creating the BIA); Legomsky, *supra* note 6, at 1380 n.488 (noting that no attorney general had ever removed a BIA member).

297. The draft bill is on file with the *Duke Law Journal* and is available on request.

Administrative Law Judge for Immigration (CALJI), to serve for a term of seven years. Instead of immigration judges, there would be Administrative Law Judges for Immigration (ALJIs). They would be based in various district offices around the country, just as the immigration judges now are.

The existing immigration judges would generally be grandfathered into the new ALJI positions, as has been done in some analogous contexts.²⁹⁸ Other staff would be similarly grandfathered. The bad apple problem discussed in Part II.B.4, however, requires a difficult judgment call. Grandfathering everyone would extend functional life tenure even to those current immigration judges whose behavior renders them unfit to wield adjudicatory power. There is a tension between the need to weed out those individuals and the potential for selective grandfathering based on ideology. Absent evidence that the bad apples number more than a few, one alternative is simply to accept these few as a tradeoff for avoiding the dangers of politicized selections. But that tradeoff would offer little solace for the immigrants who appear before those problematic adjudicators. The compromise I propose is to subject the grandfathering to a specific exclusion for any current immigration judges whom a special commission identifies as having exhibited patterns of incompetence, bias, or unprofessional conduct. The judge in question would then have the right to an evidentiary hearing before, and a *de novo* determination by, the Merit Systems Protection Board.

The biggest changes for the trial-level adjudicators would be those designed to assure their decisional independence and more generally to depoliticize the adjudication process. The changes would be reflected in the adjudicators' organizational locations, appointments, and terms of office. After the initial grandfathering, the process for future appointments would be a slightly modified version of thoughtful proposals by the ABA Commission on Immigration and by Philip Schrag and Marshall Fitz. Both proposals call for an independent committee that would recommend trial judge candidates to the chief trial judge; under those proposals, the latter would then make the final selections from the recommended list. Congress would prescribe certain minimum qualifications (U.S. citizenship, Bar membership, and certain experience requirements).

298. See Marks, *supra* note 7, at 17 & n.89 (citing Tax Court judges and Court of Claims judges as examples).

Beyond those minimum credentials, the committee would be encouraged to consider a range of other statutorily specified factors.²⁹⁹

Rather than confine this committee to a purely advisory role, however, I would have it appoint the candidates directly. Its size and diversity render unlikely the chance that candidates with extremist views, problematic credentials, or difficult personalities will be appointed. The alternative of allowing a single chief immigration judge to select from a list of candidates—even if all are well qualified—would give that one individual a broad power to shape the long-term ideological composition of the immigration bench.

Once ALJIs are in office, I would give the CALJI the power to reassign them to different district offices as caseloads change,³⁰⁰ but only for reasons of efficiency, not as a form of discipline. The ALJIs' terms of office would be the same as for most other ALJIs; they could be removed only for good cause and only after a Merit Systems Protection Board hearing.³⁰¹

b. Jurisdiction. Immigration judges currently have jurisdiction over removal hearings, including the authority to decide almost all applications for affirmative relief commonly sought during removal proceedings.³⁰² They have jurisdiction over a few miscellaneous decisions as well.³⁰³ The draft bill generally grants the same authority to the ALJIs, but in somewhat more generic language and with a specific change to the adjustment of status procedures.³⁰⁴

299. See ABA, *supra* note 215, at 10–13; COMM'N ON IMMIGRATION, *supra* note 7, at 69; Fitz & Schrag, *supra* note 7, § 103(g).

300. The chief immigration judge currently enjoys a similar power to detail immigration judges to locations with more pressing needs. U.S. GOV'T ACCOUNTABILITY OFFICE, NO. GAO-06-771, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: CASELOAD PERFORMANCE REPORTING NEEDS IMPROVEMENT 17–19 (2006), available at <http://www.gao.gov/new.items/d06771.pdf>.

301. See *supra* note 198.

302. 8 C.F.R. § 1240.1(a)(1) (2009). For more detail, see *supra* text accompanying notes 12–23.

303. See 8 C.F.R. § 1003.19 (review of ICE bond decisions); *id.* § 1003.23 (motions to reopen or reconsider); *id.* § 1003.26 (in absentia hearings); *id.* § 1003.29 (continuances); *id.* § 1003.42 (review of credible fear determinations); *id.* § 1003.106 (practitioner discipline); *id.* § 1245.13(n)(2)–(3) (rescission of adjustment of status).

304. Rather than attempt to list all the various affirmative relief applications that may be filed in removal proceedings, the draft bill defines the ALJIs' jurisdiction more generically to include all requests for relief or protection that the Immigration and Nationality Act (INA) makes available to noncitizens who are inadmissible or deportable. In addition, the draft bill addresses a nagging problem. At present, the immigration judge has the authority to decide adjustment of status applications that are filed during removal proceedings. *Id.* § 1245.2(a)(1).

c. Procedures. A few procedural rules that currently govern removal proceedings are statutory.³⁰⁵ The proposed bill generally leaves those rules intact. Most of the current procedural rules, however, are embodied in the attorney general's regulations.³⁰⁶ The draft bill takes an analogous approach. It establishes an Executive Committee composed of the chief ALJI and four senior ALJIs, and authorizes it to formulate rules of procedure, adapting the notice-and-comment requirements generally applicable to judicial rulemaking.³⁰⁷ It enumerates several specific issues that the rules must address, including venue, admissibility of evidence, authorization to practice before ALJIs, and discipline of practitioners. To preserve the relative informality of the process, the draft bill requires that the representation rules provide for nonlawyers and that the evidentiary rules accommodate the high percentage of pro se cases. The draft bill also requires the ALJIs to follow the precedent decisions of the U.S. Court of Appeals for Immigration (and the preenactment precedent decisions of the relevant court of appeals).

One provision of the draft bill would prohibit *ex parte* communications between an ALJI and a party (or counsel) concerning a pending case. As noted earlier, the attorney general's current Rules of Conduct for both immigration judges and BIA members expressly allow such *ex parte* communications with Justice Department personnel, and in at least one highly publicized incident, the former INS successfully communicated *ex parte* with the chief immigration judge.³⁰⁸ There is no way to know how many other *ex parte* communications have taken place. In the interest of fairness to both parties, the proposed provision would expressly prohibit that practice.

But adjustment of status usually requires approval of a visa petition, which only DHS—not the immigration judge—currently has the authority to decide. *Id.* § 204.1(e)(1). To prevent the immigration judge from granting adjustment of status, DHS often deliberately refrains from acting on the visa petition. As a result, immigration judges have frequently had to grant multiple continuances while they wait for DHS to act on the visa petitions, thus delaying removal hearings for long periods of time. *See, e.g.,* LEGOMSKY & RODRÍGUEZ, *supra* note 68, at 666 (excerpting an unpublished decision in which a judge criticizes INS delay). To cure that problem, this subsection would give the immigration judge the authority to decide any family-related visa petition on which an adjustment of status application filed during removal proceedings depends.

305. *See, e.g.,* 8 U.S.C. § 1229a (2006).

306. *See* 8 C.F.R. § 1240.

307. *See* Rules Enabling Act, 28 U.S.C. §§ 2071–72 (2006).

308. *See supra* notes 150–52, 189 and accompanying text.

Current law requires the attorney general to issue regulations spelling out the contempt powers of immigration judges.³⁰⁹ To date, however, the attorney general has not done so, apparently because the former INS did not want its trial attorneys subject to discipline by other Department of Justice attorneys, even if the latter are judges.³¹⁰ Thus, immigration judges have had difficulty getting government attorneys to meet deadlines; this difficulty has slowed final dispositions.³¹¹ The draft bill fills that gap, conferring contempt authority directly in language drawn partly from that used for judges of the Tax Court.³¹² The same proposed provision clarifies that government actors and private actors alike are subject to the contempt power.

2. *The Appellate Phase*

a. Assignments of Judges. The draft bill would replace both the BIA and the current role of the regional courts of appeals in immigration cases with a new Article III U.S. Court of Appeals for Immigration (CAI). The president, with the advice and consent of the Senate, would appoint a chief judge of the CAI for a term of seven years. Each circuit would assign both circuit and district judges to sit on the new court for two-year terms.³¹³ If the draft bill becomes law, Congress would need to enact subsequent legislation specifying the number of judges it wishes to authorize for the new court, as well as any corresponding adjustments Congress wishes to make to the number of authorized judgeships for the existing courts of appeals and district courts. These adjustments would compensate those courts for the judges they would be lending to the new court while accounting for the corresponding reductions in the caseloads of the

309. 8 U.S.C. § 1229a(b)(1).

310. See Marks, *supra* note 7, at 10 (“[I]t was discovered that the Attorney General had failed to [issue regulations] 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.” (quoting KEENER & SLAVIN, *supra* note 187, at 87)).

311. See *Immigration Reform and the Reorganization of Homeland Defense*, *supra* note 187, at 75–76 (recommending that the INS be required to “meet timely pre-trial deadlines . . . or notify the court and parties of delays”); KEENER & SLAVIN, *supra* note 187, at 87 (discussing delay by the INS).

312. See 26 U.S.C. § 7456 (2006) (administration of oaths and procurement of testimony in the Tax Court).

313. To stagger the appointments in a way that would avoid a complete turnover of judges every two years, a transition provision prescribes three-year assignments for one-half of the first cohort of judges.

courts of appeals. To aid Congress in those decisions, the draft bill would require the Judicial Conference of the United States to study the likely needs of both the new court and the courts from which the assigned judges are drawn and report its recommendations to Congress by a specified date.

The draft bill offers a formula for determining how many judges each circuit would be required to contribute. Initially, I considered proposing that the allocations be proportional to the number of immigration judges who sit in each circuit at the date of enactment, with periodic future adjustments. My thinking was that the number of immigration judges in a circuit provides a rough measure of the number of removal cases the circuits would otherwise be receiving, and therefore an approximation of the caseload reduction that each circuit would experience as a result of the transfer of its cases to the new court. This approach is problematic, however, because petitions for review of removal cases are filed only in the courts of appeals.³¹⁴ Thus, the caseloads of those courts would drop while the district courts, which would lose the bulk of the judges, would not experience any offsetting caseload reductions.

Instead, therefore, the proposal would make each circuit's contributions proportional to the number of active Article III circuit and district judges in that circuit. The Judicial Council³¹⁵ of each circuit would then select the assigned judges, after a recommendation from the chief judge of the court of appeals for the circuit. To preserve a generalist perspective, only active Article III judges with at least three years of service on federal courts of general jurisdiction would be eligible for these two-year assignments. No judge could be assigned to more than one two-year assignment without consent, and there are special provisions for uncompleted assignments. Assignment to the new court would have no effect on a judge's pay. Subject to certain conditions, the draft bill also provides for ad hoc assignments of both active and senior district and circuit judges when temporary needs arise.

b. Jurisdiction. The BIA now has jurisdiction over appeals from immigration judge decisions in removal proceedings, as well as

314. See 8 U.S.C. § 1252.

315. The Judicial Council of each circuit comprises the chief judge of the court of appeals and some of the district and circuit judges of the circuit. 28 U.S.C. § 332(a)(1) (2006). I must acknowledge here the logistical and political challenges that the selection of judges would inevitably entail. See Wheeler, *supra* note 170, at 1849–50, 1863–64.

jurisdiction over a number of miscellaneous matters.³¹⁶ In substituting the CAI for both the BIA and the regional courts of appeals, the draft bill would confer on the new court a jurisdiction roughly similar to that of the current BIA. The practical effect would be to restore the most important Article III appellate jurisdiction Congress stripped away in 1996—review of most discretionary decisions and review of orders removing most criminal offenders.³¹⁷ Both the immigrant and the government would have the right to appeal. The CAI would also have the discretion to accept jurisdiction over issues that ALJIs certify to it.

c. Scope of Review. At present, the BIA reviews immigration judge decisions de novo, except that it may not set aside findings of fact unless they are “clearly erroneous.”³¹⁸ The statutory provisions on the scope of review by the courts of appeals are both more complex and more unusual. The reviewing court may set aside an administrative finding of fact only if “any reasonable adjudicator would be compelled to conclude to the contrary.”³¹⁹ An exclusion decision “is conclusive unless manifestly contrary to law.”³²⁰ A decision to deny asylum in the exercise of discretion (as distinguished from a finding that the applicant is statutorily ineligible for asylum) is “conclusive unless manifestly contrary to the law and an abuse of discretion.”³²¹ There is no provision that spells out the standard of review of those other discretionary decisions for which review is not barred. A finding that corroborating evidence was available to an asylum applicant but not produced must stand unless “a reasonable

316. See 8 C.F.R. § 1003.1(b) (2009) (establishing the appellate jurisdiction of the BIA).

317. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 306, 110 Stat. 3009-546, 3009-608 (codified as amended at 8 U.S.C. § 1252(a)(2)(B)–(C) (2006)). The draft bill does not disturb some of the other current restrictions on judicial review, such as the limitations on review of in absentia orders, see 8 U.S.C. § 1229a(b)(5)(D), the bars on challenging removal orders via habeas corpus, injunctions, class actions, and other alternatives to petitions for review, see *id.* § 1252(a)(5); *id.* § 1252(b)(9); *id.* § 1252(f), the limitations on review of expedited removal orders, see *id.* § 1252(a)(2)(A); *id.* § 1252(e), and the bar on challenging asylum denials based on missed filing deadlines, see *id.* § 1158(a)(3). Similarly, the draft bill does not alter the various special removal procedures sprinkled throughout the Immigration and Nationality Act. See generally LEGOMSKY & RODRÍGUEZ, *supra* note 68, at 806–15 (describing the exceptions to the usual removal procedures, such as for expedited removal, criminal cases, and in absentia hearings).

318. 8 C.F.R. § 1003.1(d)(3).

319. 8 U.S.C. § 1252(b)(4)(B).

320. *Id.* § 1252(b)(4)(C).

321. *Id.* § 1252(b)(4)(D).

trier of fact is compelled to conclude that such corroborating evidence is unavailable.”³²²

These latter rules, apart from being needlessly complex and difficult to interpret, reflect Congress’s intentions to narrow the judicial role. These rules were enacted, however, in a world in which the courts of appeals review final orders after the BIA has already reviewed those same orders. With the abolition of the BIA, the new CAI would provide the only opportunity for appellate review of the trial-level removal orders. The draft bill therefore prescribes the familiar standards generally applicable to judicial review of formal administrative decisions—the substantial evidence standard for findings of fact, the “arbitrary, capricious, [or otherwise] an abuse of discretion” standard for discretionary decisions, and *de novo* review for conclusions of law.³²³ The draft bill would leave intact the current provision confining the reviewing court to the administrative record.³²⁴

d. Procedures. The federal Rules Enabling Act already authorizes all courts established by Congress to “prescribe [procedural] rules for the conduct of their business.”³²⁵ The Judicial Conference of the United States reviews those rules for compliance with federal law.³²⁶ The rulemaking process must include opportunity for public notice and comment unless there is an immediate need to proceed more quickly.³²⁷ Subject to these constraints, the draft bill authorizes a majority of the active judges of the CAI to exercise this rulemaking power. With the abolition of the BIA, it will become important for the CAI to keep the rules simple enough for *pro se* appellants to navigate. For the same reason, the proposed CAI would

322. *Id.* § 1252(b)(4).

323. *See* 5 U.S.C. § 706(2)(A) (2006) (setting forth the scope of judicial review of agency action); ABA, Resolution 114D Adopted by the House of Delegates 4–5 (Feb. 8–9, 2010), available at http://www.abanet.org/leadership/2010/midyear/daily_journal/114D.pdf; COMM’N ON IMMIGRATION, *supra* note 7, at 36. Ordinarily, reviewing courts must defer to administrative tribunals’ reasonable interpretations of the statutes they administer. *See* *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984) (“[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”). Because the CAI would itself be a specialized court, however, there is little reason for it to accord deference to the legal conclusions of the ALJIs. The draft bill leaves that decision to the courts.

324. *See* 8 U.S.C. § 1252(b)(4)(A) (limiting review to the administrative record).

325. 28 U.S.C. § 2071(a) (2006).

326. *Id.* § 331.

327. *Id.* § 2071(e).

be wise to permit representation by appropriate categories of nonattorneys, as EOIR currently does.³²⁸

e. Filing Deadline. Current law imposes thirty-day filing deadlines for both appeals to the BIA and petitions for review in the courts of appeals.³²⁹ The draft bill would prescribe a similar thirty-day filing deadline for appeals to the CAI, but with one significant change. Rather than make the thirty-day deadline absolute, it would give the new court the discretion to extend the deadline upon a showing of “exceptional circumstances explaining the late filing” or otherwise “in the interest of justice.”³³⁰ The latter would apply, for example, if an appellant could not offer sufficiently compelling reasons for missing the deadline but when the facts are so extreme that the court regards removal without review as a sanction grossly disproportionate to the appellant’s filing error. A request for permission to extend the filing deadline, however, would not automatically stay removal.

f. Stays of Removal Pending Judicial Review. Currently, a removal order by an immigration judge is automatically stayed until the thirty-day filing deadline for appealing to the BIA has lapsed (or appeal has been affirmatively waived). The automatic stay continues while a BIA appeal is pending.³³¹ In contrast, an appeal to the BIA of an order denying reopening or reconsideration does not stay removal unless the BIA in its discretion orders otherwise.³³²

Until 1996, somewhat analogous rules applied to petitions for review in the courts of appeals. Service of the petition for review automatically stayed removal until the court decided the case, unless the court directed otherwise.³³³ Current law reverses that default option; a petition for review no longer stays removal unless the court in its discretion orders otherwise.³³⁴ In *Nken v. Holder*,³³⁵ the Supreme

328. See 8 C.F.R. § 1292 (2009) (permitting representation by listed categories of nonlawyers).

329. See *id.* § 1003.38(b) (addressing appeals to the BIA); 8 U.S.C. § 1252(b)(1) (describing petitions for review in the courts of appeals).

330. For a somewhat similar recommendation, see ABA, *supra* note 323, at 7 (proposing a sixty-day filing deadline, with the discretion to grant a thirty-day extension upon a showing of “excusable neglect or good cause”); COMM’N ON IMMIGRATION, *supra* note 7, at 37.

331. 8 C.F.R. § 1003.6(a).

332. *Id.* § 1003.6(b).

333. 8 U.S.C. § 1105a(a)(3) (1994).

334. 8 U.S.C. § 1252(b)(3)(B) (2006).

Court interpreted the statute as contemplating for this purpose the traditional test for enforcing orders pending appellate review—a balancing test that weighs the likelihood of success on the merits, the harm that could result from the denial of a stay, any potential injury to the opposing party if a stay is granted, and the public interest.³³⁶

Under the current system, therefore, petitions for review are routinely coupled with motions for stays of removal. As a result, the court of appeals normally has to review each case twice—once to see whether the arguments have enough merit to justify staying removal until a final decision can be rendered, and then again, months later, when it decides the merits of the case directly.

Given this inefficiency, there would be strong reasons to return to the pre-1996 law even if nothing else were changed. The benefits of making that change become even more compelling under the proposed bill because current law automatically stays removal pending the BIA appeal, and the proposed bill would eliminate BIA appeals entirely. Without an automatic stay during appellate review by the CAI, therefore, those who challenge their removal orders could be erroneously expelled to far corners of the globe without *any* review of their removal orders. For asylum claimants, the dangers are even greater. They could be returned erroneously to countries in which they face persecution, torture, or even death before any tribunal has reviewed the order of removal. Moreover, because the consolidation of appellate review from two rounds to one decreases the duration of the appellate process, the proposal simultaneously reduces the total delay that an immigrant could achieve by exercising his or her appellate rights. Again, even with this change, the new court would have the discretion to deny a stay pending removal, an action it might well be inclined to take in cases of obvious abuse of the court process. The only change would be that removal without review would require an affirmative act by the court, as it did until 1996. Further, the proposed stay (with judicial discretion to dissolve the stay) would apply only to appeals from removal decisions—not, for example, to appeals from denials of motions to reopen or reconsider, to the filing of requests for extensions of time in which to

335. *Nken v. Holder*, 129 S. Ct. 1749 (2009).

336. *See id.* at 1760–62.

appeal, or, with one minor exception,³³⁷ to any of the other miscellaneous orders over which the CAI would have jurisdiction.

CONCLUSION

Adjudication is one small piece of the immigration puzzle, but it is a piece that has suffered from longstanding neglect. The problems are serious. They affect the fairness of the procedures, the accuracy and consistency of the results, and the acceptability of the system to the parties and the public. Inadequate resources, procedural shortcuts, politicization, and a few bad apples are at the root of these problems.

Few people today would dispute that the immigration adjudication system is fundamentally flawed, but the warring ideological camps differ dramatically as to how much different problems matter and how best to solve them. My goal is to propose a restructuring that would meaningfully address the most worrisome deficiencies in a manner that all sides would view as a substantial improvement over the status quo. A workable consensus will require compromises and concessions from all sides. For this to happen, however, a proposed reform will have to enable all sides to meet the specific objectives they regard as most compelling, while allowing each side to limit its concessions to those it can live with.

The restructuring proposed here is offered in that spirit. At the trial level, it would remove the current corps of immigration judges from the Department of Justice and situate them in an independent executive branch office. The adjudicators would be ALJs, appointed collectively by actors insulated from the political process. They would have the job security essential to their decisional independence and would be free of day-to-day supervision and control by a department whose primary mission is law enforcement. Most of the current immigration judges would be grandfathered into the new positions.

The larger component of the proposed reform is the appellate phase. Both the BIA and the current role of the regional courts of appeals in immigration cases would be abolished. In their place, the proposal would establish an Article III immigration court staffed by district and circuit judges on two-year assignments. Judges could not

337. The one exception would be to allow an automatic stay when an immigrant appeals an order rescinding adjustment of status under 8 U.S.C. § 1256—again, unless the CAI directs otherwise.

be assigned to the new court until they had served at least three years on federal courts of general jurisdiction.

The benefits would be ample. At the trial level, it would depoliticize (to the extent possible) the hiring, judging, and supervision and control of immigration adjudicators. It would consolidate the two current, largely duplicative, and badly underfunded rounds of appellate review into a single high-quality round. In the process, it would restore the Article III jurisdiction that Congress stripped away in 1996. The consolidation would save tax dollars and speed the removal process. Speeding the process, in turn, would not only reduce the fiscal and personal liberty costs associated with prolonged detention, but would also diminish what some believe is a meaningful incentive to file frivolous appeals to delay removal. The proposal would achieve this consolidation without sacrificing either specialized expertise or a generalist perspective. Importantly, the proposed restructuring would also add flexibility, because the district and circuit judges who would be staffing the new court could be reassigned to their home courts if caseload fluctuations so require. The major disadvantages would be the loss of the productive discourse that can result from differences of opinion among appellate courts and the concentration of power in a single tribunal. For reasons this Article has offered, those disadvantages are minor and easily remedied.

Tensions among the multiple goals of adjudication are inevitable. As this proposal illustrates, however, those tensions need be neither polarizing nor paralyzing. Efficiency and acceptability *can* coexist peacefully with procedural fairness and substantive justice. In the immigration adjudication system, the problem has not been merely that some of these objectives have been traded off to promote others. Rather, the immigration adjudication system has accomplished the improbable feat of simultaneously underserving *all* of these goals. These failings are both needless and unacceptable—the former because the present proposal offers a way for all sides to have 90 percent of their cake and eat it too, the latter because the vital human and public interests at stake demand a justice system worthy of its name.