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1 John S. Lehmann University Professor, Washington University School of Law, legomsky@wulaw.wustl.edu. For much of the numerical data on the caseloads, staffing, salaries, employment terms, and internal operating procedures of the immigration courts, the Board of Immigration Appeals, the various prosecuting agencies, and the courts of appeals, I am indebted to Gary Bowden (Administrative Office of the U.S. Courts), Cathy Catterson (Circuit Executive, U.S. Court of Appeals for the Ninth Circuit), Elaine Komis (Public Affairs Officer, Executive Office for Immigration Review), David Martin (Principal Deputy General Counsel, U.S. Dept. of Homeland Security), David Neal (Acting Chair, Board of Immigration Appeals and former Chief Immigration Judge), Juan Osuna (Deputy Asst. Attorney General, U.S. Dept. of Justice and former Chair, Board of Immigration Appeals), Susan Soong (Supervising Staff Attorney, U.S. Court of Appeals for the Ninth Circuit), and Peter Vincent (Principal Legal Advisor, Immigration and Customs Enforcement). I also thank the organizers of the 2009 annual American Bar Association Administrative Law Conference, the editors of the Duke Law Journal, Lenni Benson, Jill Family, Leon Fresco (Chief Counsel to U.S. Senate Subcommittee on Immigration, Refugees, and Border Security), Shirin Hakimzadeh (intern to U.S. Senate Subcommittee on Immigration, Refugees, and Border Security), Ronald Levin, Jeffrey Lubbers, Dana Marks (President, National Association of Immigration Judges), Jessica Owens (Counsel, U.S. Senate Subcommittee on Immigration, Refugees, and Border Security), Cristina Rodriguez, and Philip Schrag.
Immigration law presents special complexities. Both the sheer size and the chaotic layout of the principal statute and related sources of law bewilder specialists and non-specialists alike. The labyrinth known as the Immigration and Nationality Act\(^2\) governs the admission of noncitizens to the United States, their expulsion from the United States, and a host of miscellaneous decisions. Its 500 pages conspire with more than 1000 pages of administrative regulations issued by a variety of Departments of the United States government,\(^3\) and the 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 non-specialists, because qualifications to many of its most important provisions appear in distant and unexpected places.\(^4\) Moreover, even when the law is otherwise clear, rules that require the

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\(^3\) E.g., 6 CFR (Department of Homeland Security), 8 CFR (Department of Justice and Department of Homeland Security), 20 CFR (Department of Labor), 22 CFR (Department of State).

\(^4\) For example, the grounds on which a noncitizen may be deported are listed in 8 USC § 1227(a), but many of the provisions for discretionary relief in such cases are scattered throughout the statute. See, e.g., 8 USC §§ 1158, 1182(h), 1229b, 1229c, 1255, 1259. To receive asylum, one must be a "refugee," 8 USC § 1158(b)(1)(A), but the term "refugee" is defined in 8 USC § 1101(a)(42). The main requirements for the various classes of "nonimmigrant" temporary visitors are laid out in 8 USC § 1101(a)(15), but numerous other requirements for those same admissions
application of broadly worded statutory or regulatory language to individualized facts are exceptionally common, 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 numbers of noncitizens seeking admission or resisting deportation, combined with the critical interests at stake for both the individuals and the public, guarantee that the number of those disputes will be high.

The focus of this article is the formal system for adjudicating "removal" cases – i.e., those in which the government seeks either to deny a noncitizen admission to the United States or expel a noncitizen after arrival. That is not the only immigration adjudication system constructed by Congress and the executive branch. U.S. 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. 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. The State Department has procedures for deciding visa applications and, in its discretion, reviewing visa denials by consular officers. Several entities are involved in the adjudication of citizenship disputes. The USCIS “asylum officers” have procedures for adjudicating certain asylum applications.

appear in 8 USC § 1184.

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, 8 USC 1158(b)(1)(A), which in turn requires a "well-founded" fear of "persecution," 8 USC § 1101(a)(42). The latter requires a showing of "exceptional and extremely unusual hardship." 8 USC § 1229b.

In fiscal year 2008, more than 1.1 million people were admitted to the United States as lawful permanent residents, U.S. Dept. of Homeland Security, 2008 Yearbook of Immigration Statistics, Table 1 (2009), and another 60,000 as refugees, id., Table 13. There were over 175 million "nonimmigrant" (temporary visitor) admissions. id., Table 25. In the same fiscal year, the immigration courts received more than 350,000 “matters,” mainly removal proceedings. U.S. Dept. of Justice, Executive Office for Immigration Review, FY 2008 Statistical Year Book (Mar. 2009), [hereinafter EOIR Statistical Yearbook], at B3 (2009).

8 USC. § 1229a.


See generally Charles Gordon et al., Immigration Law and Procedure, chs. 91-103.

8 CFR § 208 (2009).
A truly comprehensive study of immigration adjudication in the United States would embrace all these disparate systems. This article is narrower in scope. It addresses only removal proceedings, the centerpiece of U.S. immigration adjudication. These procedures, described in Part I, 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. They are 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 the parties and to the public. This article argues that the principal sources of these problems are severe under-funding, reckless procedural short-cuts, the inappropriate politicization of the process, and a handful of adjudicators personally ill suited to the task.

Over the years, thoughtful solutions have been offered but consensus has proved elusive. The


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

The main goal of this article is to construct a politically realistic proposal that would solve the major problems afflicting immigration adjudication. To be politically realistic, the proposal must enable all sides to achieve the legitimate goals that they consider the most important, without requiring any side to make more than modest concessions.

My proposal has two parts. The first part would convert the 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 of their own. 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, while 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 include the range of available remedies, access to counsel, the quality of the language interpretations, the standards of proof, and the rules concerning motions to reopen or reconsider. For the most part, these latter issues are beyond the scope of this article. While the distinction is not always clear-cut, the focus here will be on the broad design of the system rather than on specific procedural ingredients.

Part I of this article provides a bare-bones summary of the current adjudication system for the 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. Commission on Immigration Reform, Becoming an American: Immigration and Immigrant Policy, 1997 Report to Congress 178-82 (Sept. 1997) [hereinafter CIR]. Numerous other studies have criticized core components of the EOIR adjudication system but without discussing restructuring options. See, e.g., Sydenham B. Alexander III, A Political Response to Crisis in the Immigration Courts, 21 Geo. Immigration L.J. 1 (2006); Michele Benedetto, Crisis on the Immigration Bench – An Ethical Perspective, 73 Brooklyn L. Rev. 467 (2008); Lenni B. Benson, You Can’t Get There from Here: Managing Judicial Review of Immigration Cases, 2007 Univ. Chicago Legal Forum 405; 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).

15 For a thoughtful discussion of the many external contributors to EOIR’s case management problems, see Benson, supra note 14.
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 in order 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 filing a “notice to appear” with an “immigration court” and serving the notice on the noncitizen whom it wishes to remove.\textsuperscript{16} DHS is typically represented by an “assistant chief counsel” in Immigration and Customs Enforcement (ICE), an agency of DHS.\textsuperscript{17} The noncitizen and DHS are the opposing parties. An immigration judge conducts an evidentiary hearing.\textsuperscript{18}

The immigration judges, based in offices located throughout the United States,\textsuperscript{19} are part of the Office of the Chief Immigration Judge (OCIJ). The latter is a component of the Executive Office for Immigration Review (EOIR), a tribunal within the Department of Justice.\textsuperscript{20} The immigration judge first determines whether the noncitizen is removable – i.e. whether the person is inadmissible or deportable, as the case may be, under any of the statutorily enumerated grounds.\textsuperscript{21} If the person is found inadmissible or deportable, the immigration judge then decides any affirmative applications for relief that the noncitizen has properly filed.\textsuperscript{22} 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.\textsuperscript{23} The decision culminates in a formal order directing the person’s removal, terminating proceedings, or otherwise disposing of the case.\textsuperscript{24}

\begin{itemize}
  \item[16] 8 USC § 1229(a).
  \item[17] See e-mail from Peter Vincent, Principal Legal Advisor, Immigration and Customs Enforcement, to author, Aug. 19, 2009 [hereinafter Vincent e-mail] (on file with author).
  \item[18] 8 USC § 1229b.
  \item[19] Under the EOIR “Institutional Hearing Program,” the immigration judges also conduct removal hearings in prison facilities. EOIR Statistical Yearbook, supra note 4, at P1, Fig. 24.
  \item[20] 8 CFR §§ 1003.9, 1003.10 (2009).
  \item[21] 8 USC §§ 1182(a), 1227(a).
  \item[22] 8 USC § 1229a(c)(4)(A).
  \item[23] 8 CFR § 1240.13 (2009).
  \item[24] 8 CFR § 1240.12(c) (2009).
\end{itemize}
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”). 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. One who is not in removal proceedings may file an “affirmative” application for asylum (but not for withholding of removal) with a USCIS “asylum officer.” If the asylum officer is not prepared to grant the application, he or she refers the person for removal proceedings, where the person may apply de novo to the immigration judge.

The Justice Department regulations give each of the opposing parties the right to appeal the immigration judge’s decision to the Board of Immigration Appeals (BIA), located in Falls Church, Virginia. The filing of the appeal automatically stays execution of the immigration judge's decision. The Attorney General created the BIA in 1940, names its members, determines its procedures, and may review any of its decisions. Like the immigration judges, the BIA is part of EOIR. As a result of controversial reforms introduced in 2002 by Attorney General Ashcroft, the BIA now decides the vast majority of its cases by single members rather than multi-member panels, and, in specified categories, without providing reasons. The BIA reviews the immigration judge’s legal conclusions and exercises of discretion 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.”

Subject to some broad exceptions enacted in 1996, the noncitizen has the right to judicial

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25 Asylum, which is discretionary, enables the recipient to remain in the United States and, subject to some limitations, to bring in his or her spouse and children. 8 USC § 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. 8 USC § 1251(b)(3).
26 8 CFR § 208.4(b)(3) (2009).
29 EOIR reports that in fiscal year 2008 the immigration judges received 33,000 such affirmative asylum claims and 14,000 defensive claims. EOIR Statistical Yearbook, supra note 6, at 11, Fig. 13.
32 8 CFR § 1003.6(a).
33 5 Fed. Reg. 3503 (Sept. 4, 1940).
34 8 CFR § 1003 (2009).
35 8 CFR § 1003.0(a) (2009).
36 See infra section II.B.2.
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.\(^{39}\)

The three main classes of cases for which judicial review is barred are “expedited removal orders,”\(^{40}\) most discretionary determinations, and most cases in which the noncitizens are removable on crime-related grounds.\(^{41}\) 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.”\(^{42}\) The collective consequence of these various bars on judicial review has been that asylum cases (which are still reviewable)\(^{43}\) now make up the bulk of the courts’ immigration caseloads.\(^{44}\) 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.\(^{45}\)

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 (the 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.\(^{46}\)

\(^{39}\) 8 USC § 1252(b)(2).
\(^{40}\) 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 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. 8 USC § 1225(b)(1).
\(^{41}\) 8 USC § 1252(a)(2).
\(^{43}\) 8 USC § 1252(a)(2)(B)(ii) (exempting relief under section 1158(a) – i.e., asylum – from bar on judicial review of discretionary decisions).
\(^{45}\) 8 USC § 1252(b)(3)(B).
\(^{46}\) Levinson, A Specialized Court, supra note 14, at 644.
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 manifest themselves in dubious and inconsistent outcomes; a lack of confidence in the results 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 current immigration adjudication system. Roger Cramton has posited,47 and others have refined,48 three such goals – accuracy, efficiency, and acceptability. I have suggested a fourth goal – consistency – that overlaps substantially but not completely with the other three.49 Measured against those goals, how does the immigration adjudication system fare?

At a minimum, accuracy surely 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 judgment. Still, the unprecedented scathing criticisms that so many U.S. courts of appeals have leveled at EOIR are disconcerting.50 Lending both credibility and relevance to these condemnations are two striking realities: The attacks are coming from many different judges with diverse political leanings; and the criticisms extend beyond the particular decisions under review to broad-based, systemic complaints about patterns of sloppy, poorly reasoned, decisions that the courts are encountering day after day.

These cases are likely only the tip of the iceberg, for they include only those that reach the courts of appeals. The vast majority of removal orders never get to that point, sometimes because the individual has no convincing grounds for appeal, but on other 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 that there is a right to appeal. In all those instances, any errors that the courts might have corrected in appealed cases go unnoticed.

Efficiency comprises both the wise use of fiscal resources and the minimizing of 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.51 Moreover, the procedural short-cuts that these caseloads have required the adjudicators to adopt have enabled them to decide cases very quickly. In those senses, efficiency might be perceived as high.

49 Legomsky, Forum Choices, supra note 13, at 1313-14.
50 See infra note 74.
51 The data are summarized in infra section II.B.1.
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.52 In that same year, the courts of appeals received 10,280 petitions for review of BIA decisions53 – an approximate appeal rate of 30%.54 Those petitions for review comprised 17% of the combined caseloads of the courts of appeals55 and have created a now well documented crisis for the federal courts.56 The problem is not merely the overtaxing of the judges; the caseload pressures have required massive increases in the legal staff, the clerk’s office, and the circuit executive’s office,57 as well as government prosecutorial resources.58 The Second and Ninth Circuits have been hit the hardest. In fiscal year 2008, immigration cases comprised 41% of the entire Second Circuit docket and 34% of the Ninth Circuit docket.59 To cope with its bloated docket, the Second Circuit has had to institute a no-oral-argument system for asylum cases.60

52 EOIR Statistical Yearbook, supra note 6, at S2, Fig. 27.
54 The 30% 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% congruent, and the 30% figure is therefore only an estimate. It is most likely a very close estimate, however, since petitions for review must be filed within 30 days of the BIA decision. 8 USC § 1252(b)(1).
55 In fiscal year 2008 the courts of appeals received 61,104 appeals. AO 2008 Report, supra note 53, Table B-3 at 96.
57 Catterson, supra note 56, at 293, Table 4.
58 See infra notes 257-59 and accompanying text.
59 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. AO 2008 Report, supra note 53, Table B-3 at 97, 100.
Adding to the inefficiency are the high remand rates reported by at least two circuits. The Second Circuit has been remanding approximately 20% of its petitions for review of BIA decisions, and the Seventh Circuit 40%.61 (The national remand rate is murkier but almost certainly lower, a point taken up below.)62 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, it would seem, churns out a high number of accurate decisions at low cost. In algebraic terms, adjudicatory efficiency might therefore be thought of as productivity x accuracy ÷ cost.63

Finally, efficiency also embraces elapsed time. At the end of fiscal year 2008, there were 186,342 cases pending before the immigration judges, a 19% increase in three years.64 The average age of the pending cases, again as of the end of fiscal year 2008, was 14.5 months, an increase of 23% over a period of 2.5 years.65 I could not find analogous data for the BIA or for the courts of appeals, but whatever the average elapsed times are for BIA and court of appeals review, 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 inherently inefficient but is especially so in the removal context. Individuals are routinely detained while they wait, at great cost to both personal liberty and the public fisc.66

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61 Id. at 4; accord, Benslimane v. Gonzales, 430 F.3d 828, 829 (7th Cir. 2005).
62 See infra notes 115-17 and accompanying text.
63 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 accuracy and productivity. If accuracy were quantified as the ratio of “correct” decisions to total decisions, for example, this formula would produce some counter-intuitive results. A system that decides 100 cases but gets only half of them right would earn the same efficiency rating as a system that, at the same cost, decides only 50 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.
64 TRAC, Immigration, Case Backlogs in Immigration Courts Expand, Resulting Wait Times Grow, http://trac.syr.edu/immigration/reports/208/ (last visited July 6, 2009), [hereinafter TRAC, Case Backlogs], Fig. 1 & supporting table.
65 Id.
Those who are not detained have additional incentives to delay their removals by filing appeals, and some believe that these incentives have spawned large numbers of frivolous appeals.\footnote{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 to file frivolous petitions for review solely to delay their removal. \textit{Family, supra} note 38, at 521.} 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.\footnote{8 USC § 1252(b)(3)(B).}

The acceptability goal reflects the familiar maxim that justice must not only be done, but be seen to be done. Viewed in that light, acceptability has two components. One is assuring the parties to the case that justice was done, both substantively and procedurally. The frustrations of the individuals in removal proceedings 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\% of the BIA decisions in fiscal year 2008. High as that percentage is, it understates the level of dissatisfaction with the BIA decisions, because only a fraction of the BIA decisions are appealable. First, only the immigrant, not the government, may file a petition for review.\footnote{The statute does not say this expressly, but under 8 USC § 1252(a)(1) judicial review “is governed only by chapter 158 of title 28.” That chapter, in turn, contains 28 USC § 2344, which prescribes petitions for review in the courts of appeals as the procedure for challenging various administrative agency decisions and adds “The action shall be against the United States.” Since 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 CFR § 1003.1(h) (2009).} Second, because the principal question in most removal proceedings is whether the immigrant should receive some form of discretionary relief,\footnote{67 Fed. Reg. 54,878, 54,880 (Aug. 26, 2002); EOIR Fact Sheet (Dec. 14, 2009), reproduced, 87 Interpreter Releases 80, 81 (Jan. 4, 2010).} and because Congress has barred the courts of appeals from reviewing most denials of discretionary relief,\footnote{8 USC § 1252(a)(2)(B).} only certain BIA decisions are capable of being appealed even when the immigrants are the aggrieved parties. The combination means that the percentage of reviewable BIA decisions in which the immigrant seeks review is much higher than the already substantial 30\% figure. Finally, even when the immigrant has lost before the BIA and the decision is reviewable, the immigrant who lacks counsel,\footnote{In fiscal year 2008, 78\% of the immigrants who appealed to the BIA were represented by counsel. \textit{EOIR Statistical Yearbook, supra} note 6, at W1, Fig. 30.} or the resources to appeal, or simply knowledge that a petition for 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.

Of course, if there were reason to assume that immigrants file petitions for review primarily to
delay their removals, the high rates of these petitions would offer little probative evidence of
their lack of confidence in the BIA decisions. But because a petition for review no 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. While there is no evidence that the general public has any particular view of the
procedures by which immigration cases are adjudicated, scathing criticisms are now
commonplace in respectable quarters. 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.73 The scholarly studies and commentary consistently offer similarly harsh critiques.
The 2002 BIA reforms have only heightened that dissatisfaction.74

Consistency, like the other goals of adjudication, 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.75
One set of adjudicators, the asylum officers employed by USCIS, are beyond the scope of the
study. Among the immigration judges, however, the same spectacular disparities were observed,
even after the authors controlled for different office locations and for the claimants’ varying
countries of origin. Both studies were confined to asylum cases, which do indeed possess
distinctive attributes, but there is no apparent distinction between asylum cases and non-asylum
removal cases that would systematically generate any greater consistency within the latter group.

73 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 Benedetto, supra note 14,
at 492-93; Stephen H. Legomsky & Cristina M. Rodriguez, Immigration and Refugee Law and

74 See supra note 14.

75 Ramji-Nogales, supra note 14; TRAC Immigration, Asylum Disparities Persist,
Regardless of Court Location and Nationality (2007), http://trac.syr.edu/immigration/reports/183
(last visited Nov. 29, 2009); U.S. General Accountability Office, Significant Variation Existed in
Asylum Outcomes Across Immigration Courts and Judges (Sept. 2008),
http://www.gao.gov/new.items/d08940.pdf (last visited Jan. 11, 2010). ‘’For example, in 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 adjudicated in the federal immigration court in Miami had a 5% chanc eof prevailing with one of that court’s judges and an 88% chance of prevailing before
another judge in the same building.’’ Ramji-Nogales, supra note 14, at 296.
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 under-resourcing of EOIR, with exceptionally high ratios of caseloads to adjudicators, support staff, and prosecutors; (2) procedural short-cuts 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 and therefore their decisional independence, 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 fitted to the job. One complication is that some of these causes are in turn the results of other causes.

1. Suspect # 1: The Under-Resourcing of EOIR

Massive caseloads have strained the capacities of the adjudicators, their support staffs, and the government prosecutors. In fiscal year 2008, the 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. This work was performed by approximately 214 immigration judges. 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 76 additional immigration judges; to reduce the load by two cases per day would require 204 new immigration judges. Another study estimated that the average immigration judge had available only 73 minutes per “matter” (not just removal proceedings) received.

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76 EOIR Statistical Yearbook, supra note 6, at C4, Table 4 and 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, Table 4.

77 TRAC, Case Backlogs, supra note 64, Graphical Highlights. The TRAC figure counts only those immigration judges who decide cases, not others who hold the title “immigration judge” but whose positions are purely administrative. Id. As of August 20, 2009, there were 232 immigration judges (including those in administrative positions), plus 21 vacancies and a fiscal year 2010 budget request for 28 new immigration judge positions. Elaine Komis, Public Affairs, Executive Office for Immigration Review, Query – EOIR’s Immigration Court and Board of Immigration Appeals – Staffing, Budget, and Case Adjudications (Sept. 9, 2009), on file with author [hereinafter Komis], at 1.

78 Appleseed, supra note 14, appx. 2. Others have estimated the average caseload at 4.8 per day, ABA, supra note 14, Rpt. 114B at 1, five per day, Walker Testimony, supra note 60, at 3, and even six per day, Alexander, supra note 14, at 19.

79 TRAC, Case Backlogs, supra note 64, Supp. Table for Fig. 2.
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 problem\(^80\) that has worsened with today’s much larger caseloads. As of August 20, 2009, the 232 immigration judges shared only 56 law clerks\(^81\) – approximately one for every four immigration judges.\(^82\) There are no bailiffs; immigration judges must therefore take time for administrative chores such as arranging the recording of the hearings and keeping track of documents.\(^83\) Many immigrants are unrepresented in removal hearings, so that the immigration judge must take time to advise the immigrants of possible relief provisions, explain the procedures, and answer questions.\(^84\) Moreover, 78% of the individuals in removal hearings require language interpreters.\(^85\) 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.\(^86\)

For all these reasons, a parade of judges, commentators, and organizations have lamented the extreme under-resourcing of the immigration courts.\(^87\) 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.\(^88\) 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

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\(^81\) Komis, \textit{supra} note 77, at 1.

\(^82\) See the similar calculations in ABA, \textit{supra} note 14, Rpt. 114B at 2; Appleseed, \textit{supra} note 14, at 11; TRAC, Case Backlogs, \textit{supra} note 64, at 3-4.

\(^83\) TRAC, Case Backlogs, \textit{supra} note 64, at 5-6.

\(^84\) \textit{Id.} at 6.

\(^85\) \textit{Id.}

\(^86\) Ramji-Nogales et al., \textit{supra} note 14, at 383.

\(^87\) See, e.g., Alexander, \textit{supra} note 14, at 19-20; Appleseed, \textit{supra} note 14, at 10; Benedetto, \textit{supra} note 14, at 500; Marks, \textit{supra} note 14, at 8, 13 (President of National Association of Immigration Judges calling the case completion expectations unrealistic with present resources); Ramji-Nogales, \textit{supra} note 14, at 383; TRAC, Case Backlogs, \textit{supra} note 64, at 5-6; Walker testimony, \textit{supra} note 60, at 3.

\(^88\) Walker testimony, \textit{supra} note 60, at 4; see also ABA, \textit{supra} note 14, Rpt. 114B at 2 (recommending 100 additional immigration judges and at least one law clerk per judge).
issues of credibility and to reach factual conclusions. This can take no small amount of time depending on the nature of the alien’s testimony.  

The situation is no rosier at the BIA. In fiscal year 2008, fifteen BIA members decided more than 38,000 cases – an average of more than 2500 appeals per member per year (more than 50 per week). As with the immigration judges, the overwhelming BIA caseload has come under strong criticism.

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.

What have been the practical effects of this steadily more extreme under-resourcing? 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, under-resourcing 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 TRAC Immigration reveals that, from 1998 to 2008, the number of immigration judges increased by only 6% (from 202 to 214), while the total number of matters received increased by 24% (from 282,348 to 351,477). During the same period in which the increase in the caseloads was thus

89 Walker testimony, supra note 60, at 3.
90 EOIR Statistical Yearbook, supra note 6, at S2, Fig. 27.
91 E.g., Alexander, supra note 14, at 20-21; Appleseed, supra note 14, at 34; Benson, supra note 14, at 418; Walker testimony, supra note 60, at 4 (urging expansion of the BIA to 30 members). The ABA has recommended the hiring of 40 additional BIA staff attorneys. ABA, supra note 14, Rpt. 114C at 4.
92 Vincent E-mail, supra note 17. 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 14, appx. at 20 (citing William J. Howard and calling for the hiring of additional trial attorneys).
93 TRAC, Case Backlogs, supra note 64, Supp. Table for Fig. 3.
94 Id., Supp. Table for Fig. 2.
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 86 minutes to 73 minutes).\textsuperscript{95} In addition, even with immigration judges spending less time per case, the backlog increased from 129,482 pending cases to 186,342.\textsuperscript{96} The average length of time that cases were pending increased correspondingly, from 10.8 months to 14.5 months.\textsuperscript{97} From these data, it appears that immigration judges responded to the increasingly severe under-resourcing with a combination of less time per case and longer elapsed times from filings to final dispositions – i.e., longer delays.

In addition to rushed decisions and increased delays, the under-resourcing 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.\textsuperscript{98} 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.\textsuperscript{99} 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, including very few law clerks; faulty and outdated computers and recording devices; and inadequate work space.\textsuperscript{100}

Finally, the under-resourcing and resulting BIA backlogs drove the Justice Department’s BIA procedural reforms in 2002.\textsuperscript{101} The centerpiece of those reforms was the elimination of various procedural safeguards. The effects exacerbated some of the problems associated with the under-resourcing, as the discussion in the next subsection will explain.

In turn, these consequences of under-resourcing – 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 higher-than-expected numbers of cases are remanded are a severe lack of resources and manpower at the Immigration Judge and

\begin{itemize}
\item \textsuperscript{95} Id.
\item \textsuperscript{96} Id., Supp. Table for Fig. 1.
\item \textsuperscript{97} Id.
\item \textsuperscript{98} Stuart L. Lustig et al., Inside the Judges’ Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey, 23 Geo. Immig. L.J. 57, at 57 (2008).
\item \textsuperscript{99} Id. at 64-70.
\item \textsuperscript{100} Id. Other sources of the burnout and stress include lack of respect from the courts, the Department of Justice, and the public; the 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.
\end{itemize}
BIA levels in the Department of Justice.¹⁰² Judge Walker’s conclusion is not surprising. When adjudicators are pressured to decide so many cases per day involving complex facts and often complex law, 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 under-resourced, but in this field the problem is extreme and both the individual and the public interests are large.

The causal links, therefore, are intricate. The rushed decisions contribute to burnout. Rushed decisions and burnout together inevitably compromise accuracy and consistency, harms in and of themselves. Reduced accuracy and consistency in turn lead to more petitions for review, which then compound the delays that the under-resourcing 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 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 Short-Cuts 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.¹⁰³ The 2002 reforms made AWOs the norm rather than the exception.¹⁰⁴ After the resulting dramatic spike in the percentages of decisions culminating in AWOs, the AWOs have now dwindled to approximately 5% of the BIA decisions,¹⁰⁵ though of course even opinions not officially designated as AWOs might well be so cursory or unhelpful as to be their functional equivalents. 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 majority¹⁰⁶ (at this writing, 94%)¹⁰⁷ of all BIA cases. Both elements have real costs in terms of accuracy, acceptability, and consistency, and, I would argue, even efficiency, given the resulting diversion of BIA cases to the courts.

¹⁰² Walker Testimony, supra note 60, at 3.
¹⁰⁴ 67 Fed. Reg. 54,878, 54,880 (Aug. 26, 2002) (“The final rule establishes the primacy of the streamlining system for the majority of cases.”)
¹⁰⁵ See infra notes 122-23 and accompanying text.
¹⁰⁷ Komis, supra note 77, table accompanying question 17. From fiscal years 2003 through 2008, this percentage has remained between 93% and 94%. Id.
There is ample reason to believe that the 2002 BIA procedural reforms have greatly exacerbated the problems discussed in subsection A. The most obvious 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.\footnote{67 Fed. Reg. 54,878, at 54,878 (Aug. 26, 2002) (specifying effective date of Sept. 25, 2002). Some of the reforms, however, were implemented in stages in the preceding few months. Dorsey & Whitney, \textit{supra} note 14, at 24-25; Ramji-Nogales et al., \textit{supra} note 14, at 351-52.} The avalanche of petitions for review of BIA decisions began suddenly after that, as the following chart demonstrates:

**Petitions for Review of BIA Decisions Filed During Twelve-Month Periods Ending March 31\footnote{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 author).}**

<table>
<thead>
<tr>
<th>12-months ending March 31 of Year</th>
<th>Petitions for Review of BIA Orders Commenced</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>1,763</td>
</tr>
<tr>
<td>2002</td>
<td>1,764</td>
</tr>
<tr>
<td>2003</td>
<td>8,446</td>
</tr>
<tr>
<td>2004</td>
<td>8,720</td>
</tr>
<tr>
<td>2005</td>
<td>11,464</td>
</tr>
<tr>
<td>2006</td>
<td>13,059</td>
</tr>
<tr>
<td>2007</td>
<td>10,042</td>
</tr>
<tr>
<td>2008</td>
<td>9,761</td>
</tr>
<tr>
<td>2009</td>
<td>8,890</td>
</tr>
</tbody>
</table>

To the extent the surge in petitions for review is both a problem in and of itself and evidence of deeper problems in the tribunals whose decisions are being challenged, the above chart compels at least a presumption that the 2002 BIA procedural reforms are, and remain, a principal cause of those problems. The number of petitions for review in the years ending March 31, 2001 and 2002 were virtually identical – 1,763 and 1,764, respectively. During the next 12-month period, which was 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 the sudden surge? It cannot be explained by any changes...
in total BIA decisions. 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, which was the last year before the BIA reforms went into effect.\footnote{Id.} Most telling have been the dramatic changes in the rates at which immigrants have petitioned for review of BIA decisions. In the 12-month period ending March 31, 2002 (the last 12-month period before the reforms), immigrants petitioned for review of only 5% of all BIA decisions. That rate more than tripled — to 16% — in the very next year and continued to rise steadily after that, peaking at 32% in the year ending March 31, 2006.\footnote{Id.}

Of course, the number of BIA decisions adverse to immigrants are a truer measure of rates of petitions for review than total BIA decisions, since only immigrants — not the government — may file petitions for review.\footnote{See supra note 69.} Indeed, several studies show that the BIA procedural reforms led immediately to a significant drop in the percentage of BIA decisions favorable to immigrants.\footnote{E.g., Alexander, supra note 14, at 12; Dorsey & Whitney, supra note 14, appx. 24; Palmer et al., Why So Many, supra note 56, at 94; Ramji-Nogales et al., supra note 14, at 358-59.} Still, while 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.\footnote{By way of illustration, one estimate is that the percentage of BIA decisions in favor of immigrants suddenly dropped from 25% to 10% following the procedural reforms. Alexander, supra note 14, at 12. If those figures are correct, then the percentage of BIA decisions in favor of the government increased from 75% to 90%. Substantial as that difference is, it would increase the pool of judicially reviewable cases by only 15/75, or 20% (all else equal) — not nearly enough to explain the quintupling in petitions for review. See also Ramji-Nogales et al., supra note 14, at 360-61 (documenting similarly sharp drops in BIA asylum approval rates).} Moreover, to the extent that the increase in pro-government BIA decisions contributed to the surge in petitions for review, the question arises: What caused the increase in pro-government BIA decisions? Since that large and sudden change coincided with the BIA procedural reforms (as well as the personnel purge discussed in the next subsection), and in the absence of other explanations, the latter would seem to be the obvious 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 or by 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 still does not evidence any decrease in the accuracy of the BIA decisions. 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.\footnote{U.S. Dept. of Justice, EOIR, Fact Sheet, BIA Restructuring and Streamlining} For the latter proposition, the
Department refers vaguely to “feedback” from federal courts and the Department’s Office of Immigration Litigation, the unit that argues the government’s side when petitions for review are filed. No citation or specific numbers were provided. 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 earlier,\textsuperscript{116} the remand rates are exceptionally high in the Second and Seventh Circuits, but estimates of the national rates are mixed.\textsuperscript{117}

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 review. Second, as will be discussed presently, 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 more and more cases are remanded 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 why the surge would occur 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.\textsuperscript{118}

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

\begin{itemize}
\item \textsuperscript{116} See text accompanying supra notes 61-62.
\item \textsuperscript{117} See, e.g., Alexander, supra note 14, at 14; Appleseed, supra note 14, appx. at 42; Ashcroft & Kobach, supra note 101, at 2009.
\item \textsuperscript{118} EOIR Fact Sheet, supra note 115, at 2.
\end{itemize}
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. That 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.\footnote{8 USC § 1252(b)(3)(B); see also Nken v. Holder, 129 S.Ct. 1749 (2009) (prescribing multi-factor test, which includes likelihood of success on the merits, for determining whether to stay removal pending final court decision).} Second and more important, the essential premise of the Department’s speculation is that the attainment of 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 are logical reasons to expect the procedural short-cuts implemented in 2002 to have precisely the adverse effects that occurred. The AWOs are particularly suspect. In any case in which a single Board 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 Board member is prohibited from giving reasons for his or her decision.\footnote{8 CFR § 1003.1(e)(4) (2009). A still-pending proposed rule would make AWOs discretionary. 73 Fed. Reg. 34,654, 34,663 (June 18, 2008); accord, ABA, supra note 14, Rpt. 114C at 8-9 (also recommending that BIA be required to respond to all non-frivolous arguments).} In fiscal year 2002 (the year in which the BIA procedural reforms were announced), 31\% of all BIA decisions were AWOs, in contrast to 6\% the year before.\footnote{Komis, supra note 77, Table accompanying question 18.} The corresponding percentages for the next two years were 36\% and 32\%, respectively, but they have since come down drastically, to 5\% in fiscal year 2009.\footnote{Id.}

Since 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 once the 2002 reforms were in place.\footnote{See, e.g., Alexander, supra note 14, at 12; Dorsey & Whitney, supra note 14, appx. 24; Palmer et al., Why So Many, supra note 54, at 96; Ramji-Nogales, supra note 14, at 358-59.} The Attorney General’s recent introduction of performance evaluations for both immigration judges and BIA members\footnote{See U.S. Dept. of Justice, Press Release, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006).} – standardized forms that emphasize productivity\footnote{Copies of the separate performance evaluation forms for immigration judges and BIA members were supplied by Elaine Komis, Public Affairs Officer, EOIR to the author on Sept. 9, 2009 and are on file with the author. The immigration judge form includes ratings for “legal ability,” “professionalism,” and “accountability for organizational results.” That last category then breaks down into several more specific criteria, of which criteria 2 and 3 focus}
incentive. And since the overwhelming majority of the appeals to the BIA are filed by the immigrants, 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 the adjudicator to confirm that his or her tentative conclusion is the one most compatible with the evidence and the law.

Once a decision is rendered without explanation, the appellant also has no way to determine the reasons, less confidence that the decision was correct, and thus a greater incentive to seek judicial review. The reviewing court, for its part, will now have 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 a detriment 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 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. Without adequate guidance, DHS officials and immigration judges necessarily 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 an additional 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 increase the error rate, and thus increase the rate of further appeals to the courts. A panel of three members is less likely to miss obvious errors. Multi-member panels also reduce the expressly, and criterion 1 implicitly, on productivity. The form for BIA members rates “organizational results,” “critical thinking and technical proficiency,” and “communication and teamwork.” Of these, “organizational results” count for 60% of the total score, and all of the specific criteria for evaluating “organizational results” relate to productivity. The third category, “communication and teamwork,” counts for an additional 20% and contains only 1 criterion – “takes initiative to assist ... in meeting productivity expectations.” The second criterion is the only one that seeks to measure the quality of adjudication, and it counts for only 20% of the final score. Productivity, therefore, is the dominant theme.

The percentage of BIA decisions in which the immigrants had filed the appeals ranged from 85% to 93% during fiscal years 2001 through 2008, inclusive; the other 7% to 15% were appeals that the government had filed. Komis, supra note 77, Table accompanying question 24.

8 CFR § 1003.1(g) (2009).
probability that a single individual with a strong ideology (in either direction) will reach an extreme result that the Board as a whole would not have countenanced. They do this by diffusing subjective biases, permitting deliberation, and promoting consensus. In the process, multi-member panel decisions minimize inconsistency in several ways, a crucial consideration in the light of the drastic levels of inconsistency that have plagued immigration adjudicators. Moreover, multi-member 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 of the cases are argued pro se and without legal briefs. For all these reasons, the scholarly consensus has been that the 2002 BIA procedural reforms were chiefly responsible for the sudden surge in petitions for review.

3. Suspect #3: The Politicization of EOIR

In addition to the under-resourcing and the increased resort to procedural short-cuts, 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 the adjudicators by law enforcement officials.

a. Hiring

Immigration judges and members of the BIA are appointed by the Attorney General. All of those adjudicators are “Schedule A” (career) appointees, as distinguished from “Schedule C” (political) appointees. For career employees, both federal law and Justice Department policies


129 See text accompanying supra note 75.

130 At the BIA level, the percentage of decisions in which the immigrants were represented by counsel ranged from 69% to 78% during fiscal years 2004 through 2008, inclusive. EOIR Statistical Yearbook, supra note 6, at W-1, Fig. 30. See also ABA, supra note 14, Rpt. 114E (recommending various ways of enhancing access to counsel in removal cases). The advantages of three-member panels have led the ABA to recommend requiring them in all non-frivolous BIA appeals. ABA, supra note 14, Rpt. 114C at 5-6.

131 See the long list of articles and reports cited in Alexander, supra note 14, at 11 n.62. A rare contrary view is expressed by the Attorney General who ordered the 2002 BIA procedural reforms and his chief immigration advisor at the time. See Ashcroft & Kobach, supra note 101.


prohibit hiring discrimination on the basis of political affiliation. Until the spring of 2004, that nondiscrimination policy was honored; EOIR’s merit-based recommendations generally played the major role in selecting immigration judges. 

In response to allegations that the 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. Based on her testimony and abundant additional evidence, the investigation revealed that, from 2004 to 2006, high officials from the White House 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. In all but four cases, the hiring was accomplished without public competition, and more than half the appointees had had no prior immigration experience. In 2007, the Attorney General instituted a new immigration judge appointment process in which EOIR once again plays the dominant role.

While the hope is that the new process will eliminate improper political interference, at least one appointment made by the Bush Administration after the change in procedures almost certainly rested primarily on political affiliation. At any rate, many of the illegally appointed immigration judges remain on the bench today.

Apart from the illegalities that dominated the process from 2004 to 2006, the hiring procedures continue to favor the appointment of immigration judges and BIA members whose work experiences incline them to prioritize immigration enforcement. As others 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. Those 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 durations of their prior INS or DHS employment.

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134 Id. at 12-15.
135 Id. at 72.
136 Id. at 1-2.
137 Id. at 69-124.
138 Benedetto, supra note 14, at 474. For additional commentary on the hiring improprieties and the accompanying changes in the appointment process, see Appleseed, supra note 14, at 7-9; Marks, supra note 14, at 9; Emma Schwartz & Jason McLure, DOJ made immigration judgeships political (Department of Justice), Legal Times (May 28, 2007).
139 See USDOJ, Joint Report, supra note 133, at 114-15.
140 Appleseed, supra note 14, at 8-9.
141 Id. at 7.
142 See the extensive empirical study by Ramji-Nogales et al., supra note 14, at 344-45.
143 Id. at 345-46, 347.
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 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, ideology will always be part of what every adjudicator brings to the job sooner or later. The key, I would submit, is to avoid affirmatively systematizing pro-enforcement biases. As others have recommended, the recruiting should be broadened so that the candidates do not disproportionately come from career enforcement positions.144

b. Threats to Decisional Independence

Targeted efforts by the Attorney General or his or her 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. Shortly after the Attorney General circulated the list to the BIA, the Board affirmed a denial of discretionary relief to Accardi. Holding that the Attorney General’s regulations required the BIA to exercise independent judgment, the Supreme Court ordered the Board to decide the case anew without considering the Attorney General’s list.145 On remand, the Board reached the same conclusion, which the Supreme Court accepted as being free of undue influence.146

Concerns about the unhealthy marriage of law enforcement and adjudicatory responsibilities persisted, however, especially since 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 the immigration judges and the BIA remain accountable to the Attorney General.

Today, as was true after Accardi, the regulations require both immigration judges and the BIA to exercise their discretion independently.149 Nonetheless, concerns occasionally arise. In 2001, an

144 Appleseed, supra note 14, at 9.
147 For an excellent history, see Sidney B. Rawitz, From Wong Yang Sung to Black Robes, 65 Interpreter Releases 453 (1988).
148 48 Fed. Reg. 8,038 (Feb. 25, 1983). Since then, a third unit, the Office of the Chief Administrative Hearing Officer (OCAHO), has been added. See 8 CFR § 1003.0(a) (2009).
149 8 CFR §§ 1003.1(d)(2), 1003.10(b) (2009) (requiring BIA and immigration judges, respectively, to exercise “independent judgment and discretion” but subject to orders of Attorney General). See also the cases cited in Stephen H. Legomsky, Immigration and the Judiciary – Law and Politics in Britain and America 287 n.97 (1987) [hereinafter Legomsky, Immigration and Judiciary].
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, the Chief Immigration Judge (an administrator who reports to the Director of EOIR) directed the immigration judge to change his ruling. The immigration judge recused himself in protest over the Chief Immigration Judge’s intervention.

Still, 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 short-cuts for the stated purpose of attacking the BIA backlog), Attorney General Ashcroft announced plans to reduce the number of BIA members from 23 to 11. The final regulations, published approximately six months later, provided no details as to the criteria he would use in deciding which Board members he would cull. Finally, about one year after the original announcement, Ashcroft announced the names. A subsequent empirical study demonstrated that the Attorney General had “reassigned” (to either lower-level immigration judge positions or non-adjudicative positions on the EOIR staff) those Board members with the highest percentages of rulings in favor of noncitizens. 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. In total, five members were excised. They included the former Chair of the Board, two former full-time law professors who had taught immigration law, and other experienced and highly respected BIA members with substantial

151 8 CFR § 1003.9 (2009).
152 The details appear in Legomsky & Rodriguez, supra note 73, at 665-68.
154 The Attorney General referred generally to “traditional” factors, “discretion,” and qualities such as “integrity . . ., professional competence, and adjudicatory temperament.” 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.” 67 Fed. Reg. 54,878, 54893 (Aug. 26, 2002).
157 Id. at 1155-56.
158 Of the then 23 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 “reassignments” were necessary to reduce the Board to 11 members. Id. at 1155.
These actions were unprecedented. In the then-63-year history of the BIA, no attorney general had ever before removed one of its members for any reason. During the one-year interval between the announcement of the impending cuts and the announcement of specific names, the effects were immediate. The empirical study identified several BIA members whose percentages of rulings in favor of noncitizens dropped suddenly and substantially. The patterns of some others whose rulings had historically been relatively favorable to immigrants did not change during the one-year transition period; only one of the latter survived the purge.

These, of course, were only the transitional effects. Whether traceable to the elimination of the more immigrant-friendly BIA members, the fear of the surviving members that they would lose their jobs in similar ways, the procedural short-cuts, or a combination of those and perhaps other causes, the post-purge outcomes in BIA cases have been significantly less favorable to immigrants.

Consistently 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.

Although the reassignments in question were limited to the BIA, the reference to “all attorneys” (emphasis added) makes clear that the Attorney General intended the quoted language to apply to immigration judges as well.

159 Id. at 1155. See also Dorsey & Whitney, supra note 14, at 16 (summarizing biographies of the five reassigned BIA members). Analogous events had occurred a few years earlier in Australia. See Stephen H. Legomsky, Refugees, Administrative Tribunals, and Real Independence: Dangers Ahead for Australia, 76 Wash. Univ. L.Q. 243 (1998).


161 Levinson, The Facade, supra note 156, at 1156-60.

162 Id.

163 E.g., Alexander, supra note 14, at 12; Dorsey & Whitney, supra note 14, appx. 24; Palmer et al., Why So Many, supra note 54, at 96; Ramji-Nogales et al., supra note 14, at 358-59.


165 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
Moreover, as former congressional counsel 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.” The final rule changed that sentence to make the BIA members simply “attorneys appointed by the Attorney General to act as the Attorney General’s delegates in the cases that come before them.” Only much later in the regulation does the reference to BIA independence finally appear, and then only in more qualified language.166 Coupled with the recently introduced performance evaluations that assess both productivity and quality of the decisions,167 these actions remind the 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.

c. General Supervision and Control by the Attorney General

Apart from the subtle and not-so-subtle devices described above for influencing the adjudication of pending cases, existing law supplies a number of other mechanisms by which the Attorney General and his or her delegates supervise and control the 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 unilaterally.168 While I have general objections to agency head review of adjudicatory decisions,169 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.170 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 poses obvious difficulties – particularly in proceedings in which the government is one of the opposing parties.

In theory, empowering the Attorney General to review and reverse BIA decisions makes him or her 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 about others. The legitimate interests in enhancing the speed of the decision-making and thus the productivity of the adjudicators and

167 See text accompanying supra notes 124-25.
staff can conflict with such other legitimate interests as the accuracy of the outcomes and the fairness of the procedures. The Attorney General’s enforcement responsibilities might well shape 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 the immigration judges. The Attorney General appoints the Director of EOIR, who in turn is “responsible for the direction and supervision” of the BIA and the immigration judges. 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 components and the individual adjudicators who staff them. The regulations do 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 or the Chair of the BIA. The qualification renders the prohibition on administrators directing the outcomes of cases ambiguous at best, and potentially meaningless, as evidenced by the Chief Immigration Judge episode outlined earlier. Both the President of the National Association of Immigration Judges 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.

The Attorney General’s supervisory powers have generated several specific concerns. One longstanding concern has been the Department’s control over adjudicatory resources. Writing at a time when the immigration judges were not only within the Justice Department but within the INS, former BIA Chair Maurice Roberts lamented the control of the adjudicatory resources by a law enforcement agency. 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.” Today the immigration judges and the BIA members are within EOIR, a purely adjudicatory operation, but as noted above the

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172 8 CFR § 1001.1(l) (2009); see also 8 USC § 1101(b)(4) (subjecting immigration judges to supervision of Attorney General).

173 8 CFR § 1003.0(a) (2009).

174 8 CFR § 1003.0(b)(1) (2009).

175 8 CFR §§ 1003.0(b)(1)(ii) (immigration judges and BIA), 1003.1(a)(2)(i)(C,D) (BIA, powers sub-delegated to Chair of BIA).

176 8 CFR §§ 1003.0(c), 1003.1(a)(2) (2009).

177 See text accompanying supra notes 150-52.

178 Marks, supra note 14, at 4; CIR, supra note 14, at 178.

179 Roberts, supra note 14, at 9; accord, Levinson, A Specialized Court, supra note 14, at 646.
Director of EOIR is still a subordinate of the Attorney General. As Judge Marks, the President of the National Association of Immigration Judges, 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 (OIL), the agency that represents the government against the immigrant in the cases that get to court.\textsuperscript{180} To Judge Marks, the dependence of an adjudicative tribunal on an official responsible for both law enforcement and prosecution is unhealthy.

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.”\textsuperscript{181} 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.\textsuperscript{182} The practical consequence has been that immigration judges have little leverage in getting government attorneys to meet deadlines, a handicap that often delays the completion of removal proceedings.\textsuperscript{183}

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.\textsuperscript{184} 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 officials – but not with the immigrants (who are the opposing parties) or their counsel.\textsuperscript{185}

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.\textsuperscript{186} The implications of that loss

\begin{itemize}
\item \textsuperscript{180} \textit{Marks, supra} note 14, at 3-4.
\item \textsuperscript{182} \textit{Marks, supra} note 14, at 10.
\item \textsuperscript{183} Testimony of Dana Marks Keener, President, National Association of Immigration Judges, Immigration Reform and the Reorganization of Homeland Defense: Hearing Before the Subcomm. on Immigration of the Comm. on the Judiciary, U.S. Senate, 107\textsuperscript{th} Cong., Serial No. J-107-90, at 70, 75 (June 26, 2002) [hereinafter Marks Keener Testimony]; Dana Marks Keener and Denise Noonan Slavin, \textit{An Independent Immigration Court: An Idea Whose Time Has Come}, \textit{id.} at 79, 87 [hereinafter Marks & Slavin].
\item \textsuperscript{184} See text accompanying \textit{supra} notes 123-26 (observing that AWOs take less time to produce than reversals with reasoned opinions, and that affirmances in turn systematically favor the government because 85-93\% of all BIA appeals are filed by the immigrants).
\item \textsuperscript{185} 72 Fed. Reg. 35,510, 35,511, 35,512 (Canon XV of each Code) (June 28, 2007).
\item \textsuperscript{186} For the details of that argument, see Legomsky, Immigration and Judiciary, \textit{supra}
are explored more fully below.

4. Suspect # 4: The Bad Apples

Every barrel of 232 people presumably has its bad apples, and the immigration judge corps is no exception. There is ample anecdotal evidence that the problem is not trivial. The courts of appeals have often issued blistering opinions not only identifying errors by immigration judges and by the BIA on appeal, but also calling attention to incompetence, bias, hostility, intimidation, abuse, and other unprofessional conduct by some immigration judges. Some who have studied the issue believe the problem is widespread, one suggesting it has reached “crisis” proportions.

The anecdotal nature of the evidence and the inherent difficulty of numerically 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 that can be attributed simply to the crushing caseloads discussed earlier. 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 the warning that the lines between the various problems and their root causes sometimes run in two directions. Here, in graphical form, is my attempt to summarize the lines of causation:

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187 See, e.g., Benslimane v. Gonzales, 430 F.3d 828, 829 (7th Cir. 2005) (listing eleven examples); Qun Wang v. Attorney General, 423 F.3d 260, 267-68 (3rd Cir. 2005) (discussing additional examples). Among the examples cited in Benslimane were Dawoud v. Gonzales, 424 F.3d 608, 610 (7th Cir. 2005) (finding immigration judge’s opinion “riddled with inappropriate and extraneous comments”); Qun Wang v. Attorney General, 423 F.3d 260, 269 (3rd Cir. 2005) (condemning “[t]he tone, the tenor, the disparagement, and the sarcasm” of the immigration judge); Lopez-Umanzor v. Gonzales, 405 F.3d 1049, 1054 (9th Cir. 2005) (finding the immigration judge’s assessment of asylum applicant’s credibility to be “skewed by prejudgment, personal speculation, bias, and conjecture”). Benslimane, 430 F.3d at 829.

188 E.g., Alexander, supra note 14, at 15-18 (giving examples and advocating public campaign against worst immigration judges); Appleseed, supra note 14, at 12 (citing “shocking number of examples of a lack of professionalism that infects Immigration Court proceedings”); Benedetto, supra note 14, at 492-500 (giving examples and urging ethical reforms).

189 Benedetto, supra note 14.
PROBLEMS IN THE IMMIGRATION ADJUDICATION SYSTEM
CAUSES AND EFFECTS
[Arrows lead from causes to effects.]

Under-Resourcing → Delays and Inefficiency

Procedural Short-Cuts at BIA → Rushed Decisions

Politicization (and emphasis on productivity) → Burnout

Bad Apples

Inaccuracy

Inconsistency

More Appeals

Unacceptability (including scathing judicial criticism) → Unequal Treatment
III
THE USUAL PROPOSED SOLUTIONS

These problems are serious, but plausible solutions exist. For all the reasons just discussed, my view is that any effective reform must incorporate at least five general principles: First, there has to be realistic funding, to ensure both the quality and the necessary number of adjudicators, their support staffs, including especially law clerks and staff attorneys, and adequate physical resources. Second, for reasons discussed in Part IV.C.1 below, 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.II below, 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 the reviewing bodies that will be essential to the kinds of efficiency gains that I suggest in section IV.C.4 below, 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 “reassignments” of the more immigrant-friendly BIA members in 2003, reinforced by the other components of politicization discussed in section II.B.3 above, have sent a clear message to the immigration judges and the 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 this writer has no reason to doubt the good faith of the current Attorney General. Enduring reforms, however, have to focus on institutions, not individuals. No matter how much trust a given attorney general might inspire in his or her subordinates, the genie is now out of the bottle. Every adjudicator will be aware that any action the Department 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, the adjudicators can never again feel confident that they can safely rule 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 from time to 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.

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. 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. The idea is commendable and in my view would be a clear improvement over the status quo. Nonetheless I have two concerns:

The first concern is only a relative one. If the immigration judges and BIA members become article I judges, it is safe to assume Congress would not grant them the life tenure enjoyed by article III judges. Presumably they would have fixed terms, like the judges on the existing article I courts. A fixed term, however, could theoretically be either renewable or non-renewable. If it were non-renewable, few accomplished people would aspire to those positions unless they were already immigration adjudicators or were nearing retirement, because their mid-career options would be limited when their terms expire. Renewable terms thus make more sense, and in fact fifteen-year renewable terms appear to be the norm for article I courts. But if the terms are renewable, someone will have to exercise discretion whether to renew (unless renewal were made statutorily pro forma in the absence of misconduct). And once renewal hinges on someone’s subjective judgment, the same problem that arose after Mr. Ashcroft’s reassignments – the fear that controversial or unpopular or consistently pro-immigrant decisions would displease the repository of that discretion and trigger non-renewal – reemerges in another form. The vulnerability is at its peak when the decision-maker is politically accountable, but even if the decision-maker is an article III judge relatively insulated from the political process, vulnerabilities would persist. Like anyone else, judges have ideological views and personality conflicts, and thus the fear of non-renewal could still exist. 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. Thus, while article I judges might well enjoy greater job security than immigration judges currently do, they might actually have less job security than they would under an ALJ model.

Still, if that were the only concern, one might find reassurance in the various other specialized article I court models that rely on non-automatic renewals. The larger concern is judicial

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191 See supra note 14.

192 See infra note 193.

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


195 See, e.g., 38 USC § 7253(c) (expressly contemplating additional fifteen-year
review by the regional courts of appeals. A recent proposal by the National Association of Immigration Judges (NAIJ) for an article I immigration court would preserve review by the regional courts of appeals.\textsuperscript{196} There is no guarantee, however, that Congress will accept the NAIJ proposal in its 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.\textsuperscript{197} One worries that an article I court with an appellate division would be the impetus to jettison regional court of 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.\textsuperscript{198}

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 would 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.”\textsuperscript{199} Further, regardless 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, and they ordinarily contribute a valuable generalist perspective as well.\textsuperscript{200} Thus, a system that combines appellate review by a specialist

\begin{footnotesize}
\begin{enumerate}
\item[196] Marks, \textit{supra} note 14, at 3, 15; accord, Fitz & Schrag, \textit{supra} note 14.
\item[197] Most of the existing restrictions on judicial review of immigration decisions appear in 8 USC § 1252(a)(2) and in other subsections of section 1252. For a summary of congressional efforts to trim judicial review of immigration decisions further, see Benson, \textit{supra} note 14, at 413-14.
\item[199] Legomsky, Immigration and Judiciary, \textit{supra} note 149, at 283.
\item[200] The benefits of the generalist perspective are elaborated in infra section IV.C.2.
\end{enumerate}
\end{footnotesize}
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.\textsuperscript{201}

Moreover, one might argue, there is value simply in creating a second opportunity to spot errors. On the surface, that assumption sounds reasonable enough, but the question remains why one should assume that, in cases where the specialist tribunal and a generalist court disagree, the latter is more likely to be right. Is it because the benefits of generalist experience usually outweigh the benefits of specialized expertise? Is it because the reviewing court is likely to follow more elaborate procedures, or proceed more deliberately, or have more decisional independence?

Perhaps, as I have previously argued, 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 wisdom and bring the court’s own generalist perspective to bear on the issue at the same time. Unlike the administrative tribunal, which will not have had the benefit of the court’s generalist perspective, the court will then have the best of both worlds. Of course, 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 so easily transmitted. Even then, 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 what either forum would have been able to produce on its own.\textsuperscript{202}

Given the typically differing and often complementary properties of specialized tribunals and generalist courts, therefore, 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, since 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 below, 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 and simply legislate greater job security for the immigration judges and BIA members. Congress could, for example, make EOIR an independent tribunal within the Department of Justice, as it did with the U.S. Parole Commission.\textsuperscript{203} Either alternatively or in addition, Congress could make the

\begin{itemize}
\item \textsuperscript{201} Legomsky, Immigration and Judiciary, \textit{supra} note 149, at 280-98.
\item \textsuperscript{202} \textit{Id.} at 292-98.
\item \textsuperscript{203} 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, \textit{A Specialized Court}, \textit{supra} note 14, at 650-51; Roberts, \textit{supra} note 14, at 17-18.
\end{itemize}
immigration judges and the BIA members Administrative Law Judges (ALJs).  The ALJ appointment process is freer of political influence, their 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. These options, either separately or in combination, 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 the adjudicators to the budgetary and other logistical decisions of the Department. At one time, I did not find that arrangement disturbing. Similarly, the President of the National Association of Immigration Judges, while preferring transfer of EOIR to an independent executive branch agency, found its Justice Department location at least preferable to the then-contemplated transfer of EOIR to DHS. The 2003 purge of the BIA members whose rulings had been the most favorable to immigrants, with its ominous implications for adjudicators’ decisional independence from law enforcement superiors, have forced both of us to eat our words and prescribe stronger medicine. 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. When the former Immigration and Naturalization Service [INS] was part of the Department of Justice, there might have been at least some small 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

Still another option is to make EOIR an independent tribunal, with trial and appellate divisions, but locate it outside the Department of Justice and all other Departments. Other such tribunals exist, and some have urged this model for what is now EOIR. Again, the immigration

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204 This option too has been considered by others. E.g., Levinson, A Specialized Court, supra note 14, at 649; Roberts, supra note 14, at 16-17.

205 See supra note 194.

206 Legomsky, Forum Choices, supra note 13, at 1378-80.

207 Marks Keener Testimony, supra note 183, at 76.

208 See Legomsky, War on Independence, supra note 160, at 405 (favoring independent executive branch tribunal); Marks, supra note 14 (favoring an article I immigration court).

209 See supra section II.B.3.c.

210 E.g., the Occupational Safety and Health Review Commission and the Federal Mine Safety and Health Review Commission, see Levinson, A Specialized Court, supra note 14, at 649 n.39, 651; Verkuil & Lubbers, supra note 190, at 773.

211 E.g., CIR, supra note 14, at 178-82; Orlow, supra note 198, at 50. The ABA
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 (hence both are “article I” entities), and both are independent of all existing government departments. Moreover, adjudicators in both bodies would be immune from the threat of departmental officials removing them from office because of disagreements over outcomes. By providing job security to the adjudicators and simultaneously 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 those two models. An article I court would offer greater stature to the adjudicators. Stature and respect might well restore some of the lost morale to the existing immigration judges (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 “overjudicialized, formal process attendant to the to-be-created agency’s status as ‘court,’” and that it would sacrifice speed and flexibility. That problem, however, can be solved simply by drafting rules of procedure that take into account the particular subject matter and any special needs it presents for informality.

Other considerations could become more consequential. The concern expressed earlier – that an independent entity with an appellate division might prove to be 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, a process that some have specifically urged for an article I immigration court. Each of the other article I courts, however, has only between three and nineteen judges. A court with more than 200 judges would constantly produce far more vacancies and thus require far more Presidential

Commission, which favors an article I immigration court, has proposed the independent tribunal model as a fallback position. ABA, supra note 14, Rpt. 114F at 13-15.

See ABA, supra note 14, Rpt. 114F, at 8-9 (emphasizing the stature and prestige of article I judgeships).

Orlow, supra note 198, at 49.

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

E.g. Marks, supra note 14, at 3; Roberts, supra note 14, at 19; cf. Wildes, supra note 80, at 54-55, 62 (lauding Presidential appointment process, though favoring either ALJs or independent tribunal over article I immigration court).

See 10 USC § 942(a) (U.S. Court of Appeals for the Armed Forces, five judges); 26 USC § 7443(a) (U.S. Tax Court, nineteen judges); 28 USC § 171(a) (U.S. Court of Federal Claims, sixteen judges); 38 USC § 7253(a) (U.S. Court of Appeals for Veterans Claims, three to seven judges).

At present there are 232 immigration judges. Komis, supra note 77, question 2.
appointments and Senate confirmation hearings. That 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. Of course, if Congress were to create an article I immigration court but dispense with the usual Presidential/Senate appointment process, this latter 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.  

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

As one icon of negotiation theory emphasizes, a successful negotiator looks behind positions to identify the motivating interests. 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. 

Can these principles possibly be of use in a battlefield like immigration adjudication, where 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?). My view is 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 those elements unsatisfied is likely to go nowhere. As Part III illustrates, while any number of reform models would represent clear improvements over the status quo, each of the proposals considered to this point fails at least one of those criteria. Among other things, each of them requires a choice between losing what remains of a generalist, article III check versus retaining a superfluous second round of appellate review.

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218 This is the arrangement proposed by the ABA, supra note 14, Rpt. 114F, at 10, and by Fitz & Schrag, supra note 14, section 102(a)(4).
220 Id. at 42.
221 Id. at 76.
A. The Proposal

As an alternative, I propose (a) converting the immigration judges into ALJs who would be 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 below, but the key elements can be summarized as follows:

1. With respect to the immigration judges, I would adopt any of the reform proposals discussed in Part IV. Because of the benefits of insulating these adjudicators from the Justice Department’s budgetary and logistical pressures, my preference is 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 previously discussed advantages of that arrangement over an article I court. 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 below in Part IV.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 V.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, say two years. For this purpose, each circuit would contribute district and circuit judges proportionately to the total number of district and circuit judges in that circuit. The Judicial Council of each circuit would make the 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 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. 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. These provisions protect federal judges’ decisional independence by insulating them from political pressures.

None of this, however, means 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 a series of three leading cases,222 the Court has held that non-article III courts and tribunals may adjudicate “public rights,” and that they apparently may adjudicate even “private rights” as long as 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.223

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, the Supreme Court specifically mentioned immigration as an obvious example of a “public right.”224 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. Thus, 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 the 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

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the status quo and the other reform proposals discussed in part IV. It would depoliticize what is, and should be, an adjudicatory process. It would preserve both specialized expertise and the generalist perspective in appellate review. It would repeal the principal restrictions that Congress in 1996 had placed on article III judicial review of removal orders. 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 is flexible enough that judges could be reassigned to their original posts if caseload fluctuations warrant.

Costs must be acknowledged. Centralization, while 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 below suggests that these costs, while real, are either minor or easily ameliorated.

1. Depoliticization

This proposal aims to depoliticize the immigration adjudicative process in several ways. At the hiring stage, the proposal would substitute ALJs for the current immigration judges and BIA members for article III judges. The tawdry hiring practices that so badly tarnished EOIR and other components of the Department of Justice have since been corrected, but without congressional action there is nothing to prevent 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. As detailed below, the article III judges who are assigned to the Court of Appeals for Immigration would ultimately be selected by other judges. As Professor Theodore Ruger has observed, assignments of judges by other judges are not without problems. Several statutes, for example, have authorized the Chief Justice of the United States to reassign judges temporarily to different courts. These arrangements eliminate the democratic safeguards of appointment by politically accountable actors – the President and the Senate. Moreover, a Chief Justice can select judges with particular political viewpoints. That power is especially problematic when 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. By matching specific judges to specific subject matter, that practice also violates the norm of random assignments of judges to

225 See text accompanying supra notes 136-41.
227 Id. at 343 nn.5-8, 359-67.
228 Id. at 343-44.
cases.229  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.230

My proposal does not eliminate those dangers, since some judges would still be appointing or assigning 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 the 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 the adjudicators. Unlike the current immigration judges and BIA members, the ALJs and the 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 unhappy with the decision.

Admittedly, decisional independence – by which I mean an adjudicator’s freedom to decide the case as he or she believes the evidence and the law dictate – has costs. As discussed in more detail elsewhere,231 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 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,”232 then the decisions that immigration judges, the BIA, and the courts of appeals now make in removal cases clearly qualify.

The benefits of decisional independence in an adjudicative context are compelling. Most importantly and probably most obviously, decisional independence is rooted in theories of procedural justice. We want people who decide cases to 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 what I have called

229  Id. at 372. See generally Adam M. Samaha, Randomization in Adjudication, 51 Wm. & Mary L. Rev. 1 (2009) (defending random assignments of cases to judges).

230  Ruger, supra note 226, at 390-95; see also Theodore W. Ruger, Chief Justice Rehnquist’s Appointments to the FISA Court: An Empirical Perspective, 101 Northwestern L. Rev. 239 (2007) (demonstrating empirically that Chief Justice Rehnquist disproportionately assigned to the FISA court those judges who held conservative views specifically on the fourth amendment issues that FISA was charged with deciding).


232  Asimow & Levin, supra note 222, at 398.
“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. These and other theories of decisional independence are discussed elsewhere. To be clear, none of these considerations should immunize an adjudicator from discipline or even removal for unprofessional conduct. But sanctions based on policy 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 earlier, allowing law enforcement officials not only to reverse the decisions of adjudicators but to control the staffing and other resources that the 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 administratively final removal orders. This proposal, therefore, neutralizes the 1996 court-stripping legislation. Instead of a right to appeal all immigration judge removal orders to 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 – 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. 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. In those regimes,

234 See supra section II.B.3.c.
235 For a summary of the more important 1996 constraints on judicial review of removal orders, see text accompanying supra notes 40-44.
236 E.g., Barker, supra note 198, at 27; Juceam & Jacobs, supra note 198, at 33-34; Orlow, supra note 198, at 60-62.
237 The Foreign Intelligence Surveillance Court (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 20 miles of Washington, DC. They travel to the court as needed. U.S. Federal Judicial Center, http://www.fjc.gov/history/home.nsf/page/fisc_bdy (last visited Dec. 23,
the judges have had far less opportunity to develop significant specialized expertise.

Under my proposal, specialized expertise would arise from several sources. Serving on the new court full-time for two years, the judges would rapidly acquire specialized knowledge of immigration law. They would be specially trained and would have the support of a specialized staff that possesses not only expertise but also institutional memory. Moreover, because the judges will be doing 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?\(^{238}\) 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.\(^{239}\) Experts should be well equipped to identify the right questions and more familiar with recurring legislative facts and related statutory provisions that add context to the provisions they are interpreting. All of 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 the judges to draw on the collective wisdom of their specialized colleagues, a specialized support staff, and specialized books and other resources. Their familiarity with the relevant cases can help create a consistent body of case law – by

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238 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, ch. 1 (1990) [hereinafter Legomsky, Specialized Justice].

239 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 non-literal interpretations would “unsettle the statutory scheme.” Cass R. Sunstein & Adrian Vermeule, Interpretation and Institutions, 101 Mich. L. Rev. 886, 928 (2003). As an argument for affording specialist decision-makers 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).
reducing the chance of overlooking a case on point, by avoiding unintentionally broad or misleading language in their opinions, by affirmatively contributing helpful dicta, and by virtue of the fact that a specialized court concentrates the decision-making in a smaller number of individuals.

These benefits assume particular importance in immigration. As the Introduction to this Article points out, the statute, 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.\textsuperscript{240} Familiarity with common fact patterns facilitates both broader understandings 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 need less time to decide the cases than one who has to start from scratch. The specialized adjudicator should also need less background information from counsel. The time and resources of both the tribunal and the parties can be devoted to less repetitive and more productive tasks.

Specialization also has costs, of course, 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 exposure in which to formulate 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 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, the authorities who make the appointments have a greater incentive to choose someone who is similarly-minded, and after appointments the danger of “capture” by special interests becomes more evident.\textsuperscript{241} Again, the proposed reform would greatly minimize those problems. Potential

\textsuperscript{240} Protection will generally hinge on whether an applicant’s fear of persecution in another country is “well-founded,” 8 USC § 1158(a), or on whether the applicant’s life or freedom “would be threatened” in a particular country, 8 USC § 1231(b)(3). Those determinations require assessments of the relevant country conditions.

\textsuperscript{241} Legomsky, Specialized Justice, supra note 238, at 16; Verkuil & Lubbers, supra note 190, at 756-58 (discussing effects of specialization on lobbying), 767 & n.181 (acknowledging concerns that veterans’ groups have captured Board of Veteran’s Appeals and article I U.S. Court of Appeals for Veterans Claims).
lobbyists will not know in advance which of the individuals who have been nominated for federal judgeships 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. 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 these advantages have special salience in immigration law, where liberty interests are at stake and where 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 had accumulated the requisite experience on a federal court of general jurisdiction.

3. Fix ‘96

As discussed in section IV.D.2.b below, this proposal would give the new immigration court a 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. In 1996, however, Congress slashed judicial review in numerous ways. Among the most important of these restrictions were the bar on review of most discretionary decisions and the bar on review of most crime-related removal orders. The inability to appeal discretionary decisions has had particular impact, because, as noted earlier, the vast majority of noncitizens in removal proceedings apply for various forms of discretionary relief.

Since 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

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243 8 USC § 1105a (pre-1996 version).


245 See supra notes 40-44 and accompanying text.
tribunal decisions, in turn, are ample and discussed elsewhere.\textsuperscript{246}

4. Fiscal Cost and Waste

This proposal substantially reduces fiscal waste and, most likely, overall fiscal costs. Initially, that claim might seem counter-instinctive. After all, as will now be discussed, 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 three ways:

First, for a given number of cases per adjudicator and cases per law clerk, the costs are actually lower for the federal courts than they are for the BIA. Federal judges’ salaries are higher than those of BIA members, but only slightly. The current salaries of circuit judges and district judges are $184,500 and $174,000, respectively;\textsuperscript{247} BIA members’ salaries range from $162,900 to $171,180\textsuperscript{248} – 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.\textsuperscript{249} 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 cost of living allowance).\textsuperscript{250} 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.\textsuperscript{251} And in both the BIA and the federal courts, the law clerks (or “attorney advisors” at the BIA) far outnumber the judges (BIA members).\textsuperscript{252} Thus, the much

\textsuperscript{246} Legomsky, Immigration and Judiciary, \textit{supra} note 149, at 272-98.
\textsuperscript{248} Komis, \textit{supra} note 77, question 9.
\textsuperscript{249} \textit{Id.}, question 10.
\textsuperscript{251} See \textit{supra} note 250.
\textsuperscript{252} The number of authorized federal judgeships for each court is set by statute. See
higher clerk salaries at the BIA easily outweigh the slightly higher adjudicator salaries in the federal courts.

To be clear, 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, however, 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% in fiscal year 2008)\(^{253}\) 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 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% to 9%)\(^{254}\) might reflect the current economic 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 so, 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, which arguably has dampened the incentive to file BIA appeals for the purpose of

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28 USC §§ 44 (courts of appeals), 133 (district courts). As of August 17, 2009, there were 167 active judges in the regional courts of appeals and 667 district judges. E-mail from Gary Bowden, Admin. Office of U.S. Courts, to author (Sept. 20, 2009) (on file with author). In contrast, as of August 16, 2009, the active circuit judges employed 468 full-time-equivalent law clerks (410 term law clerks, 58 career law clerks), id., and approximately 500 staff attorneys, U.S. Court of Appeals for the Ninth Circuit, Office of the Circuit Executive, Staff Attorneys’ Offices – Allocation of Work Units FY 2009, on file with author (Mar. 4, 2009). The active district judges employed another 1379 full-time equivalent law clerks (936 term and 443 career). Bowden e-mail, supra. The Board of Immigration Appeals has only 15 members, 8 CFR § 1003.1(a)(1) (2009), but 114 staff attorneys, known as “attorney advisors,” Komis, supra note 77, question 8.

253 See supra note 54.

254 EOIR Statistical Yearbook, supra note 6, at Y1, Fig. 32.
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 grounds for appeal. In that scenario, a future decrease in immigration judges’ asylum approval rates could raise the rate of appeals. Finally, as Professor Benson has suggested, perhaps the drop in the rate of appeals simply 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. 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. That causal link seems shaky, however. The two major events that would be expected to diminish 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, the effects of that loss of confidence manifested themselves in dramatically higher rates of petitions for review of BIA decisions from just before to just after those years – not in the period 2004 to 2008. There is no evidence that confidence in the BIA dropped further 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 be expected to bolster confidence in the original decisions. 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 below, 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.

Let us assume, then, 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 replacing one round with a more expensive round; the one round of review would

255 Benson, supra note 14, at 417.
256 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 14, at 4.
replace a more expensive round plus another round.

Third, one fewer round of adjudication also means one fewer round of prosecutorial time. The annual salary range of the ICE “assistant chief counsels” who currently represent the government in BIA appeals is $49,544 to $127,604, plus locality pay. 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. 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. The present proposal would not, of course, save the time of the government attorneys who litigate immigration cases in federal courts. These 239 attorneys, situated in the Justice Department’s Office of Immigration Litigation (OIL), have average annual salaries of $123,000.

Fourth, as discussed below, 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% of all the immigrants in completed removal proceedings were being detained at government expense. The dropoff in elapsed time thus reduces detention costs.

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, of course, 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 under-funding of the system, however, increasing the numbers of both adjudicators and law clerks should be a high priority. The 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 the other associated reductions in expenditures would be reinvested in either the Office of Administrative Law Judges or the United States Court of Appeals for Immigration or both.

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 under-resourcing 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 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 either reducing individual

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258 Vincent E-mail, supra note 17.
259 Telephone Interview with Juan P. Osuna, Deputy Assistant Attorney General, Civil Div., U.S. Dept. of Justice (Aug. 26, 2009).
260 EOIR Statistical Yearbook, supra note 6, at O1, Fig. 23.
caseloads or expanding the use of multi-member panels, or both. I express no view here as to the optimal use of those funds; I suggest only that any of those 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 short-cuts, Congress should redirect the same funds (and preferably 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 the end. Elapsed time is important for several reasons. As just noted, 48% of the immigrants in removal proceedings are detained pending final determinations. EOIR prioritizes those cases, but priorities that cover 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 those appeals have taken an average of 95 days to complete. 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 those immigrants who are most likely either to abscond or to threaten public safety.

Moreover, whether the 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, discretionary relief, the public has an interest in speeding removal. Either the person is detained, in which case all the interests just noted come into play, or the person is at large, in which case the person’s continued presence in the United States is detrimental to the public interest for whatever reasons prompted Congress to make that person’s 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 the opportunity to get on with his or her life 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 the numerous reasons discussed earlier. 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

261 Maria Baldini-Potermin, Practice Before the Board of Immigration Appeals: Recent Roundtable and Additional Practice Tips, 86 Interpreter Releases 2009, 2010 (Aug. 10, 2009) (summarizing information shared by Juan Osuna, the then-Chair of the BIA); Komis, supra note 77, question 17.

262 Baldini-Potermin, supra note 261, at 2010.

263 See supra notes 253-56.
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 those factors has obvious potential to alter the parties’ inclinations to appeal. For all those reasons, 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 level, the cost savings and efficiencies, the speeding of the process, and the flexibility of the arrangements – have all been presented as important benefits of the proposed restructuring. In contrast is one other element of this proposal – appellate centralization. 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 admittedly it would also impose costs.

On the benefit side, routing all appeals to the same court would theoretically make the outcomes more uniform. 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, where the courts like to emphasize the importance of the nation speaking with a single voice, divergent outcomes are also thought to have adverse foreign policy implications.264 In asylum cases, the extreme inconsistency that the recent empirical studies have revealed is yet another reason to seek out centralizing influences.265

Still, I resist here the temptation to tout the uniformity benefits of my proposal. While 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

264 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 City of New York, 92 U.S. (2 Otto) 259, 273 (1875) (arguing that the immigration laws ought to be the same in all cities); Chy Lung v. Freeman, 92 U.S. (2 Otto) 275, 279-80 (1875) (arguing that one state could otherwise embroil entire nation in disputes with other nations).

265 See text accompanying supra note 75.
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.\textsuperscript{266} 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 major culprits. For one thing, the asylum inconsistencies have occurred within the same circuits and even among judges within the same immigration courts.\textsuperscript{267} For another, the main issues in the asylum cases have been fact questions – in particular, assessments of the applicants’ credibility – not questions of law that give rise to circuit splits.\textsuperscript{268}

Moreover, circuit splits can have positive benefits. They can foster healthy discussions of opposing viewpoints and a productive maturation process. They can also avoid dangerous concentrations of power in a single body.\textsuperscript{269} In addition, circuit splits can prompt definitive, authoritative rulings from the Supreme Court. Substituting a single appellate court admittedly sacrifices those 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. Since 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 forego 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 cost, 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.\textsuperscript{270} Even when a BIA

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\textsuperscript{267} Ramji-Nogales et al., \textit{supra} note 14, at 328-39. Since the petition for review must be filed in the circuit in which the removal hearing was held, 8 USC § 1252(b)(2), circuit splits would not explain these inconsistencies.
\textsuperscript{268} Palmer, \textit{Second Circuit}, \textit{supra} note 44, at 977.
\textsuperscript{270} As noted earlier, see \textit{supra} note 54, immigrants petition for review in approximately 30% of the BIA decisions.
\end{flushright}
decision is challenged in court, the combination of *Chevron* deference\(^{271}\) to BIA interpretations of law and the limited scope of judicial review on questions of fact and discretion\(^ {272}\) results in a highly concentrated BIA power not only to decide cases but 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. Since, again, only a minority of the BIA decisions are further appealed, the proposed restructuring would leave the appellate tribunal only marginally less accessible than it is today – perhaps even more accessible if the court is situated nearer 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, since the BIA heard oral argument in only one case in fiscal year 2009.\(^ {273}\) Again, since only a minority seek further review of the BIA decisions, the vast majority of immigrants who appeal immigration judge decisions receive 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 is the most extreme example, ranging from Hawaii to Alaska to Arizona, but other circuits also require long travel distances. The Eighth Circuit extends from North Dakota to Arkansas; the Tenth Circuit runs from Wyoming to Oklahoma. With only one centralized appellate court, the travel distances admittedly would be even longer, 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,\(^ {274}\) many litigants lack access not just to oral argument but to any judicial review at all. The proposed restructuring would plug that gap.

Finally, if either the travel logistics or the concentration of adjudicatory power in a single court is nonetheless felt to be problematic, Congress can choose to situate the new court in multiple cities (say, three). Judges might be more inclined to relocate temporarily if given a choice of cities. Even if they don’t, a thoughtful selection of venues would reduce the 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 of them to develop its own precedents, as


\(^{272}\) 8 USC § 1252(b)(4).

\(^{273}\) Komis, *supra* note 77, question 19.

\(^{274}\) 8 USC § 1252(a)(2).
the regional courts of appeals now do, or it could simply establish multiple venues for the same court, in much the same way that 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, of course, alternative solutions to the logistical issues as well. One option is for the judges to ride circuit when the occasion so demands. Video-conferencing and other technological means 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 real independence. In the process, the 1996 court-stripping legislation would be effectively neutralized, because now there would be a right of review by article III judges in all removal cases. There are, in addition, 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 concerning, since review by the new court in those cases will simply replace BIA review of those cases. Instead of everyone having a right to one round of review and some having the right to a second round, everyone 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.

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; 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 of us who have chosen to specialize in immigration law know firsthand the fascinations of this extraordinary field. After significant exposure to

275 8 USC § 1252.
immigration law and an opportunity to master its nuances, many of the judges who would not 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 decisions that have guided immigration judges and administrative officials for seventy years. The question, however, is whether the value added by the BIA can match the gains from redirecting the funds currently spent on two badly under-resourced rounds of appellate review into a single round of careful, high-quality review by independent judges who combine specialist and generalist perspectives. I believe they cannot and thus favor the consolidation that 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. 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 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. Other staff would be similarly grandfathered.

277 See 5 Fed. Reg. 3503 (Sept. 4, 1940) (Attorney General creating BIA in 1940); Legomsky, Forum Choices, supra note 13, at 1380 n.488 (noting that no Attorney General had ever removed a BIA member).
278 The draft bill is on file with the author and available on request.
279 See Marks, supra note 14, at 17 & n.89 (citing Tax Court judges and Court of
The “bad apple” problem discussed earlier, 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 swallow hard and 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 that I propose is to subject the grandfathering to a specific exclusion for any current immigration judges whom a special commission (described presently) 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 of those proposals call for an independent committee that would recommend trial judge candidates to the chief trial judge; 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). Beyond those minimum credentials, the committee would be encouraged to consider a range of other statutorily specified factors.

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 or problematic credentials or personalities will be appointed. In addition, 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, 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 ALJs; they could be removed only for good cause and only after a Merit Systems Protection Board hearing.

Claims judges as examples).  

280 See supra section II.B.4.  
281 ABA, supra note 14, Rpt. 114F at 10-13; Fitz & Schrag, supra note 14, §§ 101(b)(1), 103(h).  
283 See supra note 194.
b. Jurisdiction

Immigration judges currently have jurisdiction over removal hearings, including the authority to decide almost all of the applications for affirmative relief commonly sought during removal proceedings. They have jurisdiction over a few miscellaneous decisions as well. The draft bill generally grants the same authority to the ALJIs, with two changes.

c. Procedures

A few of the procedural rules that currently govern removal proceedings are statutory. The proposed bill generally leaves those rules intact. Most of the current procedural rules, however, are embodied in the Attorney General’s regulations. 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, but it enumerates several specific issues that the rules must address. These include 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 include provision for non-lawyers and that the evidentiary rules reflect recognition of the high percentage of pro se cases. The draft

286 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 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 applications for adjustment of status that are filed during removal proceedings. 8 CFR § 1245.2(a)(1) (2009). But one requirement for adjustment of status is usually approval of a visa petition, which only DHS – not the immigration judge – currently has the authority to decide. 8 CFR § 204.1(e)(1) (2009). DHS often deliberately refrains from acting on the visa petition in order to prevent the immigration judge from granting adjustment of status. As a result, immigration judges have frequently had to grant numerous continuances while they wait for DHS to act on the visa petitions, thus delaying removal hearings for long periods of time. Matter of R.M. (Immigration Court, York County Prison, PA, May 21, 2001) (unpublished opinion), excerpted in Legomsky & Rodriguez, supra note 73, at 666. 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.
287 8 USC § 1229a.
bill also requires the ALJI to follow the precedent decisions of the U.S. Court of Appeals for Immigration (and the pre-enactment precedent decisions of the relevant court of appeals).

One specific 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. 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.

Current law requires the Attorney General to issue regulations spelling out the contempt powers of immigration judges. 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 attorneys even if the latter are judges. Thus, immigration judges have had difficulty getting government attorneys to meet deadlines; that difficulty has slowed final dispositions. The draft bill fills that gap, conferring contempt authority directly in language drawn partly from that used for judges of the Tax Court. 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. 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 but would take into account that the courts of appeals would also experience reduced caseloads. To aid

290 See text accompanying supra notes 150-52 and 185.
291 8 USC § 1229a(b)(1).
292 Marks, supra note 14, at 10.
293 Marks Keener Testimony, supra note 183, at 75-76; Marks Keener & Slavin, supra note 183, at 87.
295 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.
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 had been that the number of immigration judges in a circuit is 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. That approach is problematic, however, because petitions for review of removal cases are filed only in the courts of appeals. 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 Council 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 his or her 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. Finally, the draft bill would authorize the appointment of a CAI circuit executive and additional staff.

b. Jurisdiction

The BIA now has jurisdiction over appeals from immigration judge decisions in removal proceedings, as well as jurisdiction over a number of miscellaneous matters. 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 that Congress had stripped away in 1996 – review of most discretionary decisions and review of orders removing most criminal offenders. Both the immigrant and the government would have the right to appeal. The CAI

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296 8 USC § 1252.
297 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 USC § 332(a)(1).
298 8 CFR § 1003.1(b) (2009).
299 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Div. C, § 306, 110 Stat. 3009-607, 608 (Sept. 30, 1996), amending § 242(a)(2)(B,C) of Immigration and Nationality Act, 8 USC § 1252(a)(2)(B,C). 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, id. § 1229a(b)(5)(D), the bars on challenging removal orders via habeas corpus,
would also have the discretion to accept jurisdiction over issues that ALJI’s 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.”\textsuperscript{300} 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.”\textsuperscript{301} An exclusion decision “is conclusive unless manifestly contrary to law.”\textsuperscript{302} 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.”\textsuperscript{303} 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 trier of fact is compelled to conclude that such corroborating evidence is unavailable.”\textsuperscript{304}

These latter rules, apart from being needlessly complex and difficult to interpret, clearly reflect Congress’s intentions to narrow the judicial role. Those rules were enacted, however, in a world in which the courts of appeals are reviewing 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 and now well understood – 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.\textsuperscript{305} The draft bill would leave intact the current provision that confines the reviewing court to the administrative record.\textsuperscript{306}

\begin{itemize}
\item injunctions, class actions, and other alternatives to petitions for review, \textit{id.} §§ 1252(a)(5), 1252(b)(9), 1252(f), the limitations on review of expedited removal orders, \textit{id.} §§ 1252(a)(2)(A), 1252(e), and the bar on challenging asylum denials based on missed filing deadlines, \textit{id.} § 1258(a)(3). Similarly, the draft bill does not alter the various special removal procedures sprinkled throughout the Immigration and Nationality Act. See generally Legomsky & Rodriguez, \textit{supra} note 73, at 806-15.
\item 300 8 CFR § 1003.1(d)(3) (2009).
\item 301 8 USC § 1252(b)(4)(B).
\item 302 8 USC § 1252(b)(4)(C).
\item 303 8 USC § 1252(b)(4)(D).
\item 304 8 USC § 1252(b)(4).
\item 305 5 USC § 706; accord, ABA, \textit{supra} note 14, Rpt. 114D at 4-5. Ordinarily, reviewing courts must defer to administrative tribunals’ reasonable interpretations of the statutes they administer. \textit{Chevron, USA v. Natural Resources Defense Council}, 467 U.S. 837 (1984). Because the CAI would itself be a specialized court, however, there seems little reason for it to accord deference to the legal conclusions of the ALJIs. The draft bill leaves that decision to the courts.
\end{itemize}

\textsuperscript{63}
d. Procedures

The federal Rules Enabling Act already authorizes all courts established by Congress to “prescribe rules for the conduct of their business” (i.e., procedural rules). The Judicial Conference of the United States reviews those rules for compliance with federal law. The rulemaking process must include opportunity for public notice and comment unless there is an immediate need to proceed more quickly. Subject to those 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 becomes important for the CAI to keep the rules informal enough for pro se appellants to navigate. For the same reason, the proposed CAI would be wise to permit representation by appropriate categories of non-attorneys, as EOIR currently does.

e. Filing Deadline

Current law imposes 30-day filing deadlines for both appeals to the BIA and petitions for review in the courts of appeals. The draft bill would prescribe a similar 30-day filing deadline for appeals to the CAI, but with one significant change. Rather than make the 30-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.” The latter would apply, for example, if an appellant could not offer sufficiently compelling reasons for missing the deadline but where the facts are so extreme that the court regards removal without review as a sanction grossly disproportionate to the appellant’s filing error. As the following discussion explains, however, a request for permission to extend the filing deadline 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 30-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. 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.

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307 28 USC § 2071(a).
308 28 USC § 331, para. 6.
309 28 USC § 2071(e).
310 8 CFR § 1292 (2009).
311 See 8 CFR § 1003.38(b) (2009) (appeals to BIA); 8 USC § 1252(b)(1) (petitions for review in courts of appeals).
312 For a somewhat similar recommendation, see ABA, supra note 14, Rpt. 114D at 7 (proposing 60-day filing deadline, with discretion to grant 30-day extension upon showing of “excusable neglect or good cause”).
313 8 CFR § 1003.6(a) (2009).
314 8 CFR § 1003.6(b) (2009).
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. Current law reverses that default option; a petition for review no longer stays removal unless the court in its discretion orders otherwise. In *Nken v. Holder*, the Supreme 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.

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 there is enough merit to the arguments 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, since 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 amount of 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 be well be inclined to take in cases of obvious abuse of the court process; the only change would be that removal without review would now 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 appeal, or, with one minor exception, to any of the other miscellaneous orders over which the CAI would have jurisdiction.

CONCLUSION

Adjudication is just one small piece of the immigration puzzle, but it is a piece that has suffered from longstanding neglect. The problems are serious. They go to 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 short-cuts, politicization, and a few bad apples are

315 8 USC § 1105a(c) (pre-1996).
316 8 USC § 1252(b)(3)(B).
318 The one exception would be to allow an automatic stay when an immigrant appeals an order rescinding adjustment of status under 8 USC § 1256, again unless the CAI directs otherwise.
at the root of these problems.

Few 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 here is to propose a restructuring that would meaningfully address the most worrisome deficiencies and 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 that to happen, however, a proposed reform would have to enable all sides to meet the specific objectives they regard as the most compelling, while allowing every 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 a new executive branch office outside all Departments. 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. For the most part, 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 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, the judging, and the supervision and control of immigration adjudicators. It would consolidate the two largely duplicative current rounds of appellate review into one, in the process restoring the article III jurisdiction that Congress stripped away in 1996. The consolidation would save tax dollars in several ways and speed the removal process. Speeding the process, in turn, would not only reduce the personal liberty and fiscal costs associated with prolonged detention, but 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, since 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 not be either polarizing or 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 under-serving all these goals. Those failings are both
needless and unacceptable – the former because the present proposal offers a way for all of us to have 90% of our cake and eat it too, the latter because the vital human and public interests at stake demand a justice system worthy of its name.