

## REPORT

### I. The Case for Restructuring

Concerns about the lack of independence of immigration judges and the BIA, as well as perceptions of unfairness toward immigrants, have spawned proposals to separate these tribunals from the Department of Justice. The National Association of Immigration Judges (“NAIJ”) and others have long advocated for the establishment of an independent body, either an independent agency or an Article I court, as a necessary step in reforming the immigration adjudication system.<sup>1</sup>

Changes in recent years have only exacerbated these concerns, as resources devoted to enforcement of immigration laws have increased the burden on immigration judges without increasing the resources allocated to adjudication.<sup>2</sup> The calls for independence have become more urgent in this decade in response to politicized hiring of immigration judges and the removal of BIA members most sympathetic to noncitizens. In addition, the Department of Justice has taken the view that immigration judges are merely staff attorneys of the Department. As such, they would be required to comply with rules of conduct applicable to DOJ attorneys, rather than rules of judicial conduct, and would owe their ethical obligations to the Department as their “client.” In such circumstances, the immigration judges can hardly be viewed as independent.

In addition, several reforms directed at the BIA have, according to the ABA, “resulted in a loss of confidence in the fairness of review at the BIA and generated a massive number of appeals to the federal courts.”<sup>3</sup> Indeed, the ABA has noted that the lack of independence of immigration courts and the BIA is a problem, and has expressed the view that a number of problems with immigration adjudication “can best be addressed by moving toward a system in which immigration judges are independent of any executive branch cabinet officer.”<sup>4</sup> It recently stated that it was considering how such a system might best be implemented.<sup>5</sup>

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<sup>1</sup> See, e.g., Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13-1 BENDERS IMMIGR. BULL. 1 (2008); National Association of Immigration Judges, *Immigration Court Needs: Priority Short List* (November 2008) (on file); U.S. Commission on Immigration Reform, *Becoming an American: Immigration and Immigrant Policy* (1997), at 174-182 (recommending an independent Agency for Immigration Review), available at <http://www.utexas.edu/lbj/uscir/becoming/full-report.pdf>; Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 386-87 (2007). For an expanded version of the Refugee Roulette study, with commentary by scholars from Canada and the United Kingdom as well as from the United States, please see JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, *REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM* (NYU Press 2009).

<sup>2</sup> See ABA, *ENSURING FAIRNESS AND DUE PROCESS IN IMMIGRATION PROCEEDINGS* 6 (2008), available at [http://www.abanet.org/poladv/transition/2008dec\\_immigration.pdf](http://www.abanet.org/poladv/transition/2008dec_immigration.pdf).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

Appleseed has echoed the call for independence in its newly released report on reform of the nation's immigration court system, stating:

“[W]e have seen time and again how DOJ can influence decisions by Immigration Judges and BIA members--from the 2002 ‘streamlining reforms’ that replaced careful BIA review with expediency, to the Attorney General’s power to transfer Immigration Judges and BIA members with whom he disagrees, to DOJ’s ability to ‘manage the caseload and set the standards for review.’ The ability to engage in this kind of mischief can never be fully eliminated unless immigration cases are heard in an independent court.”<sup>6</sup>

The need for adjudicatory independence and accountability itself spawned the creation of EOIR. The DOJ thought this independence would be achieved by moving the immigration judges and BIA from the Immigration and Naturalization Service (“INS”) and putting these “quasi-judicial functions” under EOIR within DOJ.<sup>7</sup> This removal, however, has not achieved this purpose.<sup>8</sup> Many critics argue that judicial independence could be better achieved through a complete system restructuring.<sup>9</sup>

In providing greater independence, such a restructuring will promote the achievement of three other goals for reform of the removal adjudication system-- fairness and improved perceptions of fairness, a more professional immigration judiciary, and greater efficiency in the adjudication of removal cases.

Fairness and Perceptions of Fairness. Critics note that a perception of unfairness plagues the current system. A perceived lack of independence means that those going through the system do not consider the verdicts rendered to be fair or impartial.<sup>10</sup> Although the adjudicators’ agency, the Department of Justice (“DOJ”), no longer has primary enforcement responsibility for

<sup>6</sup> APPLESEED, ASSEMBLY LINE INJUSTICE: BLUEPRINT TO REFORM AMERICA’S IMMIGRATION COURTS 35 (2009).

<sup>7</sup> ABA, *supra* note 2, at 1; Board of Immigration Appeals; Immigration Review Function; Editorial Amendments, 48 Fed. Reg. 8,038 (Feb. 25, 1983) (codified at 8 C.F.R. § 1003.0).

<sup>8</sup> See Marks, *supra* note 1; *Immigration Reform and the Reorganization of Homeland Defense: Hearing Before the Subcomm. on Immigration, Border Security and Citizenship of the S. Comm. on the Judiciary*, 107th Cong. (2002) (testimony of Hon. Dana Marks Keener, President, NAIJ) (recommending an appendix to proposed legislation which creates “language to ensure decisional independence”).

<sup>9</sup> Cf. Stephen Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1291, 1398-99 (1986) (assessing and rejecting an Article I immigration court). Notably, Professor Legomsky has since changed his views on this issue, and now supports an Article I immigration court proposal. As he explains, “Writing twenty years ago, I thought such a significant change unnecessary; the culture of several decades had suggested that the jobs of immigration judges and BIA members were secure. The events of 2002 and 2003 [Attorney General Ashcroft’s reassignment of liberal BIA members to lower-level or nonadjudicative positions] have altered my thinking. I now believe I was shortsighted to dismiss future threats to the independence of the administrative adjudicators and today would favor making them an independent entity within the executive branch.” Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 405 (2006) (internal citations omitted).

<sup>10</sup> See Leon Wildes, *The Need for a Specialized Immigration Court: A Practical Response*, 18 SAN DIEGO L. REV. 53, 58-59 (1980).

immigration matters, it remains the nation's principal law enforcement agency overall, and its lawyers prosecute immigration cases before the federal courts of appeal. For some, the Attorney General's power over the members of the BIA and immigration judges "gives the impression of unfairness" and does not give those going through the process confidence in the decision making.<sup>11</sup>

Professionalism. We recognize that in order to have better quality judgments, better quality judges are necessary, regardless of how this is achieved. Moving existing judges to an Article I court (or separate agency) without increasing resources, training, and qualifications would not alone ensure sufficient improvement in the quality of decisions. We recommend such increases in resources and training and the strengthening of qualifications -- all of which should help make the immigration judiciary more professional. We also believe it is necessary to make this judiciary independent in order to attract the highest quality judges who can do their jobs and make decisions without fear of termination, transfer, or other sanctions.

Efficiency. By attracting and selecting the highest quality lawyers as judges, an Article I court or independent agency is more likely to produce well-reasoned decisions. Such decisions, as well as the handling of the proceedings in a highly professional manner, should improve the perception of the fairness and accuracy of the result. Perceived fairness, in turn, should lead to greater acceptance of the decision without the need to appeal to a higher tribunal.<sup>12</sup> NAIJ suggests there would be a decrease in the number of cases going to the courts of appeal if the immigration trial and appellate bodies were independent Article I courts, because the aggrieved party would experience a greater confidence in the decision of such courts.<sup>13</sup> Similarly, there should be fewer appeals from decisions at the trial level to the appellate level of the Article I court or independent agency. When appeals *are* taken, more articulate decisions should enable the reviewing body at each level to be more efficient in its review and decision-making and should result in fewer remands requesting additional explanations or fact-finding.

Such improvements in efficiency should reduce the total time and cost required to fully adjudicate a removal case and thus help the system keep pace with expanding caseloads. They also should produce savings elsewhere in the system, such as the cost of detaining those who remain in custody during the proceedings.

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<sup>11</sup> *Id.* For example, there is a perceived disparity between immigration judges' treatment of DHS attorneys and asylum applicants' attorneys. This arises from incidents such as recently promulgated regulations to discipline immigration attorneys who bring frivolous cases before the immigration courts. *See* 73 Fed. Reg. 76,914 (Dec. 18, 2008) (declaring disciplinary measures against immigration attorneys); 74 Fed. Reg. 201 (Jan. 5, 2009) (clarifying previous announcement of new disciplinary rules against practitioners). There are no regulations that authorize immigration judges or the BIA either to discipline or ask for disciplinary proceedings against DHS attorneys who submit frivolous filings or obstruct the process of a case. Concerns regarding this new regulation seem particularly justified given that disciplinary proceedings may be started by either the EOIR or the DHS. *See* 73 Fed. Reg. at 76, 918.

<sup>12</sup> *See generally* Thane Rosenbaum, *The Myth of Moral Justice: Why Our Legal System Fails to Do What's Right* (HarperCollins 2004).

<sup>13</sup> *See* Marks, *supra* note 1, at 3.

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Other Benefits. Creating an Article I court or independent agency for immigration adjudication would have still other potential benefits. For example, an Article I court or independent agency would:

- With proper resources, be better equipped to keep clear records and transcripts of proceedings;
- Provide an independent source of statistical information to assist the public in evaluating its performance;<sup>14</sup>
- Submit its own funding requests to Congress, allowing it to request adequate resources without relying on a parent agency;<sup>15</sup>
- Provide better focus on the adjudication function by separating it from a large department whose attention and resources are widely diffused; and
- Leave DOJ free to focus on law enforcement, terrorism, civil rights, and other important missions.

Counter-Arguments. Some doubts persist as to the ability of an Article I court or independent agency to overcome longstanding deficiencies in the immigration adjudication system. One author suggested that while an Article I court would increase the prestige and position of the immigration judges, it would not do anything to increase the rights of those going through the system and facing deportation, which may be the real problem.<sup>16</sup> Other practitioners have pointed out that changing the structure does not change the judges or DHS's interpretations of the law. One has noted that the current system worked well before recent increased emphasis on enforcement and an expansive reading of the law that focuses on detention rather than alternatives.

There is also the question of funding. Public opinion of the immigration courts is not always high, particularly at a time when there are many pressing national issues facing the federal government. A new court or agency would face stiff competition for resources. However, the budget for the immigration judiciary would not have to compete for funding with other priorities within the same department, as it does now in DOJ.

The main thrust of most criticisms or doubts expressed about an independent court or agency seems to be that it will not necessarily solve all of the current problems with the existing system. That, however, does not diminish the case for attacking problems that can be addressed by creating an independent immigration judiciary.

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<sup>14</sup> *Id.*, at 10-11. The BIA currently does not keep adequately detailed statistics. *See also* Ramji-Nogales et al., *supra* note 1, at 373.

<sup>15</sup> Marks, *supra* note 1, at 11.

<sup>16</sup> *See* Wildes, *supra* note 10, at 57.

## **II. Background on System Restructuring**

### **A. Differences Between an Article I Court and an Independent Agency**

Article I, section 8 of the Constitution grants Congress the power to “constitute Tribunals inferior to the supreme Court.”<sup>17</sup> These are known as “Article I courts” or, occasionally, “legislative courts.”<sup>18</sup> From a strictly legal standpoint, the distinction between Article I courts and independent agency adjudicatory bodies, however, is not entirely clear. It appears that the distinction may be in name only and that whatever forum Congress decides is appropriate dictates.

The similarities between the two types of bodies are striking. In both forums, members are often appointed by the President with the advice and consent of the Senate, serve for set terms, and are removable only for cause. Like Article I courts, agency adjudicatory bodies are specialized judicial entities that can create precedent and issue final decisions appealable to Article III courts. Both structures provide statutorily recognized independence, job security, and stature, which are missing from the current immigration adjudication system. Some scholars even view administrative adjudicatory bodies as “Article I tribunals” as described by the Constitution, distinct from “Article I courts” in name alone.<sup>19</sup>

In practice, however, there are many differences between the two types of forums. Adjudicatory agencies often consist of a board or commission, small in size, with members appointed by the President, who serve as an appellate layer of review over decisions made by some type of administrative judge at the initial, trial-type level. Article I courts generally consist only of a trial level, with appeals proceeding directly to an Article III appellate court (or trial court in bankruptcy cases) without an intermediate level of review, or only an appellate level that reviews decisions of an administrative agency. We are not aware of any Article I court system that includes both a trial level and appellate level (except for bankruptcy courts in some circuits).<sup>20</sup> Agencies employ administrative judges or ALJ’s whose employment terms and hiring procedures differ from those used for Article I judges.

For whatever reason, Article I courts tend to be viewed as more independent and prestigious than agency adjudicatory bodies.<sup>21</sup> Article I judges “most closely approximate the

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<sup>17</sup> U.S. CONST., art. I, § 8.

<sup>18</sup> 20 Charles Alan Wright & Mary Kay Kane, *FEDERAL PRACTICE & PROCEDURE DESKBOOK* § 5 (2008).

<sup>19</sup> See, e.g., James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power*, 118 HARV. L. REV. 643, 651-52, 658-59 (2004).

<sup>20</sup> The First, Sixth, Eighth and Ninth Circuits have formed Bankruptcy Appellate Panels, consisting of three bankruptcy judges, appointed by the circuit court, to hear appeals from the bankruptcy courts. Even when a panel exists, participants may elect to have their appeal go to a district judge instead. 28 U.S.C. § 158(b). Most bankruptcy decisions are appealed to the district courts and then upward. See 28 U.S.C. § 158(a) and (d).

<sup>21</sup> See Peter Levinson, *A Specialized Court of Immigration Hearings and Appeals*, 56 NOTRE DAME L. REV. 644, 651 n.52 (1981) (“On various occasions Congress has recognized that a judicial forum provides a more appropriate structure for resolving controversies that had been left to executive decision-making [through agency boards] in the

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formal independence of federal judges.”<sup>22</sup> Article I courts also have “low political profiles” as compared to administrative agencies; thus, the President is unlikely to deny reappointment of judges for strictly political reasons.<sup>23</sup> In addition, the long length of the terms of Article I judges serves to reduce the attractiveness of seeking reappointment versus retirement.<sup>24</sup>

Article I courts are “true courts, in the sense that they do nothing but adjudicate,” whereas most agencies also use rulemaking as a form of policy making.<sup>25</sup> This characteristic “has led to some structural and legal accommodations that affect adjudicative independence.”<sup>26</sup> Splitting the agency policy-making functions from the adjudication functions, as in the Department of Labor and the Occupational Health and Safety Review Commission, does not necessarily increase fairness and independence.<sup>27</sup> However, the protections for ALJs under the Administrative Procedure Act do somewhat increase independence.<sup>28</sup>

Finally, Article III courts tend to be more deferential to agency decisions than decisions of other courts, indicating that if a more searching Article III review is desired, an Article I court is a better solution.

## B. Models Reviewed

We studied the United States Tax Court, the United States Bankruptcy Court, the United States Court of Federal Claims, and the Court of Appeals for Veterans Claims as Article I court models; the Occupational Safety and Health Review Commission (“OSHRC”), the Merit Systems Protection Board (“MSPB”), and the National Labor Relations Board as independent agency models; and the system for granting and assessing veterans’ benefits as a hybrid adjudication model, consisting of an agency within the executive branch for trial-level proceedings and an Article I court for initial appellate review. We also reviewed proposals for an Article I court or independent agency developed by the National Association of Immigration Judges, the American Immigration Lawyers Association (“AILA”), Appleseed, and various scholars.

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past”); Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 351 (1991) (comparing Legislative (Article I) Judges and Administrative Judges).

<sup>22</sup> Bruff, *supra* note 21, at 344.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 345.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 347. Bruff cites to a 1990 Administrative Conference study of this arrangement that “was unable to conclude whether split enforcement better promotes fairness than traditional agency structure.”

<sup>28</sup> *See id.*

### **III. Options for System Restructuring**

It is theoretically possible to define the features of an Article I court system and an independent agency model almost interchangeably, since there is no clear legal distinction between the two. However, we believe models for restructuring immigration adjudication should draw from existing models for other adjudication systems as much as possible. Accordingly, we define features of an Article I immigration court that resemble existing Article I courts and, similarly, draw from existing independent agencies in constructing the features of an independent agency for immigration adjudication. The key features that define the three models are the method of selection of judges and their tenure, removal, supervision, evaluation and discipline.

#### **A. Article I Court**

An Article I court for the entire immigration adjudication system would include an Appeals Division and a Trial Division. The leadership of the court would include a Chief Appellate Judge and Chief Trial Judge.

##### **1) Selection of Judges**

Article III judges are nominated by the President and confirmed by the Senate, as are the Article I judges who serve on the Tax Court, the Court of Federal Claims and Court of Appeals for Veterans Claims.<sup>29</sup> NAIJ has proposed a similar appointment system.<sup>30</sup>

However, there are so many immigration judges (more than 200 now and more than 300 if our recommendations for additional resources are implemented) that this method of appointment may be difficult to manage and could easily create a backlog in vacancies. Therefore, we recommend that the President would appoint the Chief Trial Judge, the Chief Appellate Judge and the other appellate judges, with the advice and consent of the Senate. The Assistant Chief Trial Judges (“ACTJ”) would be appointed either by the President or by the Chief Trial Judge with the concurrence of the Chief Appellate Judge. The other trial judges would be appointed either (i) by the Chief Trial Judge or (ii) by the ACTJ responsible for the court in which the vacancy exists, subject to approval of the Chief Trial Judge.

In either case, the appellate and trial judges would be selected from among persons screened and recommended by a Standing Referral Committee. The Committee would include the Chief Appellate Judge, the Chief Trial Judge (“ACTJ”), the two most senior ranking members of the Appellate Division, and the three most senior ranking ACTJs. The appellate and trial judges appointed to this committee (other than the head of each division) would be replaced by new ones every two years based on next-in-line seniority. Other stakeholders (*e.g.*, DHS, DOJ, and academic and immigration bar groups) would be represented on the Committee or have an opportunity to comment on candidates before they are recommended for appointment.

<sup>29</sup> 28 U.S.C. § 44(a) (federal courts of appeals); 28 U.S.C. § 133(a) (federal district court judges); 26 U.S.C. § 7441(b) (tax court judges); 28 U.S.C. § 171 (federal court of claims); 38 U.S.C. § 7253(b) (veterans appeals).

<sup>30</sup> *See Marks, supra* note 1, at 1.

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This approach would provide a balance between the political accountability of the “externally” appointed judges and the internal appointment of trial judges independent of the executive or legislative branches. It also would most closely resemble the method of appointment for other Article I courts, with a necessary change at the trial level to accommodate practical problems created by the large number of judges at that level.

Apart from the method of appointment, the minimum qualifications of candidates also warrants consideration. We recommend that each judge at both the trial and appellate levels be a United States citizen and a member of the bar of any State, the District of Columbia, the Commonwealth of Puerto Rico or a United States territory, and have a minimum number of years of experience as a licensed attorney or judge involved in litigation or administrative law matters at the federal, state or local level (e.g., 5 years for trial judges and 7 years for appellate judges). In selecting nominees, the Standing Referral Committee should give particularly strong consideration to candidates who possess a minimum period of experience in the field of immigration law (e.g., 5 years for trial judges and 7 years for appellate judges). Such immigration law experience, however, should not be an absolute requirement, since the goal is to attract lawyers of the highest caliber with the appropriate temperament and demeanor, not necessarily immigration lawyers as such.

## **2) Tenure**

For an Article I immigration court, Congress would define the terms that a judge may serve, as it has done for other Article I courts. Bankruptcy judges serve 14 year terms and may be reappointed on application.<sup>31</sup> Tax Court judges serve 15 year terms,<sup>32</sup> as do judges who sit on the Court of Federal Claims<sup>33</sup> and the United States Court of Appeals for Veterans Claims.<sup>34</sup>

At least one practitioner has expressed reservations about fixed terms and argued that they might actually make it easier for attorneys to transition between DHS enforcement and immigration courts. Notwithstanding such concerns, it would appear to be unprecedented to have Article I judges with unlimited terms of office.

Accordingly, we recommend the adoption of fixed terms for the judges of an Article I immigration court at both the trial and appellate levels. The terms should be relatively long like those of Article I judges in other courts, although the terms could be longer for the appellate judges than for the trial level judges. For example, the terms could be in the range of 8 to 10 years for trial judges and 12 to 15 years for appellate judges.

## **3) Removal**

A corollary to fixed terms is the protection of Article I judges from termination for political reasons (or otherwise) without cause during their term. A judge sitting on the Court of

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<sup>31</sup> 28 U.S.C. § 152(a)(1).

<sup>32</sup> 26 U.S.C. § 7443(e).

<sup>33</sup> 28 U.S.C. § 172(a).

<sup>34</sup> 38 U.S.C. § 7253(c).

Federal Claims may be removed during his or her term only by a majority of the Court of Appeals for the Federal Circuit for “incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability.”<sup>35</sup> Similarly, Tax Court judges may be removed only by the President after notice and a public hearing and only for reasons of “inefficiency, neglect of duty, or malfeasance in office.”<sup>36</sup> A Bankruptcy judge may be removed only by the court of appeals in the circuit in which the judge serves and only for “incompetence, misconduct, neglect of duty, or physical or mental disability.”<sup>37</sup> A judge on the United States Court of Appeals for Veterans Claims may be removed by the President only for “misconduct, neglect of duty, or engaging in the practice of law.”<sup>38</sup>

Consistent with these provisions, we recommend that the judges of an Article I immigration court be removable only for incompetency, misconduct, neglect of duty, malfeasance, or physical or mental disability. The judges appointed by the President (the appellate judges, the Chief Trial Judge and the ACTJs, if applicable) would be removable only by the President, while the other trial level judges could be removed by the Chief Trial Judge with the recommendation of the ACTJ who supervises the judge and the concurrence of some group of other ACTJs. Alternatively, a trial judge would be removable by the Chief Appellate Judge, with the concurrence of the appellate division.

#### **4) Supervision and Evaluation**

Each trial immigration judge would be supervised by the ACTJ responsible for the local court on which the judge served. Each appellate judge would be under the supervision of the Chief Appellate Judge. As Article I judges, neither the trial nor appellate judges would be subject to comprehensive performance reviews of the type used for civil service employees. However, their performance would be reviewed based on a system using the ABA’s Guidelines for the Evaluation of Judicial Performance<sup>39</sup> and the model for judicial performance evaluation proposed by the Institute for Advancement of the American Legal System (“IAALS”).<sup>40</sup> The system would stress judicial improvement and could not be used for purposes of judicial discipline. The evaluation program would operate through independent, broadly based and diverse committees that include members of the bench, the bar and the public. The judges would be evaluated based on legal ability, integrity, impartiality, communication skills, professionalism, temperament and administrative capacity, but not the merits of their decisions

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<sup>35</sup> 28 U.S.C. § 176(a).

<sup>36</sup> 26 U.S.C. § 7441(f).

<sup>37</sup> 28 U.S.C. § 152(e).

<sup>38</sup> 38 U.S.C. § 7253(f)(1).

<sup>39</sup> AMERICAN BAR ASSOCIATION, GUIDELINES FOR EVALUATION OF JUDICIAL PERFORMANCE (2005), *available at* [http://www.abanet.org/jd/lawyersconf/pdf/jpec\\_final.pdf](http://www.abanet.org/jd/lawyersconf/pdf/jpec_final.pdf).

<sup>40</sup> *See* INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, SHARED EXPECTATIONS: JUDICIAL ACCOUNTABILITY IN CONTEXT (2006), *available at* <http://www.du.edu/legalinstitute/publications2006.html>; INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, TRANSPARENT COURTHOUSE: A BLUEPRINT FOR JUDICIAL PERFORMANCE EVALUATION (2006), *available at* <http://www.du.edu/legalinstitute/publications2006.html>.

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or procedural rulings. The evaluation would utilize multiple, reliable sources, including attorneys, litigants, witnesses, non-judicial court staff and Article III appellate judges.

## **5) Discipline**

The judges on the Article I court would be subject to a code of ethics and conduct based on the ABA Model Code of Judicial Conduct, tailored as necessary to take into account any unique requirements for the immigration judiciary. They would also be subject to a complaint and disciplinary procedure similar to what is used for other federal judges.<sup>41</sup> Under this procedure, all complaints against immigration judges (at the trial or appellate level), whether from litigants, practitioners, DHS attorneys, other immigration judges, circuit court judges or others, would be made directly to a reviewing body established specifically for this purpose. The complaints would bypass persons in the chain of supervision (ACTJs and the Chief Trial Judge in the Trial Division and the Chief Appellate Judge in the Appellate Division) to avoid personal conflicts of interest, to ensure equal consideration of all complaints, and to maintain the distinction between the supervisory and disciplinary roles.

The Code of Conduct would be the governing standard, and all complaints should be based on alleged violations of the Code. Complaints relating directly to the merits of an immigration judge's decision or procedural ruling would not be entertained.

The disciplinary body would have authority to investigate complaints, dismiss them, resolve them without adversarial proceedings or recommend private or public disciplinary action (subject to the limitations on removal discussed above). The final decision on disciplinary action would rest with the Chief Appellate Judge as to appellate judges and the Chief Trial Judge as to trial judges. A trial judge would have the right to appeal the adverse action to the court of appeals for the circuit in which he presides, while an appellate judge could appeal to the DC Circuit.

## **B. Independent Agency**

In defining an independent agency model for immigration adjudication, we have drawn primarily from the Administrative Procedure Act, draft legislation submitted by AILA to the Obama Transition Team, and the practices of existing independent administrative agencies where applicable. The agency would include an Office of Immigration Hearings ("OIH") at the trial level and a Board of Immigration Review ("Board") for administrative appeals. The highest level officials would be a Chief Immigration Judge ("CIJ") in OIH and a Chairperson of the Board. In other respects, many of the specific features of an independent agency would resemble those of an Article I court. The key differences are described below.

### **1) Selection of Judges**

Unlike the trial judges of an Article I court, the immigration judges in the OIH (other than the Chief Immigration Judge) would be hired according to a process similar to the one currently used to hire Administrative Law Judges, but administered through the personnel office

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<sup>41</sup> See 28 U.S.C. §§ 351-364.

of the independent agency rather than the Office of Personnel Management.<sup>42</sup> New immigration judges would be required to meet criteria similar to those applicable to ALJ positions. Similar to the procedure for hiring new ALJs, OIH would publicly announce the open opportunity to take a competitive examination as the first step in the hiring process.<sup>43</sup> After demonstrating in their written materials that they meet the experience qualifications, candidates would take a written examination and undergo an interview by a panel and an inquiry of their personal references. As with the ALJ examination, the IJ examination would be designed to evaluate the competencies/knowledge, skills, and abilities essential to performing the work of an immigration judge.<sup>44</sup> Those candidates who score above a predetermined level would be placed on a register of eligible candidates for immigration judge openings. When an opening occurs at one of the immigration courts, the CIJ would hire from among the top candidates on the register.

This process for selecting trial judges would help create a more professional immigration judiciary that, over time, should be more comparable to the ALJ corps.<sup>45</sup>

## 2) Tenure

The fixed terms of Board members would resemble those in other administrative agencies and thus would be considerably shorter than the terms of Article I appellate judges. The Chairperson of the Board would be appointed for a single, relatively short term (*e.g.*, 5 to 7 years). At the end of this term, the Chairperson would be eligible to continue to serve the Board as one of its members for a term of similar length. Other Board members would be appointed for fixed, renewable terms of similar length, as is typical in independent agencies and commissions.<sup>46</sup>

The Chief Immigration Judge also would be appointed for a relatively short term of five to seven years and would be eligible to continue as an immigration judge at the end of this term for a new term of similar length. Otherwise, immigration judges would not be limited to fixed terms. In this respect, they would be treated like ALJs as to their tenure as well as their method of selection. Moreover, we are not aware of fixed terms in other independent agencies for trial-level administrative judges who are not ALJs.

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<sup>42</sup> We do not at this time recommend requiring new immigration judges in an independent agency to be Administrative Law Judges as such.

<sup>43</sup> 5 C.F.R. § 930.203. Note, however, that this regulation was amended in 2007 to remove the lengthy description of the hiring process.

<sup>44</sup> *Id.*

<sup>45</sup> Theoretically, a similar process could be used to select the trial judges of an Article I court. However, such a process for hiring judges on a competitive basis as civil servants is used only in administrative agencies, such as the Social Security Administration, the NLRB, and the Department of Labor. There is no precedent for doing so in an Article I court.

<sup>46</sup> Among the agencies we studied, the terms are six years (staggered) for members of the Occupational Safety and Health Review Commission, five years for members of the National Labor Relations Board and seven years (non-renewable) for members of the Merit Systems Protection Board.

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### 3) Removal

Immigration judges (other than the Chief Immigration Judge), like ALJs, would be subject to removal only for good cause after an opportunity for a hearing before the MSPB under the same procedures that apply to removal of an ALJ. Any removal would be subject to judicial review.<sup>47</sup>

### 4) Transition

Transitional provisions for existing BIA members and the Chief Immigration Judge could be similar to those proposed for an Article I court. However, other immigration judges in the agency model would have unlimited tenure and could not be removed except for cause. The logical extension of this feature is that all existing immigration judges would remain in their positions indefinitely.

## IV. Comparative Analysis

The alternative models for structuring an independent immigration adjudication tribunal have been compared based on six criteria, including the degree of independence, perceptions of fairness, the quality of judges and increased professionalism, efficiency (relative cost and ease of administration), accountability, and impact on the Article III courts.<sup>48</sup>

Independence. Both models would provide a forum for adjudication that is independent from any executive branch department or agency. An Article I court may be viewed as more independent than an administrative agency since it would be a true judicial body. However, the method of selection, unlimited tenure and protection against removal for immigration judges in the agency model would give them greater independence than in an Article I court (as defined here).

Perceptions of Fairness. Both models should increase public confidence in the fairness of immigration adjudication, compared to the current system. As a judicial body, an Article I court is likely to engender the greatest level of confidence in the results of adjudication. The

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<sup>47</sup> This removal procedure for immigration judges is consistent with ABA policy, as expressed in Resolution 101B adopted August 6, 2001, which states that “any individualized removal or discipline of a member of the administrative judiciary [shall] occur only after an opportunity for a hearing under the federal or a state administrative procedure act before an independent tribunal, with full right of appeal.” In keeping with this resolution, the Administrative Law Section in February 2005 proposed that full-time presiding officers in the administrative judiciary shall be removed or disciplined only for good cause and only after a hearing to be provided by the MSPB under the same standards applied to the removal or discipline of ALJs, subject to judicial review. Section of Administrative Law and Regulatory Practice, ADJUDICATION REPORT 9-10 (Feb. 2005).

<sup>48</sup> We also examined a hybrid model, which would include an independent agency at the trial level and an Article I court at the appellate level. Although this option has intellectual appeal, it would be the most complex and costly restructuring option to implement, since it would require the creation and operation of two new and separate institutions. We found no advantages of the hybrid option significant enough to outweigh these major disadvantages. We, therefore, focused instead on the choice between an Article I court or an independent administrative agency for the entire immigration adjudication system.

professionalization of the immigration judiciary in an independent agency also would go a long way toward increasing public confidence.

Professionalism. Both models should attract higher caliber judges and help professionalize the immigration judiciary. The greater prestige of an Article I judicial office may attract more qualified candidates than an administrative judgeship. However, the method of selection, unlimited tenure and protection against removal without cause in the agency model, which is based on the ALJ system, offers greater job security and a proven approach to creating a highly professional judiciary at the trial court level.

Efficiency: Relative Cost and Ease of Administration. Both models should make the adjudication system for removal cases more efficient for the reasons set forth in Section I of this Report. By doing so, they will reduce the total time and cost required to fully adjudicate removal cases and also should reduce costs elsewhere in the system, such as detention costs. The resources needed in terms of judgeships and law clerks also should be similar under both options. However, the ability to fill and maintain several hundred judgeships at the trial level in an Article I court could be a significant challenge, without precedent in the judiciary; whereas, this can be accomplished in an administrative agency through a civil service type of process similar to the one used to maintain a much greater number of judges in the Social Security Administration. The cost of establishing and administering a new system should not differ significantly between an Article I court and a new independent agency.

Accountability. To some degree, accountability to the political branches is the flip side of independence. Thus, the trial judges in an Article I court, with fixed terms, generally would be more accountable than those in an independent agency where they would have the equivalent of life tenure.

Impact on Article III Courts. This factor is impacted by independence and perceptions of fairness, since greater independence is likely to lead to greater confidence in results, which in turn is likely to reduce the number of appeals to the courts of appeals. To the extent the Article I court may be perceived as more independent and may engender greater confidence than an independent agency, its favorable impact on appeals court caseloads should also be greater.

In sum, the key attractions of the independent agency model, as defined here, are (1) the independence and professionalism that would result from the treatment of trial judges in a manner similar to Administrative Law Judges with respect to selection, tenure, evaluation, and discipline; (2) the agency's ability to fill and maintain a large number of judgeships through a civil service type of process; and (3) the likely perception that an independent agency is a less drastic departure from the current system and one that has many precedents in other independent adjudicatory agencies.

The Article I model is likely to be viewed as more independent than an agency because it would be a true judicial body; is likely as such to engender the greatest level of confidence in its results; can use its greater prestige to attract the best candidates for judgeships; and offers the best balance between independence and accountability to the political branches of the federal

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government. Given these advantages, the Article I court model is the preferred option. The independent agency model also would be an enormous improvement over the current system and offers a strong alternative if the Article I court is deemed infeasible or unacceptable to Congress and/or the President.

Respectfully Submitted,

Karen Grisez, Chair  
Commission on Immigration  
February 2010

**GENERAL INFORMATION FORM**

Submitting Entity: Commission on Immigration

Submitted By: Karen T. Grisez, Chair, Commission on Immigration

1. Summary of Recommendation(s).

The Recommendation supports the creation of an Article I court, with both trial and appellate divisions, to adjudicate immigration cases, which should have features substantially consistent with the following guidelines:

-Selection of Judges: A Standing Referral Committee would screen and recommend candidates for judicial appointments. The Chief Trial Judge, Chief Appellate Judge, and other appellate judges should be appointed by the President and with the advice and consent of the U.S. Senate. The trial judges should be appointed by the Chief Trial Judge or by the Assistant Chief Trial Judges with the approval of the Chief Trial Judge.

-Tenure: Appellate and trial judges should have fixed terms, which should be relatively long (e.g., 8 to 10 years for trial judges and 12 to 15 years for appellate judges).

-Removal: Judges may be removed by the appointing authority only for incompetence, misconduct, neglect of duty, malfeasance, or disability.

-Supervision and Evaluation: Each trial immigration judge would be supervised by an Assistant Chief Trial Judge; each appellate judge would be under the supervision of the Chief Appellate Judge. Performance would be reviewed based on a system using the ABA's Guidelines for the Evaluation of Judicial Performance and the model for judicial performance evaluation proposed by the Institute for Advancement of the American Legal System.

-Discipline: Judges would be subject to a code of ethics and conduct based on the ABA Model Code of Judicial Conduct. The final decision on disciplinary action would rest with the Chief Appellate Judge as to appellate judges and the Chief Trial Judge as to trial judges.

-Transition: Existing judges would serve out the remainder of the new fixed terms, which are deemed to have begun at the time of their prior appointment to current positions, and are eligible for reappointment thereafter. The Chairman of the Board of Immigration Appeals ("BIA" or "Board") would serve as Chief Appellate Judge of the Article I court until replaced by Presidential appointment. The current members of the BIA would become the appellate judges of the Article I court and would serve out the recommended fixed terms, which would be deemed to have begun at the time of their prior appointment to the BIA. Thereafter, these judges would be eligible for reappointment by the President with the advice and consent of the Senate. The Chief Immigration Judge in Executive Office of Immigration Review ("EOIR") would serve as Chief Trial Judge of the new Article I court until replaced by Presidential appointment. The current Assistant Chief Immigration Judges would serve as Assistant Chief Trial Judges in the Article I court until replaced by the new method of appointment.

If an Article I court is not established, the Recommendation supports the creation of an independent agency for both trial and appellate functions. Such an agency should include an Office of Immigration Hearings (OIH) at the trial level and a Board of Immigration Review

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(Board) for administrative appeals, and should have features substantially consistent with the following guidelines:

-Selection of Judges: A Standing Referral Committee should be created to screen and recommend candidates for judicial appointments. The Chairperson and members of the Board and the Chief Immigration Judge should be appointed by the President with the advice and consent of the Senate. Trial judges should be selected through a competitive, merit-based appointment process, similar to the one used for Administrative Law Judges (“ALJs”) but administered through the personnel office of the independent agency.

-Tenure: The Chairperson of the Board would be appointed for a single, relatively short term; other Board members would be appointed for fixed, renewable terms. The Chief Immigration Judge would be appointed for a relatively short term. Other immigration judges would not be limited to fixed terms

-Removal: Members of the Board and Chief Immigration Judge would be subject to removal prior to the end of their terms by the President for inefficiency, neglect of duty or malfeasance in office. Other immigration judges would be subject to removal only for good cause after an opportunity for a hearing.

-Supervision and Evaluation: Immigration judges would be supervised by the Assistant Chief Immigration Judge responsible for the local court on which the judge served; each appellate judge would be supervised by the Chairperson of the Board. Performance would be reviewed based on a system using the ABA’s Guidelines for the Evaluation of Judicial Performance and the model for judicial performance evaluation.

-Discipline: The agency would have a separate office responsible for receiving, reviewing and investigating complaints filed against Board members and immigration judges.

## 2. Approval by Submitting Entity.

On November 17, 2009, the Commission approved this recommendation.

## 3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

## 4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The need for due process, uniformity, predictability, professionalism, efficiency and fairness in immigration adjudications is a core concern of the ABA. Promoting these goals through system-wide improvement to our overburdened immigration adjudication system will only serve to advance the rule of law (Goal IV) by providing for a fair legal process. The ABA has previously addressed some of the fundamental problems with the immigration system, including issues of due process, immigration detention and fairness in the administrative immigration process. The ABA has called for the appointment of Administrative Law Judges as immigration judges, bound by the Administrative Procedure Act (2/83). However, the ABA has not previously supported policy calling for creation of an Article I court.

In 1983, the House of Delegates adopted a policy to recommend that the United States reform its immigration laws and practices in accord with the following principles, that those federal agencies charged with administering the immigration and refugee laws and the pertinent laws governing fair labor standards and practices be provided sufficient resources and organization to enforce and administer the laws effectively and fairly. The policy favored legislative proposals that would require that administrative law judges for immigration proceedings be appointed pursuant to the provisions of the Administrative Procedure Act. In addition, this policy opposed proposals relating to immigration and naturalization that would limit the availability and scope of judicial review of administrative decisions under the Immigration and Nationality Act to less than what is provided for in applicable provisions of the relevant section of the Administrative Procedure Act, 5 U.S.C. 706: in particular judicial review of decisions regarding the reopening and reconsideration of exclusion or deportation proceedings, asylum determinations outside of such proceedings, the reopening of applications for asylum because of changed circumstances, denials of stays of execution of exclusion or deportation orders, administrative decisions to exclude aliens from entering the United States and constitutional and statutory writs of habeas corpus. (2/83)

In 2006, the House of Delegates adopted a policy urging an administrative agency structure that will provide all non-citizens with due process of law in the processing of their immigration applications and petitions, and in the conduct of their hearings or appeals, by all officials with responsibility for implementing U.S. immigration laws. Such due process in removal proceedings should include proceedings like those governed by the Administrative Procedure Act, in person and on the record, with notice and opportunity to be heard, and a decision that includes findings of facts and conclusions of law; availability of full, fair, and meaningful review in the federal courts where deportation or removal from the United States is at stake; and the restoration of discretion to immigration judges when deciding on the availability of certain forms of relief from removal. This policy also supported the neutrality and independence of immigration judges, both at the trial and appellate levels, and of any federal agency by which they are employed, so that such judges and agencies are not subject to the control of any executive branch cabinet officer. (06M107C)

In 2006, the House adopted a policy on the administration of U.S. immigration laws, calling for “a system for administering our immigration laws that is transparent, user-friendly, accessible, fair, and efficient, and that has sufficient resources to carry out its functions in a timely manner.”(06M107D)

These policies recognize the crucial importance of uniformity, fairness, and due process for immigrants facing removal and other negative immigration consequences. However, they do not fully address the need for systematic reform of the immigration removal adjudication system to promote fairness, efficiency and professionalism in the adjudication of all removal cases. The proposed creation of an Article I court clearly establishes the main goals necessary for a fair and functioning immigration adjudication process. The Article I model is likely to be viewed as more independent than an agency because it would be a true judicial body; is likely as such to engender the greatest level of confidence in its results; can use its greater prestige to attract the best candidates for judgeships; and offers the best balance between independence and

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accountability to the political branches of the federal government. Given these advantages, the Article I court model is the preferred option. The independent agency model also would be an enormous improvement over the current system and offers a strong alternative if the Article I court is deemed infeasible or unacceptable to Congress and/or the President.

5. What urgency exists which requires action at this meeting of the House?

Given the overburdened and inefficient nature of the current system, there is a strong likelihood that Congress will address the need for comprehensive immigration reform in the next few months, between the next meeting of the House and the Annual Meeting.

The current removal adjudication system handles several hundred thousand matters annually, overwhelming the resources that have been dedicated to the task of determining whether noncitizens in immigration proceedings should be removed from the United States. Due to this overwhelming burden, and the known problems in the current system, there is intense political pressure for immediate and systematic immigration reform.

6. Status of Legislation. (If applicable.)

Several bills have been introduced addressing various aspects of immigration system; however, as of this time, none have received legislative action.

7. Cost to the Association. (Both direct and indirect costs.)

None. Existing Commission and Governmental Affairs staff will undertake the Association's advocacy on behalf of these recommendations, as is the case with other Association policies.

8. Disclosure of Interest. (If applicable.)

There are no known conflicts of interest with this resolution.

9. Referrals.

This recommendation is being circulated to Association entities and Affiliated Organizations including:

Section of Administrative Law and Regulatory Practice

Criminal Justice Section

Commission on Domestic Violence

Section of Family Law

Government and Public Sector Lawyers Division

Section of Individual Rights and Responsibilities

Section of International Law

Judicial Division

Legal Services Division/Center for Pro Bono

Legal Services Division/Standing Committee on Pro Bono and Public

Council on Racial and Ethnic Justice  
Commission on Law and Aging  
Commission on Law and National Security  
Section of Litigation  
Standing Committee on Legal Aid and Indigent Defendants (SCLAID)  
Young Lawyers Division  
American Immigration Lawyers Association (AILA)  
National Legal Aid and Defender Association (NLADA)

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

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## EXECUTIVE SUMMARY

### 1. Summary of the Recommendation

The Recommendation supports the creation of an Article I court, with both trial and appellate divisions, to adjudicate immigration cases, which should have features substantially consistent with the following guidelines:

-Selection of Judges: A Standing Referral Committee would screen and recommend candidates for judicial appointments. The Chief Trial Judge, Chief Appellate Judge, and other appellate judges should be appointed by the President and with the advice and consent of the U.S. Senate. The trial judges should be appointed by the Chief Trial Judge or by the Assistant Chief Trial Judges with the approval of the Chief Trial Judge.

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-Removal: Judges may be removed by the appointing authority only for incompetence, misconduct, neglect of duty, malfeasance, or disability.

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If an Article I court is not established, the Recommendation supports the creation of an independent agency for both trial and appellate functions. Such an agency should include an Office of Immigration Hearings (OIH) at the trial level and a Board of Immigration Review (Board) for administrative appeals, and should have features substantially consistent with the following guidelines:

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consent of the Senate. Trial judges should be selected through a competitive, merit-based appointment process, similar to the one used for Administrative Law Judges (“ALJs”) but administered through the personnel office of the independent agency.

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-Discipline: The agency would have a separate office responsible for receiving, reviewing and investigating complaints filed against Board members and immigration judges.

## 2. Summary of the Issue that the Resolution Addresses

Concerns about the lack of independence of immigration judges and the BIA, as well as perceptions of unfairness toward immigrants, have spawned proposals to separate these tribunals from the Department of Justice. The National Association of Immigration Judges (“NAIJ”) and others have long advocated for the establishment of an independent body, either an independent agency or an Article I court, as a necessary step in reforming the immigration adjudication system.

Changes in recent years have only exacerbated these concerns, as resources devoted to enforcement of immigration laws have increased the burden on immigration judges without increasing the resources allocated to adjudication. The calls for independence have become more urgent in this decade in response to politicized hiring of immigration judges. In addition, the Department of Justice has taken the view that immigration judges are merely staff attorneys of the Department. As such, they would be required to comply with rules of conduct applicable to DOJ attorneys, rather than rules of judicial conduct, and would owe their ethical obligations to the Department as their “client.” In such circumstances, the immigration judges can hardly be viewed as independent.

These changes would address widespread concerns regarding both political influence and adjudicatory fairness, while promoting greater efficiency and professionalism within the immigration judiciary.

## 3. Please Explain How the Proposed Policy Position will Address the Issue

The Article I court has been chosen as the preferred restructuring option, with the independent agency option being a close second choice. Both options offer greater

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independence, fairness and perceptions of fairness, professionalism, and efficiency than the current system. The Article I model, however, is likely to be viewed as more independent than an agency because it would be a true court; is likely, as a judicial body, to engender the greatest level of confidence in its results; can use its greater prestige to attract the best candidates for judgeships; and offers the best balance between independence and accountability to the political branches of the federal government.

In providing greater independence, such a restructuring will promote the achievement of three other goals for reform of the removal adjudication system-- fairness and improved perceptions of fairness, a more professional immigration judiciary, and greater efficiency in the adjudication of removal cases.

#### 4. Summary of Minority Views

None to date.