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REVIEW FUNCTION: OPTIONS PAPER

Current Structure of the Review Function

Most, but not all, immigration-related decisions are reviewable at a higher administrative level. For example, decisions regarding an alien's deportability, excludability, and removability in non-expedited proceedings are reviewable. Denials of asylum, withholding of deportation, waivers of excludability, fine determinations, bond/release determinations, rescission of adjustment to lawful permanent status, visa petitions, and a myriad of other types of case are also reviewable. [Staff is still researching the extent, forum, and procedures for administrative review of naturalization decisions].

Some immigration-related decisions, however, are not subject to any review at all. For example, administrative review is precluded in decisions on applications for change of nonimmigrant status, applications for extension of nonimmigrant stays, applications for extensions of voluntary departure time, and student-related requests to transfer schools, change academic or vocational programs, or to reinstate to valid status. Additionally, decisions by consular officers denying visas are not subject to any formal administrative or judicial review, although nonbinding advisory opinions on legal issues may be obtained from the Visa Office. The absence of any meaningful review of consular decisions has been the source of intense criticism for decades.¹

¹ See: *Whom We Shall Welcome*, Report of the President's Commission on Immigration and Naturalization (1953) (recommending review of consular decisions); Gordon, *The Need to Modernize Our Immigration Laws*, 13 San Diego L. Rev. 1, 9-10 (1975) (recommending Board of Visa Appeals); Rosenfield, *Consular Nonreviewability: A Case Study in Administrative Absolutism*, 41 A.B.A.J. 1109 (1955); Note, *Judicial Review of Visa Denials: Reexamining Consular Nonreviewability*, 52 N.Y.U.L. Rev. 1137 (1977); Wildes, *Review of Visa Denials: The American Consul as 20th Century Absolute Monarch*, 26 San. Diego L. Rev. 887 (1989); Processing and Review of Visa Denials, Recommendation 89-9 of the Administrative Conference of the United States found at 1 C.F.R. 305.89-5 (1990) (recommending that there be some level of review of consular discretion to deny or grant visas), Attachment A.

To the extent that administrative review of immigration-related decisions is authorized under current law, however, such review is conducted by several Boards and units located in the Departments of Justice, Labor, and State. Within the Department of Justice, the Executive Office for Immigration Review [EOIR] oversees the Board of Immigration Appeals [BIA], the system of immigration courts, and the Office of the Chief Administrative Hearing Officer [OCAHO]. Each of these subcomponents performs the review function in different subject areas.

Board of Immigration Appeals. The BIA is a quasi-judicial tribunal created by regulation 57 years ago in 1940 as a separate entity in the Department of Justice. In 1983, the Board was placed within the newly-created Executive Office for Immigration Review. It is ultimately responsible to the Attorney General and is not part of the INS. Board Members are appointed by the Attorney General and serve at her pleasure, as opposed to serving fixed terms. In the history of the Board, there never has been an instance where the Attorney General has removed a Board Member. Over the years, the BIA's caseload has grown tremendously, from 3,630 incoming cases in 1983 when EOIR was created, to 20,304 incoming cases in 1996, and an anticipated 24,000 in FY 97. In light of this ever increasing caseload, the BIA was expanded from 5 to 12 Members in 1995, and will expand again to 15 in the very near future.

The BIA now sits in panels of three to decide cases, with selected cases being considered by an en banc Board. Supporting the Board's work is a staff of over 100 attorneys, an increase of nearly 100 percent in the last 2 years. The Board designates selected cases as precedents which are published and made available to the public at large for guidance. The BIA has nationwide jurisdiction [see: 8 C.F.R. 3.1(b) (1996)] over a wide range of cases including:

- Decisions of Immigration Judges in exclusion cases (and the corresponding forms of relief available in these proceedings such as requests for asylum, withholding of deportation, withholding of removal, retroactive permission to reapply for entry, various waivers of inadmissibility, and to withdraw an application for admission);

- Decisions of Immigration Judges in deportation cases (and the corresponding forms of relief available in these proceedings such as adjustment of status, suspension of deportation, voluntary departure, asylum, withholding of deportation, and certain waivers of inadmissibility);
- Decisions of Immigration Judges in removal proceedings (including the forms of relief permitting cancellation of removal);
- Decisions relating to administrative fines and penalties (typically involving airlines, vessels, and other carriers);
- Decisions of District Directors and Service Center Directors on family-based visa petitions and revocation of approval of such petitions;
- Decisions by District Directors on applications for nonimmigrant waivers under section 212 (d)(3) of the Immigration and Nationality Act (INA);
- Decisions of Immigration Judges involving rescission of adjustment of lawful permanent resident status;
- Decisions of Immigration Judges relating to temporary protected status;
- Decisions of Asylum Officers on applications for asylum or withholding of deportation filed by crewmen or stowaways; and,
- Determinations regarding the recognition and accreditation of organizations and individuals appearing in immigration proceedings.

Immigration Judges. At present, there are 201 Immigration Judges, soon to be 210, hearing cases in over 41 immigration courts located throughout the country, with more venues slated for addition. Full-time judges also sit at several detention centers across the country. In addition, Immigration Judges hold hearings at over 20 other detention facilities around the country by “circuit riding,” video conferencing or telephonic hearings at those sites on a regular basis. In FY 96, 262,572 cases (representing a 61% increase since 1994) were filed with the immigration courts,

and 246,426 cases were completed. It is estimated that at least 300,000 cases will be received at the trial level in FY 97. In addition to the types of cases described above, effective April 1, 1997, and pursuant to the provisions of IIRIRA, Immigration Judges now perform the final review of the "credible fear" of persecution determinations made in the admission/inspection process, as well as determinations that an alien seeking admission is not currently a lawful permanent resident, refugee, or asylee as he or she claims [see: section 235(b)(1)(B)(iii)(III) and (C) of INA, as amended by IIRIRA].

Office of the Chief Administrative Hearing Officer. OCAHO is headed by a Chief Administrative Hearing Officer and is staffed by 4 Administrative Law Judges who preside at hearings which were mandated by the Immigration Reform and Control Act of 1986 and the Immigration Act of 1990. OCAHO may review decisions of Administrative Law Judges in cases arising under sections 274A (unlawful employment of unauthorized aliens, i.e, employer sanctions) and 274C (document fraud) of the INA. OCAHO also reviews the final decisions of Administrative Law Judges in unlawful immigration-related employment practice cases arising under section 274B of the INA. Currently, the ALJ program receives approximately 200 cases annually, a figure which is expected to rise as a result of a variety of INS worksite enforcement and related initiatives.

Administrative Appeals Office. Prior to 1983, appellate review within the INS was located at the Regional Commissioner level. Thereafter, and in an effort to ensure consistency in background and to more efficiently deal with case backlogs, review authority was given to the Associate Commissioner for Examinations who acts through the Administrative Appeals Office (AAO) located in Washington, D.C. Within the AAO are located the Administrative Appeals Unit (AAU) headed by a Chief with a staff of 17 examiners, and the Legalization Appeals Unit (LAU) also headed by a Chief and staffed by approximately 25 officers/examiners, supplemented by detailed employees. AAU has approximately 3, 000 pending cases and on average completes somewhere between 300-400 appeals each month. LAU has 30,000 pending cases and completes on average 1,000 cases a month.

Unlike the BIA, AAO does not have a decision-making board. Rather, examiners, who need not be attorneys, write up a decision which then goes to an editor for

“legal sufficiency” and grammar checks. A designated attorney from the General Counsel’s Office assigned to the AAU, but apparently there is limited, if any, interaction between the unit and this attorney. The Chief of the Unit signs the decisions. AAO decisions are almost never published. AAO has appellate jurisdiction over decisions on petitions and applications in no fewer than *thirty-nine* subject areas. [See: 8 C.F.R. 103.1(f)(3)(iii) (1996)]. The cases falling within the AAO’s ambit are not directly related to reviewing deportation orders, but favorable disposition of a petition or application can collaterally resolve deportation issues. Among the categories of cases within the appellate purview of the Associate Commissioner for Examinations are decisions relating to:

- Breaching of bonds;
- Employment-based visa petitions;
- Adjustment of status for Indochinese refugees;
- Petitions for Amerasian children;
- Petitions for orphans;
- Permission to reapply for admission after deportation or exclusion;
- Waivers for certain grounds of excludability;
- Waiver of the two-year foreign residency requirement for exchange visitors;
- Certification of schools for acceptance of foreign students;
- Petitions for temporary workers;
- Petitions for fiances or fiancées;
- Applications for reentry permits;

- Applications for refugee travel documents;
- Claims to acquisition of citizenship abroad;
- Applications to preserve residence abroad for naturalization purposes;
- Various applications for certain certificates of naturalization; and,
- Applications for temporary or permanent resident status under the regular legalization, Special Agricultural Worker [SAW], or the Replenishment Agricultural Worker [RAW] programs, and corresponding waivers of inadmissibility. (These appeals are adjudicated within a special Legalization Appeals Unit [LAU] established by AAU).

Board of Alien Labor Certification Appeals. In the Department of Labor, the Board of Alien Labor Certification Appeals [BALCA] was created by regulation in 1987. Its mission is to adjudicate appeals of denials of applications for labor certification. Previously, appeals were adjudicated by individual Administrative Law Judges (ALJs) within the Department of Labor [see: 20 C.F.R. 656.26 (1996)]. BALCA is chaired by the Chief Administrative Law Judge of the Department of Labor and consists of other DOL ALJs designated by the Chief Judge. At full capacity, BALCA is a 9-member board that sits in three panels of three. Currently, only two panels are in operation as a result of board vacancies. BALCA docketed 697 appeals in FY 1995, and 496 in FY 1996.

Board of Appellate Review. In the Office of the Legal Adviser in the Department of State, there is a Board of Appellate Review [BAR] vested with the jurisdiction [see: 22 C.F.R. 7.3 (1996)] to hear appeals from decisions in the following categories of cases:

- Determinations of loss of nationality or expatriation;
- Denials, revocations, restrictions, or invalidations of passports;

- Final decisions of contracting officers arising under contracts or grants of the Department of State [DOS] (those not otherwise provided for in the DOS contract appeal regulations);
- Denials of U.S. government assistance to U.S. nationals who do not comply with certain labor standards; and,
- Administrative decisions of the DOS “in such other cases and under such terms of reference as the Secretary of State may authorize.”

When considering the appellate review function in its totality, it is apparent that the major immigration functions, i.e., benefits adjudication, border management, interior enforcement (worksite and removals), and detention are reviewed by a number of different entities. Review of border management-related decisions is performed by AAU and BIA. Regarding interior enforcement, removal decisions are reviewed by the BIA; enforcement worksite and employment-based unfair labor practice cases are reviewed by OCAHO. To the extent that administrative appellate review exists on matters relating to detention, it is performed predominantly by the BIA and to a lesser extent the AAU (i.e., matters relating to the breaching of bonds). Review of benefits adjudication is performed within the Department of Justice by AAU, LAU and the BIA, within the Department of Labor by BALCA, and within the Department of State for a more limited set of immigration-related matters, by the BAR.

As can be gleaned from the above discussion, the division of appellate review jurisdiction between the AAU and the BIA vis-a-vis benefits adjudication appears to follow no particular rhyme or reason but instead appears to be historical in nature. Whereas decisions on most family-preference visa petitions are appealable to the BIA, decisions on other family-based petitions such as fiance/fiancees, Amerasian children, and orphans are appealable to the AAU. Although the BIA frequently decides questions regarding the legal requirements for legitimation and adoption, some of the same issues, particularly in the area of adoption, also arise in AAU orphan cases. In addition, the BIA decides appeals on certain waivers for nonimmigrant visas, but the AAU decides appeals in other nonimmigrant cases.

Following a study examining attributes of cases and possible forums for administrative review in immigration cases, the Administrative Conference of the United States (established in 1964 to develop improvements in the legal procedures by which federal agencies administer regulatory, benefit, and other Government programs) recommended in 1985 that appeals from the following categories of cases, which presently fall within AAU's jurisdiction, be heard instead by the BIA: denials of all visa petitions, including occupational-based petitions; denials of section 212(i) and 212(h) waivers (affecting close relatives of U.S. citizens and permanent residents); and denials of applications to waive the 2-year foreign residence requirement for exchange visitors. The Conference also recommended that appeals from denials of nonimmigrant waivers under section 212(d)(3) of the Act be transferred to the AAU from the BIA. In essence, the Administrative Conference recommended that review of INS decisions regarding petitions and applications relating to permanent residents be consolidated in the BIA, and review of such matters for nonimmigrants be consolidated in the AAU. These recommendations were never implemented. See: Recommendation 85-4 found in 1 C.F.R. 305.85-4 (1986), Attachment B; see also: Legomsky, Forum Choice for the Review of Agency Adjudication: A Study of the Immigration Process, 71 Iowa L. Rev. 1297 (1986).

Independence in Decisionmaking

Notwithstanding the chosen forum for administrative review, it is generally agreed that the review function works best when it is insulated from the initial adjudicatory function and is conducted by an independent agency within a Department, or to a lesser extent, separate entity within an agency. Independence in decisionmaking process is the hallmark of meaningful and effective review. It is also critical to both the reality and the perception of fair and impartial review.

Some have questioned whether the current system sufficiently institutionalizes the independence of the review function, particularly within the Department of Justice. For example, although a separate entity within the INS, the AAO nevertheless reports to the Associate Commissioner for Examinations as ultimately do the adjudicatory components, i.e., Adjudications and Nationality, Service Center

Operations. These observers maintain that the review function, as embodied in the AAO, necessarily competes for resources with the adjudicatory function, and can be relegated in terms of priority to other INS concerns.

Similarly, some observers question whether the Board of Immigration Appeals, the forum handling a vast, if not the greatest, volume of appeals and whose decisions are binding on Immigration Judges and on all officers and employees of the INS, can be truly independent when a regulatory procedure exists granting the Attorney General power to review any Board decision. See: 8 C.F.R. 3.2 (h) (1996). More specifically, the regulations mandate that the Board *shall* refer all cases to the Attorney General for review that (1) the Attorney General directs; (2) the Chairman (or a majority of the Board) believes should be referred; or (3) the INS Commissioner requests be referred. In most instances, it is the Service that requests certification of a Board case to the Attorney General for review. In the last 20 some years, fewer than 20 cases have been certified up to the Attorney General for review and decision. See: list of such cases, as reported by EOIR, Attachment C.

In recent years, there has been an increase in the frequency of Service requests for Attorney General review of Board decisions. Some attribute this situation to the fact that over the past decade Congress has enacted several major immigration laws giving rise to a corresponding need for the BIA to decide several novel legal issues. Others note that the Board has completed produced more cases in the past several years. Still others note that since its expansion in 1995 from 5 to 12 Members, there has been an increase in the number of divided decisions handed down by the Board.

Whether the Attorney General should retain power to review BIA decisions is a subject of debate. On the one hand, proponents argue that such review facilitates not only coherent policy formulation within the Department of Justice, but also the resolution of discrepancies between the legal positions taken by the Service, and the legal interpretations and rulings of the Board. In essence, Attorney General review of a Board decision is the last opportunity the Service has to appeal a Board decision. However, proponents of such review power acknowledge that it should be used sparingly. See: Recommendation 83-3 of the Administrative Conference of the United States found at 1 C.F.R. 305.83-3 (1985), Attachment D.

Others maintain that Attorney General review of Board decisions at a minimum compromises the appearance of independent Board decisionmaking, injects into a quasi-judicial appellate process the possibility of intervention by the highest ranking law enforcement official in the land, and generally undermines the Board's autonomy and stature. Furthermore, as one writer points out, "the subordination of the Board's collective judgment to a single individual's opinion reverses a sound principle of appellate scrutiny: that the decision of one judge is best reviewed by a collegial body. Although authorized to act independently in its decisionmaking role, the Board hardly can avoid taking into account its perception of the Attorney General's likely view." See: Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 *Notre Dame Law* 644, 650 (1981).

Inasmuch as the Attorney General's power to review Board decisions is authorized by regulation, this power arguably could be repealed by regulation, although some observe that a statutory change might be required. It is also pointed out that the merits of an appeal or decisions of the Board of Appellate Review in the Department of State, which was fashioned after the BIA, are not subject to review by any other Department official, including the Secretary of State. See: James, *the Board of Appellate Review of the Department of State: The Right to Appellate Review of Administrative Determinations of Loss of Nationality*, 23 *San Diego Law Review* 261, 263-264 (1986).

Another issue frequently raised when discussing the independence of the BIA is the fact that the Board is a creature of regulation and as such could be dissolved at any time. Although this is unlikely given that it has existed for the past 57 years, many argue that the Board should be given statutory recognition. Furthermore, advocates of BIA statutory standing argue that as a consequence of such recognition the Board would be upgraded in stature and would consequently command greater prestige. See: *Whom We Shall Welcome* (1953); *U.S. Immigration Policy and the National Interest*, Report of the Select Commission on Immigration and Refugee Policy (SCIRP) (1981) (some Commissioners recommended statutory creation of a United States Immigration Board). The contrary view is that the Board is not significantly affected by its regulatory existence. Indeed, it has existed longer than some statutory agencies. Moreover, statutory recognition would likely result in Presidential appointments of Board Members for set terms. In turn, such a system would affect

the continuity of the Board's decisionmaking capacities, and could interject a political element into an otherwise nonpartisan decisionmaking body.

Establishment of an Article I Immigration Court

Although the review function could be strengthened in various ways within the current organizational structure, or under the new structures or functional alignments recommended by this Commission, there is an overarching question as to whether the review function should be strengthened by establishing an Immigration Court under Article I of the Constitution of the United States.

Article I courts differ from Article III courts in that the judges are appointed for terms, as opposed to life, and their salaries are not subject to the constitutional mandate of nonreduction. Moreover, Article I courts typically specialize in one particular area of the law, unlike the courts of general jurisdiction under Article III. Over the years, Congress has created several Article I courts including, but not limited to the United States Tax Court, the Court of Military Appeals, the U.S. Court of Federal Claims, and the United States Court of Veterans Appeals. With the exception of the Court of Military Appeals, decisions rendered by these Article I courts are reviewable first by the United States Court of Appeals for the Federal Circuit, and then by petition for certiorari to the Supreme Court of the United States.

There may be limitations as to the nature of the issues that may be decided by Article I courts. Whether, and under what circumstances, such courts may decide matters implicating constitutional rights and protections, i.e., issues that otherwise fall within the jurisdiction of Article III courts of general jurisdiction, is the subject of debate and apparently is without definitive resolution. (For a further discussion of these issues, see: articles in group Attachment G). In the immigration context, such issues could encompass due process considerations, habeas corpus, claims to United States citizenship or loss of nationality, and questions regarding the constitutionality of statutes and regulations. Subject to these possible constraints, there appears to be no legal preclusion to the creation of an Article I Immigration Court.

Inasmuch as it is Congress that would create such a Court, there would be flexibility in how that Court would be organized. Among the myriad of questions Congress could determine are (1) who would nominate and appoint the judges and for what term (it appears fairly standard practice that the President would appoint at least the appellate level judges for a 15 year term); (2) whether the trial division would be required to be staffed by Administrative Law Judges (it does not appear that the trial judges necessarily be ALJs); (3) what procedures would be followed (it does not appear that an Immigration Court would have to be subject to the formalities of the Administrative Procedures Act, the Federal Rules of Evidence, or the Federal Rules of Civil Procedure); (4) the Court's jurisdiction; and (5) the forum for and limitations on judicial review of the Immigration Court's orders (i.e., only review by petition for certiorari to the Supreme Court of the United States, or by petition for review to the Courts of Appeal, or one particular Court of Appeals, with subsequent review by the Supreme Court on petition for certiorari).

In its 1981 report *U.S. Immigration Policy and the National Interest*, the Select Commission recommended that an Immigration Court be created by Congress under Article I of the Constitution (although some commissioners recommended going only so far as a statutory administrative review board). At the time of the SCIRP report, Immigration Judges were housed in the INS and were subject to the administrative and budgetary control of the INS district director, who is the chief law enforcement officer for the local district. It was noted that at times, district directors were involved in an adversary capacity in proceedings before an Immigration Judge. In its 1980 report *The Tarnished Golden Door*, the United States Commission on Civil Rights likewise observed that immigration judges, although at that time theoretically responsible only to the Commissioner of the INS, were in practice dependent on district directors for their budgetary and administrative needs.

In addition to these concerns, the Select Commission noted other weaknesses in the review system as it then existed vis-a-vis deportation and exclusion: the vulnerability of the BIA due to possible executive intervention and lack of statutory standing; the comparatively low grade levels of Immigration Judges and Board Members which served as a deterrent to recruitment of highly qualified lawyers to fill such important roles; the process of judicial review following administrative review which "unreasonably and unnecessarily prolong[ed] the execution of exclusion and

deportation orders;" and the combination of quasi-judicial and judicial appellate structures promoting doubt and confusion in the development of immigration law and encouraging relitigation of already decided issues. See: excerpt from the SCIRP Report, Attachment E.

In 1983, and some say in response to the aforementioned reports, the Attorney General promulgated a regulation creating the Executive Office for Immigration Review, an independent agency responsible for overseeing both the immigration courts as well as the Board of Immigration Appeals (BIA). In so doing, authority over Immigration Judges was removed from the INS and placed within EOIR. Since that time, the pay scales of Board Members and Immigration Judges have been substantially increased, attracting, in the eyes of many observers, better qualified decisionmakers from a diversity of backgrounds and perspectives. In addition, caseloads have increased dramatically.

Notwithstanding the creation of EOIR, the suggestion that an Article I Immigration Court be established arises from time to time. Indeed, in the last Congress, Representative Bill McCollum introduced a bill, H.R.4258, providing for the establishment of a United States Immigration Court. Under this bill, the functions currently performed by EOIR would be removed completely from the Department of Justice and vested instead in a new court composed of both a trial division of Immigration Judges and an appellate division headed by a 6-member court appointed by the President serving staggered 15 year terms. The Chief Immigration Appeals Judge would appoint the trial judges (who would not be ALJs). The jurisdictional base would remain essentially the same as that presently assigned to the BIA and to the Immigration Judges.

The trial judges would be permitted to take and order the taking of depositions, issue subpoenas requiring the attendance and testimony of witnesses and the production of documentation or other evidence from any place in the United States, and order responses to written interrogatories. Both the trial and appellate judges would possess contempt authority. A final decision of the appellate division would be binding on all immigration trial judges, immigration officers, and consular officers unless the decision was modified or reversed by the Court of Appeals for the Federal Circuit or the Supreme Court of the United States. In asylum cases, the

appellate division would be required to render a decision within 60 days of the filing of the appeal.

With respect to the governing procedures, the McCollum bill provides that “[o]nly such selected provisions of the Federal Rules of Evidence and the Federal Rules of Civil Procedure as the appellate division deems appropriate for inclusion in the rules of the Immigration Court shall apply to proceedings in the Immigration Court.” There would be no right to counsel in the proceedings before the Court, but there would be a privilege of representation at no expense to the Government, as is the current practice.

The Court of Appeals for the Federal Circuit would have exclusive jurisdiction to review all constitutional matters, and would be the only Court of Appeals authorized to hear appeals from Immigration Court’s decisions. The bill sets forth the standard for review to be utilized by the Federal Circuit, and provides specific standards of review for asylum cases.

In his remarks introducing this legislation, Representative McCollum noted that the system for adjudicating immigration matters has “matured tremendously over the last 15 years.” See: *Congressional Record*, E1806, September 28, 1996. He noted, however, that much of the current system, including the BIA, does not exist in statute. Moreover, while separated from the INS, both the immigration judges and the BIA are employed by the same Department funding the INS. Further, it is the INS that initiates the proceedings which result in the hearings conducted by Immigration Judges and the subsequent appeals to the BIA. Representative McCollum expressed the belief that an Article I Court “would allow for more efficient and streamlined consideration of immigration claims with enhanced confidence by aliens and practitioners in the fairness and independence of the process.” *Ibid.* Inasmuch as no further action was taken, this bill died at the close of the last Congress. As of this writing, Representative McCollum has not introduced this bill in the current Congress.

In a law review article published in 1980, again a point in time before the creation of EOIR, Maurice A. Roberts, a retired Chairman of the Board of Immigration Appeals, also advocated the creation of an Article I Immigration Court. See: Proposed: A

Specialized Statutory Immigration Court, 18 Dan Diego L. Rev. 1 (1980), Attachment F; for opposing views, see: articles found in group Attachment G. Under his proposal, the Immigration Court would likewise consist of an appellate and trial division. The appellate division would be composed of 7 members, and the trial division 50 members. The Court would be empowered to formulate rules governing its practices and procedures. Neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure would necessarily apply, although selected provisions of those Rules could be adapted and incorporated, as deemed appropriate. Again, the jurisdiction of the Court would track that assigned to the BIA and the Immigration Judges. A final decision of the appellate division would be binding on all judges of the trial division and all officers of the United States, and would be subject to further review only (and this differs from the McCollum bill) by the Supreme Court of the United States on petition for certiorari.

Specific Review Function Options

The following options could be considered:

Option 1. Establishment of separate reviewing entities within each agency with immigration-related responsibilities.

On its face, placing a separate review entity within each agency--that is one for benefits adjudication and one for enforcement--has its appeal. Such an arrangement theoretically facilitates planning and coordination between the adjudicatory and review functions, and the enforcement and review functions. Experience teaches, however, that the review function should remain steadfastly independent of the adjudicatory and enforcement functions so as to facilitate fair and impartial review. When the review function is placed in the same agency as the underlying adjudicatory or enforcement function, the heads of respective components ultimately report to the same person. The two functions inevitably compete for resources, staffing, administrative support, and relative priority. Since adjudications or enforcement is, respectively, the primary mission of the agency, the review function can take on a secondary role, if not be wholly subjugated to that mission. There can be the

appearance, if not the reality, that the review function within the agency is not altogether impartial or fair. Another issue arises as to whether the head of the agency will have the power to review the decisions of the review component.

Regarding the reviewing entity for enforcement, it should be remembered that the immigration laws provide for various forms of relief for aliens in proceedings, the determination of which involves the same types of legal questions and considerations that arise in the context of benefits adjudications.

If this option is recommended, the Commissioners may wish to give additional consideration to the characteristics the reviewing entities should possess, i.e., should there be a collegial decisionmaking body such as the BIA, or should decisions be signed by the head of the body as is the case at the AAU and LAU; should the supporting staff be attorneys as at the BIA, or should they be non-attorneys as at the AAU; should the reviewing body publish precedent decisions as at the BIA, or should it not as at the AAO?

In addition, if this option is selected, it would appear that a realignment of review body jurisdictions would be necessitated. For example, the review of family-based visa petitions now conducted by the BIA (2,080 such appeals were filed in FY 96, and 2,607 are pending) presumably would be transferred to the new benefits adjudication review body. The same presumably would be true of the nonimmigrant visa waiver cases the BIA presently decides. The BAR's immigration-related matter jurisdiction might be transferred to the new service-only review entity as well. Similarly, decisions would have to be made whether review of certain decisions on benefits affecting admissions at ports of entry (i.e., applications for reentry permits, waivers for certain grounds of excludability), now adjudicated by AAU, should be transferred to the enforcement review body.

Finally, the Commission may wish to consider if review should be permitted on certain "benefits" applications where no administrative review is presently permitted, i.e., consular decisions denying visas, student-related applications, etc. Consideration of these matters might be appropriate regardless of which review function option is selected.

Option 2. Consolidation of Review Functions in the Executive Office for Immigration Review.

This option would work best if both the enforcement agency and the benefits adjudication agencies remain in the Department of Justice. Under this scenario, the EOIR would continue to exist, but its mandate would be expanded to include all of the appeals presently falling under the jurisdiction of the AAO, BALCA (to the extent the labor certification system exists), and the immigration-related portfolio of the BAR's jurisdiction. Within EOIR, this newly-acquired jurisdictional base, depending on the case attributes, could be added to the BIA's jurisdiction, or a new body within EOIR could be created to handle review of such appeals.

The appeal of this option is that all administrative review of immigration-related matters would be housed under one roof. While it may be the case that different segments of EOIR would be reviewing different types of cases (enforcement/benefits/detention, etc), the function performed by all the segments would be the same: review. As such, the review function would be relatively insulated from other considerations..

This option, however, does not solve other problems that have been identified. For example, although the review function would be housed in a separate agency within DOJ (and thus on a par with the service agency and the enforcement agency), there remains the potential that the review function will be pitted against the service and enforcement functions at the Department level, as sometimes occurs under the present organizational structure (i.e., both INS and EOIR report to the Deputy Attorney General at DOJ who, at least for the present time, has been designated by the Attorney General to handle coordination of immigration matters; in the disputes between the INS and EOIR, due process concerns can be subjugated to the proposals represented as being "critical to the mission of enforcement").

Furthermore, this option does not address the problem (which in the eyes of some is considerable and in the eyes of others is a non-issue) of the Attorney General retaining the power to review, reverse, or modify rulings by the Board of Immigration Appeals. Absent statutory recognition of whatever is the immigration review-

ing agency in DOJ, that agency potentially could be dissolved by the Attorney General, although it is generally agreed that this has no chance of occurring.

An unanswered question is what would happen to the review function itself should the consolidation envisioned under this option be implemented. Clearly the volume of cases handled by EOIR would require an infusion of resources and staffing, and there is doubt that such resources and staffing would be garnered. Increases in the volume of cases requiring review, without sufficient resources, can actually result in less review, less quality in the review, and longer backlogs than now exist.

Moreover, consolidation does not guarantee that appeals will be resolved more expeditiously. If it is determined that the benefits-only cases are to be reviewed by the BIA under its current operating procedures, then tens of thousands of cases now decided by the respective Chiefs of the AAU and the LAU would instead be considered by 3-Member Board panels. Such a system would sorely tax an already taxed Board. If on the other hand a new component within EOIR would be established to handle benefits-only appeals, decisions would have to be made regarding the structure of that component (collegial or single person decisionmaking; attorney or non-attorney staff, etc.). If there is a lateral transfer of AAU review function, procedures, and staff to EOIR, arguably not much is gained by the transfer in terms of enhanced and better quality of review.

Option 3. Establishment of an Article I Immigration Court.

As previously discussed, the idea of creating an Article I Immigration Court has arisen from time to time, although the primary focus occurred in the early 1980s, before EOIR came into being. There has been no apparent surge of support for this idea since that time other than Representative McCollum's bill, which died at the end of the last Congress without any action being taken.

A critical question is whether an Article I Immigration Court would be an improvement over the present system. Consolidating the review function in an Immigration Court in the judicial branch of government would insulate the review function

to the greatest extent possible, thus facilitating independence in decisionmaking. Arguably, the prestige and stature of the review function, and immigration proceedings themselves, would be elevated and given the distinction they deserve. No longer would the review function have to compete with the other missions of the agency or Department in which the review function would otherwise be placed. Furthermore, applicants for benefits and aliens in proceedings would have only one forum to turn to for review of decisions.

However, there are other considerations militating against the creation of such a Court. For example, in its 1991 Recommendation regarding "Specialized Review of Administrative Action" offering general guidance to Congress on the considerations that should be taken into account on whether and under which circumstances Article I courts should be established, the Administrative Conference of the United States stated:

While review by specialized courts may offer a solution . . . , specialization brings dangers as well. One premise of the national system of courts of general jurisdiction is that sound decisionmaking results from exposure to a wide range of problems and issues; adjudicative bodies with limited subject matter jurisdiction may lack this generalist perspective. Specialization can also produce problems of two kinds: the appointments process may be distorted as interest group pressures lead to the selection and confirmation of nominees for their views on specific issues; in addition, the standard of review may be distorted, either because expertise leads the court to substitute its judgment for that of the agency or because familiarity with a particular agency leads the court to accept the agency's positions too readily. Public perception that a court is biased can reduce its effectiveness even when actual bias is not present. Finally, a specialized court may suffer reduced prestige if its repetitive subject matter attracts lower caliber judges.

See: Specialized Review of Administrative Action, Recommendation No. 91-9 found at 1 C.F.R. 305.91-9 (1991), Attachment H; accord, Wildes, *The Need for a Specialized Immigration Court: A Practical Response*, 18 San Diego L. Rev. 53, 60-62 (1980), Attachment F.

There may be further considerations weighing against the creation of an Article I Immigration Court depending on its organization, jurisdiction, staffing, resources, and the procedures employed. Given nature of INS enforcement activities (i.e., worksite raids, enhanced and targeted border enforcement efforts, the criminal alien program) and situations of mass immigration emergencies (Marielitos, Haitian migration, Golden Venture), there is an ongoing need for EOIR, particularly the Immigration Judges, to make administrative court time not only available on short notice, but available in certain problem areas for certain periods of time. Would an Article I Immigration Court be able to provide this flexibility and do so in very short order? Assuming that such a Court, depending on its characteristics and jurisdiction, would be part of the Judicial, not the Executive, Branch of government, neither the Attorney General nor the President would be empowered to order the Immigration Court to do anything. The present ability and flexibility of the Attorney General to coordinate the enforcement and review function would be lost. Ultimately, the Immigration Court would be responsible to Congress and its power of the purse, as well as its power to delineate (and possibly restrict) the parameters of review.

The specific Article I Immigration Court bills that have been proposed envision the jurisdiction of such a Court to track that of the BIA and the Immigration Judges. None has gone so far as to include the review of all immigration-related decisions, as is currently being considered by this Commission. Even assuming that the newly-created Court's jurisdiction would be limited to that now assigned to EOIR, an Article I Immigration Court would need to be staffed to handle an extremely large caseload-- an anticipated 300,000 incoming cases for Immigration Judges, and some 24,000 cases for the BIA for this fiscal year. If the Court's jurisdiction also were to include that of the AAU, LAU, certain BALCA cases, certain BAR cases, and possibly visa appeals and review of consular decisions, one wonders what the necessary and appropriate size of such a Court might be. Some argue that the bigger the Court, the greater the opportunity for inconsistent decisionmaking. Others add that inasmuch as there may be an outer limit to the resources and staffing that can be provided, procedural restrictions would inevitably be put in place limiting the categories of cases that could be reviewed and under which circumstances (i.e., review by certiorari rather than by right, 1-judge decision rather than panel or en

banc decisions). In essence, a court too big, or one whose case volume is too great, could lead to less, rather than more or better quality review.

Some observers believe that the existence of an Article I Immigration Court would do nothing to improve the flow of cases through the system. There is also the view that immigration-related matters and proceedings are comparatively, and some say preferably, informal. Most applicants for benefits and aliens in proceedings are not represented by counsel. They may not be English-proficient. The vast majority are unfamiliar with court rules, legal matters, burdens of proof, and evidentiary requirements. Some observers take the position that the more formalistic the system of review, the more apt the alien may be to suffer, particularly if he or she is unrepresented. Moreover, Congress already has considered the question of whether to subject immigration proceedings under the INA to the formalities of procedures that govern other administrative bodies and courts (i.e., the Administrative Procedures Act, the Federal Rules of Evidence, and the Federal Rules of Civil Procedure, etc.), but it has decided against such a proposition, opting instead for the development of specific statutory and regulatory procedures in support of due process rights in immigration proceedings.

There also is the question of what degree of judicial review would be authorized following an Immigration Court's order. Many observers urge that the federal courts of appeal, because of their generalist perspective and diverse experience gained by reviewing the panoply of substantive and procedural legal issues, have offered a special creativity in the development of administrative law generally, and immigration law in particular. As such, circuit court review has provided a counterbalance to the sometimes limited and inevitable prejudices that arise when initial decisions are made by specialists. Furthermore, the development of varying positions in different circuits helps to flesh out and ripen legal issues for final consideration by the Supreme Court. Indeed, that there are splits in the circuits on immigration law legal questions does not differ from the splits in the circuits in other areas of substantive or procedural law. Without a process of circuit court review, the Supreme Court (which hears cases for the most part only on petition for certiorari) would not have the benefit of the diverse views of the lower courts. It is also anticipated that a minuscule number of immigration cases would ever be

granted certiorari (and therefore review). Hence, the generalist perspective of the federal courts of appeal would be lost.

Placing judicial review of immigration-related matters in one circuit court may be preferable to no circuit court review at all, but it is not clear that the United States Court of Appeals for the Federal Circuit, sitting only in Washington, D.C., is the best forum for immigration matters to be considered. Preliminary inquiries suggest that the jurisdiction of this court may itself be limited to hearing appeals from the U.S. Court of Federal Claims, the U.S. Court of International Trade, the U.S. Court of Veterans Appeals, the International Trade Commission, the Board of Contract Appeals, the Patent and Trademark Office, the Merit Systems Protection Board, certain decisions of the Secretaries of the Department of Agriculture and the Department of Commerce, and cases from district courts involving patents and minor claims against the federal government. It is not at all apparent from this description that the Court of Appeals for the Federal Circuit Court regularly, or ever, handles legal questions in the areas of criminal, bond/release, and family/domestic relations under foreign and state laws (i.e., marriage, divorce, adoption, legitimation, step-relationships), questions that frequently arise in the context of immigration matters and proceedings.

and more on the value that decisions can have to inform and assist the public.

RECOMMENDATION

1. Indexing of Agency Decisions

Agencies that do not already do so should compile a subject-matter index of their adjudicatory decisions so as to afford citizens information useful in dealing with the agencies and to assist the development of agency standards and policies on general issues and recurring questions.²

In meeting FOIA indexing requirements, agencies should ensure that a subject-matter index is made of their decisions and that the index includes all significant decisions, whether or not the decisions are designated as precedential.

2. Level and Scope of Decisions Indexed

The index should cover the adjudicatory decisions of the agency's highest level tribunal. The agency should also consider whether to index significant lower level decisions that have become final. The adjudicatory decisions intended to be covered by this recommendation are those made with an accompanying written opinion or rationale in contested cases after an opportunity for a hearing at some stage of the proceeding.

3. Index Contents

Agency indexes should be designed for effective and efficient use. These indexes should contain sufficient information on each indexed decision to identify the major issues decided and the location of the case file. Agencies should adopt one of the following practices in indexing their adjudicatory decisions:

² In programs where the agency has established a policy that none of its decisions have precedential effect, the Conference urges that the agency re-examine the feasibility of creating a system that accords certain decisions precedential value to provide guidance about the factors that influence their decisions and to ensure better development of agency policy and standards. See ACUS Recommendation 87-7, "A New Role for the Social Security Appeals Council," 1 CFR 305.87-7. See also ACUS Recommendation 71-5, "Procedures of the Immigration and Naturalization Service In Respect to Change-of-Status Applications."

A. *Universal Index.* Index all final decisions; or

B. *Selective Index.* Where the volume of decisions makes a universal index impracticable or uninformative, selectively index final decisions omitting those decisions that are repetitive. The selective index should include all significant decisions. Decisions may be significant because they are deemed by the agency to be precedential or otherwise establish a principle to govern recurring cases with similar facts, develop agency policy and exceptions to the policy in areas where the law is unsettled, deal with important emerging trends, or provide examples of the appropriate resolution of major types of cases not otherwise indexed.

4. Public Notice of the Index

Agency indexes should be fully disclosed and readily available. Appropriate notice of the existence of unpublished decisions should also be given in both the agency's FOIA regulations and the procedural or substantive regulations governing the specific program.

5. Computer Technology

Agencies should explore the use of computer technology in order to promote accessibility and reduce costs of indexing.

[54 FR 53495, Dec. 29, 1989]

§ 305.89-9 Processing and Review of Visa Denials (Recommendation 89-9).

United States consulates around the world complete the processing of some nine million applications for immigrant and nonimmigrant visas each year. Approximately ninety percent are granted; ten percent are denied. Under current practice, the only review of a consular official's denial of a visa may be by a more senior officer in the consulate, or, on points of law, by the Visa Office in the State Department. The Immigration and Nationality Act has been read to preclude administrative review, and the courts, with a few exceptions, have declined to review visa denials.

Immigrant visas are available to persons with close family relationships to U.S. citizens and residents, or with particular abilities or skills that are needed but not otherwise available in the United States. Nonimmigrant visas are available in a long list of classes, ranging from tourists to students to

certain types of business personnel to diplomats.

Whatever the visas category or class, there clearly are important interests at stake. These interests are not just those of the applicants themselves, but also of citizens and residents of the United States who are sponsoring the applicant or have some other interest in the applicant's presence in the United States. These interests warrant a close look at whether initial decisions in this important program of mass adjudication should be more fully reviewable than at present.

Federal law and State Department regulations give consular officers substantial discretion in adjudicating visa applications. For example, consular officials exercise absolute discretion in determining whether an applicant may be represented by an attorney or other qualified representative at the visa application interview. Furthermore, although current Department regulations, at 22 CFR 41.121(c), require that a denial of a visa application be reviewed by a more senior officer, the high volume of applications at some posts has resulted in only a random sample of denials being reviewed. Review by a senior official may also be a problem in single-officer posts.

Consular posts send a few hundred cases a year presenting significant legal issues to the Visa Office of the State Department for an advisory opinion that is binding only with respect to legal issues. The applicant typically has no notice of this proceeding. Such review affects the results in only a small number of cases, since most visa denials are based on a factual determination.

Current law has been read by some to limit both administrative and judicial review. Section 104(a) of the INA, 8 U.S.C.1104(a), excepts the Secretary of State from the administration or enforcement of "those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas." This language has been considered by some to preclude the establishment of a more formal review mechanism within the State Department. Further, courts have generally limited the extent of available judicial review.

The Conference believes that it is important that there be at least some level of review of consular discretion to deny or grant visas. The availability of such review would not only encourage consistency and care in the initial adjudication, but would serve interests of fairness and legitimacy. On the other hand, a review scheme in this area can be crafted in a fashion that keeps procedure to a minimum, takes account of the extremely high volume of visa applications, and avoids over-judicialization of the process.

The Recommendation reflects a two-pronged approach to administrative review of visa denials, aimed both at improving the review at the consular level and at considering the creation of a level of centralized administrative review. The suggestions directed at the consular offices are intended to encourage quick, consistently applied, and cost-effective review that would resolve many of the issues on which review might be requested. The Recommendation also asks the State Department to study the issues, and develop and submit to Congress a proposed process for administrative review of consular actions. The Conference recognizes that there are currently competing priorities for resources that might be required by implementation of the Recommendation, but believes that these proposals should be implemented as quickly as is feasible under the circumstances.

RECOMMENDATION

1. The State Department should adopt a regulation ensuring that applicants may be accompanied by an attorney or other authorized representative during the course of the visa application interview process. To the extent practicable, the State Department should take steps to reply promptly to communications from applicants or authorized representatives and to ensure that facilities are available to enable applicants to meet with their representatives during the application interview process.

2. The State Department should require consular officers to provide brief but explicit written statements of the factual and legal bases and reasons for denying a visa application, except where reasons of national security or potential adverse effects on foreign policy dictate otherwise.

3. The State Department should modify its regulations to allow Visa Office advisory opinions to be made available to applicants and their authorized representatives except where national security or potential adverse effects on foreign policy dictate otherwise.

4. The State Department should either comply with its regulation found at 22 CFR 41.121(c) requiring review within a consulate of each denial of a visa application, or examine alternative systems to review visa denials at consular posts. In such a study, the State Department should

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keep in mind the goal of ensuring consistency in visa adjudications and consider possible alternatives to address exigencies created by busy consular posts, for example, by reviewing random samples of visa denials, or selecting for review certain types of denials.

5. The State Department should, after appropriate study, develop and submit for Congressional review a proposed process for administrative review of consular visa actions.¹

[54 FR 53496, Dec. 29, 1989]

§ 305.89-10 Improved Use of Medical Personnel in Social Security Disability Determinations (Recommendation 88-16).

The Social Security Administration annually processes more than 1.5 million requests for Disability Insurance Benefits and Supplemental Security Income requiring a determination whether the claimant is disabled. The Administrative Conference has addressed various aspects of the Social Security Administration's administrative procedures in earlier recommendations.¹ This recommendation focuses more specifically on the appropriate use of medical personnel in making disability determinations.

The Social Security Administration (SSA) uses medical personnel currently in two ways. First, initial and reconsideration determinations are made for SSA by federally funded state agencies that use teams composed of one lay disability examiner and one medical doctor or psychologist.² Second, medical sources are used to provide evidence of disability in individual cases and to explain or elaborate upon medical evidence obtained from other sources. Medical sources provide evidence relating to individual claims to state agencies at the initial decision and reconsideration levels, to administrative law judges at the hearing level, and to the Appeals Council. Requests can be made to the claimant's treating physician or

to an independent physician who is asked to examine the claimant and report on his or her findings. Doctors are asked by some administrative law judges to explain or elaborate upon existing medical evidence; other administrative law judges and most state agency personnel do not use independent medical doctors for these purposes. Medical personnel are involved in the disability determination process for other federal disability programs as well. Although the extent to which they are used varies from program to program, programs typically concentrate the use of medical personnel at the initial decision stage, as does the Social Security Administration.³

There is no doubt that medical personnel can offer valuable assistance in making disability determinations called for by the Social Security Act. Notwithstanding the mixed medical and legal content of the Social Security Act's disability standards, most disability determinations require the resolution of medical issues in one form or another. At the same time, it must be recognized that doctors cannot simply apply their general medical expertise to the work of determining disability under a complex and multi-faceted statutory disability standard. Doctors are accustomed to evaluating a person's limitations in the context of treatment; they are oriented professionally to identify the cause of and resolve limitations, rather than to identify limitations and then measure them against stated requirements for receipt of benefits. These recommendations are intended to help reconcile the needs of the Social Security Administration disability determination process for medical expertise and the ability of the medical profession to meet those needs.

Medical personnel perform three main functions in current practice. First, they assist in developing the medical records on which disability decisions are based. Second, they provide medical evidence for the record, including medical findings and opinions relating to an individual claimant's impairments and explanations of other medical evidence already in the record. Third, they participate in making disability decisions at the initial and reconsideration levels based on the record.

Each of these functions suggests models for using medical decisionmakers in Social Security disability determinations. The first model would increase the responsibility of

³ While the Conference has examined the other federal disability programs and believes that these recommendations hold valuable lessons for the agencies administering those programs, these recommendations are addressed solely to the Social Security Administration.

medical personnel for compiling all relevant medical evidence. Medical personnel would concentrate on evaluating the adequacy of the record and following up with requests for clarification and additional information from treating and consulting medical sources. Medical personnel would also be given specific responsibility for assuring that all medical evidence in the record is clear and understandable to both medical and non-medical decisionmakers. The second model would improve the use of doctors as sources for supplying medical data and opinions on which disability decisions can be based. This model also supports the use of medical personnel to evaluate and resolve certain specified medical issues relevant to a claim if, in a particular case, there are medical issues that can be identified as appropriate for separate decision. The third model would make more effective use of medical personnel in decisionmaking role. This model would concentrate medical resources at the initial decision level, where a doctor would share the responsibility for decisionmaking with a non-medical disability examiner. The doctor member of the team would be given special responsibility for certain tasks, and would undertake a full and independent review of the entire record in each case. The expectation is that through open exchange of information between the two decisionmakers and a reasonable allocation of responsibility based on each member's expertise, most disability determinations will be made by consensus. If conflicts arise on medical issues, separate medical personnel would be given the authority to resolve those conflicts.

The following recommendations would implement the important provisions of each of these models. Implementing these recommendations would require greater expenditures for medical personnel and related support at the state agencies. However, additional costs should be offset by savings resulting from elimination of the reconsideration level and reduced numbers of administrative and federal court appeals.

RECOMMENDATION

A. Improvements at the Initial Decision Level

The Social Security Administration (SSA) should enhance the decision-making role of medical personnel at the initial decision level. This can be accomplished by improving upon the current practice of using two-member teams—consisting of a medical member who is a licensed physician or psychologist and a non-medical member who is a disability examiner—to determine disability, as follows:

1. *Responsibility for developing medical evidence.* SSA should ensure that the medical member of the team is given primary responsibility for developing the medical evidence⁴ in the record.

(a) Staff and resources should be allocated so as to assure that a complete record of all evidence relevant to a disability claim is obtained before an initial decision is made on the claim.

(b) Specially trained support staff, including nurses and non-medical personnel, should be made available to assist the medical member in developing the medical evidence.

(c) The medical member should, whenever possible, be assigned direct responsibility for evaluating the adequacy of reports from physicians and for following up with requests for clarification or additional information from these sources.

2. *Identifying and deciding discrete medical issues.* SSA should develop a list of discrete issues raised by the applicable disability standards that may arise in individual claims and that are appropriate for decision by medical staff. The medical member of the team assigned to a claim should be made responsible for identifying any such discrete issues raised in the claim, developing all evidences relevant to the issue, and reaching a decision on that issue.

3. *Resolving medical conflicts.* SSA should ensure that medical personnel are used to resolve any conflicts on medical issues that arise in the course of team evaluations of disability at the initial decision level.

(a) Senior medical staff should be given the authority to review claims where the team members are unable to agree and to recommend further

⁴ "Medical evidence" includes (1) medical findings and opinions relating to an individual claimant's impairments, (2) other evidence, including subjective symptoms, that is relevant to determining the existence or severity of the claimant's condition, and (3) explanations of other medical evidence already in the record. The recommendations' focus on development of medical evidence is not intended to minimize the importance of the development of other evidence, including vocational evidence.

Clean Water Act and the Hazardous and Solid Waste Amendments of 1984 permit plaintiffs to seek civil penalties in private enforcement actions.

As use of private enforcement actions has grown, issues related to coordinating public and private enforcement activities have arisen. Coordination in the development and use of criteria regarding the bringing of cases and maintaining basic consistency in the imposition of penalties is important for several reasons. Notwithstanding the different enforcement perspectives and goals of public and private plaintiffs, inconsistencies in case selection or penalty policy may create actual and perceived unfairness to regulated entities, as similarly situated parties receive varying treatment. Uncertainties about the likelihood or outcome of enforcement actions may increase litigation and decrease voluntary compliance. Lack of coordination may also make it difficult for the Environmental Protection Agency and cooperating state agencies to deploy their limited enforcement resources in the most efficient and effective manner. The recommendation that follows proposes administrative steps which the Environmental Protection Agency can take to provide better guidance to those involved in the enforcement process, and to achieve better coordination between public and private enforcement.

RECOMMENDATION

1. Articulation of Enforcement Policy

In order to achieve better coordination between public and private enforcement efforts, the Environmental Protection Agency should, as feasible, enunciate its views concerning enforcement criteria, calculating penalties, and settling contested cases. When enunciated, the agency's views, or an announcement of their availability, should be published in the *FEDERAL REGISTER*.¹ Public knowledge of the means by which the EPA calculates penalties will be particularly helpful to courts performing similar calculations in private enforcement actions, and the agency should consider whether more detailed specification of its policies in this respect is feasible. EPA should offer opportunities, consistent with Recommendation 76-5, for

¹In administering the Clean Water Act, for example, the EPA has begun this process by issuing a proposed rule to revise program reporting requirements for the assessment of permit noncompliance. See, e.g., 49 FR 29720 (July 23, 1984).

public comment on statements of policy regarding calculation of penalties.²

2. Improvement of Information Systems

The availability of accurate, complete, and current information about (a) the compliance status of regulated persons and firms, and (b) the outcome of public and private enforcement actions, is essential both for the formulation and implementation of agency enforcement strategies and for the effective use of private enforcement actions. When designing management information systems and reporting requirements, the Environmental Protection Agency should consider improving the quality of such information and its availability for private enforcement, subject to statutory limitations on disclosure of confidential information. The Office of Management and Budget should give similar consideration to the role of compliance information when reviewing EPA data-gathering proposals.

3. Notice of Private Actions

When the Environmental Protection Agency receives from a private party notice of an alleged violation, the EPA should request from that party copies of all complaints³ and other significant pleadings, settlement agreements, and judicial decrees in any action relating to the alleged violation, in which the EPA is not a party.⁴

²See Recommendation 76-5, *Interpretive Rules of General Applicability and Statements of General Policy*, 4 ACUS Recommendations and Reports 62 (1979), 1 CFR 305.76-5. The Administrative Conference recommended that agencies adopting significant interpretive rules or policy statements normally should provide an opportunity for public comment.

³The Hazardous and Solid Waste Amendments of 1984, Pub. L. 98-616, section 401 (to be codified at 42 U.S.C. 6972 (b)(2)(F)), provide that a plaintiff bringing an action under the citizen suit provision of the Resource Conservation and Recovery Act must serve a copy of the complaint on the Attorney General and the Administrator of the EPA.

⁴Nothing in this recommendation is intended to suggest that a request for or receipt of any such notice or other information or document has or should have any preclusive effect upon the federal government's ability to take enforcement action against the alleged violator.

Continued

[50 FR 28366, July 12, 1985]

§ 305.85-4 Administrative Review in Immigration Proceedings (Recommendation No. 85-4).

The Immigration and Nationality Act of 1952, as amended, requires the Justice Department to make two major types of decisions affecting aliens—whether to exclude aliens seeking to enter the United States and whether to deport those already in the country. The Act and the accompanying regulations also require a host of collateral decisions concerning visa petitions, waivers of grounds for exclusion or deportation, adjustment of status from non-immigrant to permanent resident, and many other immigration-related matters. Responsibility for making these decisions resides in two very different types of officials. Immigration judges, who are part of the Justice Department's Executive Office for Immigration Review, conduct formal evidentiary hearings in deportation, exclusion, and certain other proceedings. District directors and their subordinates are part of the Immigration and Naturalization Service (I.N.S.). They decide numerous other matters in far less formal proceedings. While the immigration judges have only adjudicative responsibilities, the district directors are principally responsible for the administration and enforcement of the immigration laws within their local geographic districts.

Similarly, there are two channels of administrative appeal for the Justice Department's immigration decisions. The Board of Immigration Appeals (B.I.A.), like the immigration judges, is located within the Executive Office for Immigration Review. The Board reviews almost all immigration judge decisions and some district director decisions. It is composed of five attorney members, all of whom normally participate in every case. It reviews cases *de novo* on the basis of the administrative record and publishes precedential opinions binding on the immigration judges and on the I.N.S.

Twenty-five other categories of district director decisions are appealable to the Associate Commissioner for Examinations, an I.N.S. policymaking official whose appellate jurisdiction has been subdelegated to the Administrative Appeals Unit (A.A.U.) In that unit, cases are decided *de novo* by individual non-attorney staff members and reviewed by the unit chief. The A.A.U. does not ordinarily publish its decisions.

cept of any such notice or other information or document has or should have any preclusive effect upon the federal government's ability to take enforcement action against the alleged violator.

The Justice Department's current regulations specify with a high degree of clarity which immigration decisions are administratively appealable and to which appellate body. However, reasons for the various assignments are not always evident.

The factors that should influence the choices of forum for administrative review of agency adjudication can be developed through a three-part methodology: (1) identify those attributes of the possible review forums that affect the accuracy, the efficiency, the acceptability, or the consistency of the administrative process; (2) identify the attributes of cases that favor the selection of a review forum with particular forum attributes; (3) determine the extent to which those case attributes tend to be present in the particular class of cases under consideration.

In Recommendation 75-3, the Administrative Conference set forth criteria to guide Congress in selecting the appropriate forum for judicial review of administrative agency action. Using the methodology described above, the present recommendation suggests some additional criteria and describes ways in which that expanded list of factors, with only slight modification, can be employed also to select a forum for administrative review. Applying those criteria, the recommendation then suggests forums for administrative review of various classes of immigration decisions.

RECOMMENDATION

A. Forum For Administrative Review

1. The Justice Department should undertake a comprehensive review of its regulations governing the assignment of forums for administrative review of immigration orders. In examining the categories of Board of Immigration Appeals (B.I.A.) and Administrative Appeals Unit (A.A.U.) jurisdiction, the Justice Department should consider the following factors to the extent applicable.

a. Factors favoring selection of the B.I.A. for a particular class of cases include (i) high likelihood of a substantial impact on the litigants; (ii) the prevalence of issues of law or discretion, particularly when the public impact of a decision will be widespread; (iii) the desirability of providing for judicial review of the class of cases in the courts of appeals.

b. Factors favoring selection of the A.A.U. for a particular class of cases include (i) a high volume of cases; (ii)

Attachment B

the prevalence of questions of descriptive fact, rather than issues of law or discretion; (iii) high likelihood that administrative review will require the taking of additional evidence.

c. Once one class of cases is committed to a particular review forum, there is benefit in assigning to that same forum (i) other classes of cases tending to raise similar issues and (ii) other cases which, if sent elsewhere, would frequently result in the bifurcation of proceedings affecting the same individual.

d. With all else equal, the status quo should be preserved.

2. In revising its regulations, the Justice Department should make the following specific case assignments:

a. Appeals from orders of deportation and exclusion should continue to be heard by the B.I.A.

b. Appeals from orders rescinding adjustment of status should continue to be heard by the B.I.A.

3. The Justice Department should also, subject to the development of new information in the review recommended in paragraph 1, make the following case assignments:

a. All appeals from district directors' denials of visa petitions should be heard by the B.I.A.; thus orphan, fiancée(e), and occupational petitions should be transferred from the A.A.U. to the B.I.A.

b. If administrative appeals from district directors' denials of waivers of the grounds of exclusion under section 212(c) of the Immigration and Nationality Act (applicable to aliens who are returning to a lawful unrelinquished domicile in the United States of seven years) are preserved,* they should continue to be heard by the B.I.A.

c. Appeals from district directors' denials of waivers under sections 212(h) and 212(i) of the Act (applicable to certain close relatives of American citizens and permanent residents) should be transferred from the A.A.U. to the B.I.A.

*A pending Justice Department proposal would eliminate administrative appeals from these orders. The issue of whether these orders should be administratively appealable is beyond the scope of this recommendation.

d. Appeals from district directors' denials of applications to waive the two-year foreign residence requirement for exchange visitors should be transferred from the A.A.U. to the B.I.A.

e. Appeals from denials of waivers under section 212(d)(3) of the Act (applicable to nonimmigrants) should be transferred from the B.I.A. to the A.A.U.

f. Appeals from district directors' denials of applications for permission to reapply for admission after exclusion or deportation should continue to be heard by the A.A.U.

B. Structure and Independence of the Board of Immigration Appeals

1. The B.I.A. should adopt a system of randomly selected three-member panels to decide cases. En banc review should be afforded, upon a determination by a majority of the B.I.A., only in the following circumstances: (a) When invoked by any B.I.A. member; (b) at the request of the I.N.S. Commissioner or the Attorney General following decision; or (c) when the aggrieved party petitions for review of a split panel decision.

2. If necessary to accommodate the case transfers recommended in part A above, the B.I.A.'s membership should be slightly increased.

3. Congress should enact legislation to give the B.I.A. statutory recognition. Under the legislation, the B.I.A. should remain within the Department of Justice. The statute should confer jurisdiction over deportation, exclusion and rescission orders, and should authorize the Attorney General to adjust the Board's jurisdiction as to other matters.

4. The Attorney General should retain the power to review individual B.I.A. decisions. In accordance with current practice, this power should be exercised only in extraordinary circumstances.

[50 FR 52894, Dec. 27, 1985]

§ 305.85-5 Procedures for Negotiating Proposed Regulations (Recommendation No. 85-5).

Negotiations among persons representing diverse interests have proven to be effective in some cases in developing proposals for

Agency Rules. In 1982, the Administrative Conference of the United States adopted Recommendation 82-4, 1 CFR § 305.82-4, encouraging the use of negotiated rulemaking by Federal agencies in appropriate situations.¹ The concept of negotiated rulemaking arose from dissatisfaction with the rulemaking process, which since the 1960's, in many agencies, had become increasingly adversarial and formalized—unlike the brief, expeditious notice and comment procedure envisioned in section 553 of the Administrative Procedure Act. Experience has now shown that negotiated rulemaking can be a practical technique in appropriate instances.

Since Recommendation 82-4 was adopted, its recommended procedures have been followed four times by Federal agencies. The Federal Aviation Administration used negotiated rulemaking to develop a new flight and duty time regulation for pilots. The Environmental Protection Agency used negotiated rulemaking to develop proposed rules on nonconformance penalties for vehicle emissions and on emergency exemptions from pesticide regulations. The Occupational Safety and Health Administration encouraged labor, public interest, and industry representatives to negotiate a standard for occupational exposure to benzene. The benzene negotiations did not result in agreement among the parties on a proposed rule, but the other three negotiations did lead to substantial agreement resulting in two final rules (which have thus far not been challenged) and one draft rule which, after public comment, is pending before the agency.

The experience of these four cases has shown that the original recommendation was basically sound, and has provided a basis for the Administrative Conference to use in supplementing Recommendation 82-4.

It is important to view Recommendation 82-4 and the present recommendation, taken together, as a guide to issues to be considered rather than a formula to be followed. Negotiation is intrinsically a fluid process that cannot be delineated in advance. Accordingly, what will "work" in a particular case depends on the substantive issues, the perception of the agency's position by interested parties, past and current relationships among the parties, the authority of party representatives in the negotiations, the negotiating style of the represent-

¹Recommendation 82-4 used the term "regulatory negotiation" to refer to this process. The present recommendation substitutes "negotiated rulemaking" to emphasize that it is addressing negotiation of rules, and not other uses of negotiations in the regulatory process.

atives, the number and divergence of views within each constituency represented, and the skill of the participants and mediators. These factors are mostly dynamic and their character is likely to change during the negotiating process. Proponents of negotiated rulemaking must recognize the unavailability of neat formal solutions to questions of who should participate, how the negotiations should be conducted, or even the definition of "successful" negotiations.

Agencies undertaking negotiated rulemaking must be prepared to deal with these real world uncertainties by pursuing a thoughtfully flexible approach. Elements of Recommendation 82-4 and the present recommendation provide a conceptual framework within which to plan and conduct negotiations in a particular proceeding, but should not be taken as a formal model. An agency cannot merely transplant a pattern followed successfully by another agency, or even by itself on another occasion. Nevertheless, agencies that are considering negotiated rulemaking for the first time should find it helpful to discuss their plans with other agencies and persons experienced with the process.

Some agencies have indicated a concern about the effect of the Federal Advisory Committee Act on negotiated rulemaking proceedings. The four agency experiences reviewed by the Administrative Conference have not shown that the Act, as interpreted by the sponsoring agencies and participants, impeded effective negotiations. Under current judicial and agency interpretations of the Act, it appears that caucuses and other working group meetings may be held in private, where this is necessary to promote an effective exchange of views.

Another concern expressed by some agencies has been the potential costs associated with negotiated rulemaking. While aspects of the recommended process may entail some short-term additional costs, the Conference believe that potential long-range savings will more than offset the costs. Moreover, agencies should be aware of opportunities for assistance from within the government, for example, training provided by the Legal Education Institute of the Department of Justice, and mediation assistance by the Federal Mediation and Conciliation Service and the Community Relations Service.

RECOMMENDATION

1. An agency sponsoring a negotiated rulemaking proceeding should take part in the negotiations. Agency participation can occur in various ways. The range of possibilities extends from full participation as a negotiator

ATTACHMENT C

Recent Board Decisions Certified up to the Attorney General for Review, as Reported by EOIR

Matter of Blas, 15 I &N Dec. 626 (BIA 1974 ; A.G. 1976). In a divided decision, the Board affirmed an Immigration Judge decision denying adjustment of status as a matter of discretion. The Board requested Attorney General review of its decision. The Attorney General *affirmed* the Board's decision.

Matter of Cantu, 17 I&N Dec. (BIA 1978; A.G. 1978). The Service requested the Attorney General to review a Board decision terminating proceedings against an individual claiming to be a United States citizen by virtue of his birth in a territory which was formerly part of the United States, but which had been ceded back to Mexico in 1972. The Attorney General *affirmed* the Board's decision.

Matter of Belenzo, 17 I&N Dec. (BIA 1980, 1981; A.G. 1981). The Board requested review of its decision finding that the 5-year limitation period for rescission of lawful permanent resident status bars the initiation of deportations proceedings against an adjusted alien when the alleged grounds for the deportation were acts committed in procuring the adjustment. The Attorney General *reversed* the Board.

Matter of Leon-Orosco and Rodriguez-Colas, 19 I&N Dec. 136 (BIA 194; A.G. 1984). The Service requested Attorney General review whether (1) the Board improperly rejected certain stipulations entered into by the parties, and (2) the Board should have provided an interpretation of the term "membership in a particular social group: in the context of this case for the future guidance of the parties (the Board disposed of the case without ever reaching this issue). The Attorney General *approved* the Board's action on both of these issues.

Matter of Kalejs (unpublished decision). The Attorney General *affirmed* the Board's decision in a bond case involving how high bond should be set for an alleged Nazi war criminal.

Matter of Doherty (unpublished decision, BIA November 14, 1988; A.G. June 30, 1989). The Board granted the respondent's (an IRA member) motion to reopen his deportation proceedings in order to apply for withholding of deportation and permit him the opportunity to redesignate his country of deportation. The Attorney General *reversed* the Board and denied the motion.

Matter of Hernandez-Casillas, 20 I&N Dec. 262 (BIA 1990; A.G. 1991). The Service requested Attorney General review of a Board decision finding that relief under section 212(c) of the Immigration and Nationality Act should be available to aliens deportable under any ground of deportation (including entry without inspection), except those where there is a comparable ground of exclusion that is specifically excluded under section 212(c). The Attorney General *reversed* the Board's decision and found that an alien deportable for

having entered without inspection could not apply for such relief.

Matter of Ponce de Leon, Interim Decision 3261 (BIA January 3, 1996). The Service requested Attorney General review of a divided Board decision holding that absent contrary circuit court precedent, it would follow the federal regulation providing that an application for section 212(c) relief shall be denied if the alien has not maintained lawful permanent resident status in the United States for at least 7 consecutive years. In so holding, the Board rejected the argument that time spent as a lawful temporary resident (under the legalization program) could be counted for purposes of establishing 7 years of unrelinquished lawful domicile. EOIR reports no decision from the Attorney General.

Matter of Cazares, Interim Decision 3262 (BIA January 3, 1996). The Service requested review of this case, which was decided the same day as *Matter of Ponce de Leon*, in which the divided Board found that a lawful permanent resident, who gained such status under the legalization program by first becoming a lawful temporary resident established "lawful domicile" for purposes of eligibility for section 212(c) relief as of the date the alien filed his or her application for temporary resident status. In so holding, the Board applied Ninth Circuit law in a Ninth Circuit case. EOIR reports no decision from the Attorney General.

Matter of Luviano, Interim Decision 3267 (BIA February 29, 1996). The Service requested Attorney General review of a divided Board decision ruling that a conviction for a violation of a firearms offense that has been expunged under California law will not support a finding of deportability. No decision has been rendered by the Attorney General.

Matter of Farias, Interim Decision 3269 (BIA March 12, 1996). The Service requested Attorney General review of a divided Board decision finding that a waiver for a lawful permanent resident alien who has engaged in smuggling activity involving a spouse, parent, son or daughter, is available if the familial relationship arose after the smuggling incident but exists at the time of the application for relief. The Attorney General *remanded* this case to the Board because the issue presented was mooted by provisions of the Illegal Immigration and Immigrant Responsibility Act of 1996 (IIRIRA). In essence, *Congress reversed* the Board's decision.

Matter of Soriano, Interim Decision 3289 (BIA July 1996). The Service requested review in this case, and in a number of other like issue cases, of a divided Board decision holding that the strict restrictions on eligibility for relief under section 212(c) relief of the Act, as enacted under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), applied only to applications filed on or after April 24, 1996, the date of AEDPA's enactment, and *not* to otherwise pending cases. In a decision rendered February 21, 1997, the Attorney General *overruled* the Board's interpretation and found that the AEDPA 212(c) restrictions did in fact apply to pending cases, but directed EOIR to reopen cases where the alien conceded deportability before AEDPA to allow the alien to contest deportability.

Matter of Marroquin, an unpublished case, was certified up to the Attorney General for review on February 6, 1997. The issue presented is essentially the same as presented in *Matter of Luviano* discussed above. Thus far, no decision has been issued by the Attorney General.

Over the years, the Service has requested Attorney General review of other Board decisions, however, the Attorney General did not decide the case. The most notable of these were two unpublished Chinese family planning cases, *Matter of Chu* and *Matter of Tsun* (BIA June 7, 1993; A.G. December 7, 1993). In these cases, the INS essentially sought reversal of the Board's published decision in *Matter of Chang*, 20 I&N Dec. 38 (BIA 1989), holding that China's one child per family population control policy was not on its face persecutive. The Attorney General avoided deciding this issue and instead issued a one paragraph order rescinding her order granting review stating that the legal issue had been improperly certified to her. She concluded that the Board's factual finding that the aliens' evidence was not credible made it unnecessary to decide the family planning issue.

In *Matter of Anselmo*, 20 I&N Dec. 25 (BIA 1989), the Service requested certification of a Board decision holding held that since it was bound by the ruling of law in the Ninth Circuit, the Equal Access to Justice Act regulations should be applied to EAJA fee requests in that circuit. The issue was mooted when the Supreme Court issued a decision holding that EAJA does not authorize fees for deportation proceedings.

Finally, an alien sought certification of an unpublished 1983 Board decision, *Matter of Damo*, involving a request that for humanitarian reasons a visa not be revoked. The Attorney General declined to certify the case by a letter dated February 29, 1984.

Attachment D

nificant comments, as well as its reasons for changing or not changing the rule in light of the comments. The responsive statement should be published within a reasonable time after receipt of public comments, taking into account the nature and number of comments and the agency's other responsibilities. Of course, the agency's decision to amend or repeal the rule, or its decision to deny commenters' requests for changes, will be judicially reviewable under the APA.

The Conference recommends, however, that the post-promulgation comment opportunity not extend to rules for which the agency determines public procedure to be "unnecessary," as that term has been interpreted by courts. Generally, courts have applied the "unnecessary" ground to rules that are minor or merely technical amendments in which the public has little interest; they generally have not upheld its application to rulemaking involving agency discretion on matters having a substantial impact on the public. Finally, in Paragraph 3, the Conference advises agencies to consider other measures that might appropriately be employed in particular rulemakings under the good cause exemption.

In making this recommendation, the Conference cautions agencies against more readily invoking the good cause exemption on the belief that the post-promulgation comment opportunity will be an adequate substitute for the opportunity to comment prior to adoption of a rule. Comment after promulgation is less likely to cause an agency to reconsider the basic policy choices made in formulating the rule. And even if the agency does reconsider the basis of the rule, it may be impossible to reverse the effects of a rule that is already in place.

RECOMMENDATION

1. Agencies adopting rules under the good cause exemption in the Administrative Procedure Act should provide interested persons an opportunity for post-promulgation comment when the agencies determine notice and comment prior to adoption is "impracticable" or "contrary to the public interest." However, a post-promulgation comment opportunity should not be required when the agency determines public procedures are "unnecessary" as that term has been interpreted by courts reviewing agency use of the good cause exemption.

2. To implement paragraph 1, agencies should:

a. Publish a notice of the post-promulgation comment opportunity in the FEDERAL REGISTER along with the

rule and the agency's statement of reasons for its finding of good cause;

b. Give interested persons an appropriate period of time to submit comments on the rule; and

c. Within a reasonable time after close of the comment period, publish a statement in the FEDERAL REGISTER indicating the agency's adherence to, or plans to change, the rule and include in the statement a response to significant and relevant issues raised by the public comments.

3. In addition to the post-promulgation comment procedures specified in paragraph 2, agencies adopting rules under the good cause exemption should consider:

a. Framing the rule as narrowly as possible while still accomplishing the regulatory objective;

b. Using notice and comment procedure to develop general criteria to be applied by the agency in foreseeable, recurring situations that require emergency action;

c. Promulgating the rule as an interim rule, to be followed by an amended rule promulgated after complying with notice and comment requirements; and

d. Taking appropriate alternative steps to obtain the views of interested persons before adopting the rule.

4. If Congress amends the good cause exemption in 5 U.S.C. 553(b), it should impose requirements no more stringent than are here recommended.

[48 FR 31180, July 7, 1983]

§ 305.83-3 Agency Structures for Review of Decisions of Presiding Officers under the Administrative Procedure Act (Recommendation No. 83-3).

This recommendation is addressed to the organizational structures which agencies establish to review decisions of presiding officers (ordinarily, administrative law judges) in proceedings governed by sections 556 and 557 of the Administrative Procedure Act or otherwise involving agency determinations on the record after opportunity for a hearing. It is based on a study of structures now in use and their relationship to the accuracy, efficiency and acceptability of the adjudicatory process.

The study concludes that variations in the characteristics and numbers of adjudicatory proceedings in different agencies and in the organization and functions of such agencies

caution against recommending any single structure for review of adjudicatory decisions made by presiding officers. By and large the present review structures in the agencies studied seem well adapted to the particular circumstances of the agency. Consequently, the purpose of this recommendation is not to effect any drastic change in present structures, but to provide general guidance to agencies which are establishing new review structures or revising present ones.

In selecting among possible structures for review of adjudicatory decisions four basic precepts should be kept in mind. The first two involve considerations of efficiency; the others involve considerations of accuracy and acceptability.

First, efficiency is generally served by spreading the review load over a number of reviewers adequate to keep review time low relative to initial decision time. Application of this precept requires attention to three variables: the total relevant adjudicatory caseload, the difficulty of the cases, and the number of reviewers.

Second, efficiency also is served by minimizing repetition; the same matter seldom should be put in issue more than once. This cautions against *de novo* review, instead favoring more limited review of issues properly committed to a subordinate.

Third, accuracy depends on matching the skills of the reviewer to the issues presented. Officials integrated into the agency's policymaking apparatus should review decisions that significantly involve policy issues while officials trained in factfinding should review decisions presenting fact issues. Furthermore, the level of the reviewer should match the magnitude of the issue. Agency heads with numerous other responsibilities should be insulated from routine cases, but attempts to force resolution of major policy issues at lower levels seem misguided except when those issues can readily be addressed by rulemaking. Similarly, individual reviewers easily can address relatively simple issues, whether of fact or of policy, while more complex questions may call for collegial consideration.

Fourth, acceptability generally requires that some review by a higher agency authority be available at the instance of the aggrieved party, at least in cases of great impact on individual parties. Inspection of a substantial penalty and removal of a valuable government benefit are obvious candidates for review as of right.

RECOMMENDATION

1. Agency Head Review

a. In drafting legislation governing the institutional structure for agency adjudicatory proceedings, Congress

should favor delegation of decisional authority and should not prescribe detailed review structures. The presumption should be that each agency head is best able to allocate review functions within the agency.

b. Congress should authorize agency heads¹—

(i) to review initial decisions of presiding officers in adjudicatory matters on a discretionary basis, as described in Administrative Conference Recommendation 68-6, section 2(b); and

(ii) to delegate review authority on an *ad hoc* basis or with respect to any or all classes of decisions to a subordinate official or board of officials either with possibility for further review by the agency head in his discretion or without further administrative review.

Where the agency head retains the right of discretionary review of an initial or intermediate decision, the agency should provide by regulation the grounds and procedures for invoking such review, in accordance with the guidelines set forth in section 2(b) of this Recommendation.

c. Only in the rarest circumstances should Congress require agency heads to review decisions personally. These circumstances are where:

(i) In the case of an agency headed by an individual, the subject matter at issue is of such importance that attention at the very highest level is imperative; or

(ii) In the case of an agency headed by a collegial body, the subject matter at issue is of special importance, the cases comprising the relevant class of decisions are few in number, and the agency either has no other significant non-adjudicatory functions or has few such functions and has a sufficient number of members adequately to perform review and other tasks. This paragraph does not address requirements for discretionary review procedure under which a case may be

¹ "Agency head" is used in the functional sense of the individual or body politically responsible for the administration of the program in question whether this responsibility is vested by statute or by delegation from a superior official, such as the Secretary of a department.

brought before the agency for review on the vote of one or more members of the agency.

Nothing in this section is intended to deal with the appropriate allocation of responsibilities between the agency head and his subordinates in connection with the decisions in cases which he personally reviews.

2. Forms of Delegations

a. *General.* Agency heads having powers of delegation should delegate review authority on a class, rather than case-by-case, basis whenever a substantial number of cases is adjudicated at the agency. Delegations on an *ad hoc* basis should be limited to situations where adjudicatory proceedings are relatively few and of such varied nature as to make selection of a single qualified reviewing authority difficult.

b. *Reservation of Authority.* Where an agency head delegates review authority, any authority he retains to grant further review should normally be exercisable only in his discretion on a showing that important policy issues are presented or that the delegate erroneously interpreted agency policy. Multilevel review of purely factual issues should be avoided.

3. Choice of Delegate

When an agency head determines to make a standing delegation of his review authority, either unconditionally or subject to further discretionary review, he may choose between delegating to a subordinate authorized to act individually, e.g., a judicial officer, or to an employee board authorized to act collegially. A multi-member agency might also delegate to one of its members or a panel made up of its members. In choosing the form of reviewing authority, the agency head should consider the function to be performed by the authority and the degree of finality expected of its decisions. This section sets forth some factors which may guide an agency head in his choice among these forms. The list is not intended to be exclusive, nor to suggest that in every case there are clear grounds for preferring one form to another.

a. *Individual Delegates.* Where a standing delegation of review author-

ity is to be adopted, the following factors favor a delegation to an individual delegate (or to a number of delegates authorized to review decisions individually) rather than to several delegates acting jointly: the number of cases is large, the cases are relatively simple, and the predominant issues concern descriptive facts, or, to the extent complex issues are presented, their resolution generally depends on application of a single skill or discipline, such as legal interpretation, or application of knowledge uniquely associated with the medical or engineering professions or with a discrete branch of science rather than on some combination of skills or disciplines.

b. *Review Boards.* In deciding whether a delegation instead should be made to a group of persons jointly charged with review of ALJ decisions, among the factors that should be considered as favoring such delegation are: the caseload is substantial (but somewhat less than that contemplated by paragraph (a) above), and includes more complex cases that consume a significant amount of time at the initial decision stage, and cases presenting a class of issues dependent for resolution on the application of several different skills or disciplines.

c. *Agency Panels.* In some circumstances, a multi-member agency may find it desirable to make a standing delegation of review authority to a panel of agency members. Factors favoring such delegation include a large adjudicatory caseload and difficulty in elaborating or clarifying agency policy (especially through formal mechanisms such as rulemaking) in a manner that will substantially limit the number of significance of policy issues presented in adjudications.

4. Standards for Grant of Review

a. *Review of Right; Discretionary Review.* Delegation of review authority does not necessarily imply that such review must be available as of right. While review of right is appropriate in certain cases because of the severe consequences to the parties, such as cases involving the imposition of a substantial penalty or the revocation of a license, agency heads should

consider the desirability in routine cases of authorizing the review authority to decline review in the absence of a reasonable showing that:

(i) A prejudicial procedural error was committed in the conduct of the proceeding, or

(ii) The initial decision embodies (i) a finding or conclusion of material fact which is erroneous or clearly erroneous, as the agency may by rule provide; (ii) a legal conclusion which is erroneous; or (iii) an exercise of discretion or decision of law or policy which is important and which should be reviewed.

b. *Review Sua Sponte.* Normally, a reviewing authority should call up a case for review *sua sponte* only where policy issues are involved and the functions of that authority include the resolution of such issues.

(48 FR 57461, Dec. 30, 1983)

§ 305.83-4 The Use of the Freedom of Information Act for Discovery Purposes (Recommendation No. 83-4).

The Freedom of Information Act (FOIA) and discovery provide separate mechanisms for obtaining the disclosure of Government documents. Any person may invoke at any time the release provisions of the FOIA by requesting an agency to disclose any reasonably described agency records. A requester's need for the records and his purpose in making the request normally do not affect the right to obtain disclosure. The agency must release the records unless they fall within one of the nine exemptions specified in the Act. On the other hand, a person may obtain the disclosure of Government documents through discovery only if he is a party to a judicial or administrative proceeding and if the procedural rules governing the proceeding include provisions for discovery. If both these conditions are satisfied, the party may normally obtain from the Government through discovery unprivileged documents relevant to the subject matter of the pending proceeding.

The separate disclosure mechanisms established by the FOIA and by discovery serve different purposes. Congress' fundamental objective in enacting the FOIA was to permit the public to inform itself about the operations of the Government. All members of the public are beneficiaries of the Act because Congress' goal was a better informed citizenry. A requester's rights under the Act are therefore neither diminished nor enhanced by his status as a party to litigation or by his litigation-generated need for the requested records. Discovery,

on the other hand, serves as a device for narrowing and clarifying the issues to be resolved in litigation and for ascertaining the facts, or information as to the existence or whereabouts of facts, relevant to those issues. In the discovery context, a party's litigation-generated need for documents does affect the access available to him and may result in the disclosure to him of documents not available to the public at large.

Discovery does in fact provide parties to litigation with the more reliable mechanism for obtaining from the Government the information which they need to prepare for trial or hearing. Parties to litigation nevertheless sometimes use the FOIA for discovery purposes because they hope to obtain the release of additional agency records for use in litigation, or to obtain the release of records at an earlier time. Limitations on the availability of discovery explain these uses of the FOIA. Discovery is a pretrial procedure designed to permit the parties to a proceeding to prepare for trial or, if possible, to resolve the controversy without a trial. It is not designed to provide the parties with the level of access to Government documents furnished to the general public by the FOIA; and even the most generous rules of discovery do not always provide the parties with that level of access.

There are several limitations on the Government's disclosure obligations in the discovery context that account for use of the FOIA as a supplemental discovery device. First, discovery is normally available to the parties only after a proceeding has begun and then only for a short period of time before trial or hearing. Second, it may be used only to obtain documents that are relevant, or that may lead to information that is relevant, to the pending action. Recent reform efforts have sought to keep civil discovery in the federal courts within reasonable bounds by emphasizing that the purpose of discovery is not the disclosure of information but the simplification of the matters in dispute. More specifically, the 1980 and 1983 amendments to the discovery rules in the Federal Rules of Civil Procedure seek to prevent "overdiscovery" by increasing the trial judge's supervisory role. Less generous discovery is available in criminal proceedings than in civil actions; and, in some administrative adjudications, no formal discovery is available at all.

The Conference believes that the use of the FOIA for discovery purposes is a matter of valid concern to the Government because that use, unlike other uses of the FOIA, may disadvantage the Government's position in litigation in several ways. First, a party in litigation with the Government may obtain the release of agency records without the knowledge of Government counsel and then seek to use those records

Attachment E

97th Congress }
1st Session }

JOINT COMMITTEE PRINT {

No. 8

U.S. IMMIGRATION POLICY
AND THE
NATIONAL INTEREST

COMMITTEES ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

AND

UNITED STATES SENATE
NINETY-SEVENTH CONGRESS

FIRST SESSION



AUGUST 1981

VII.C.1. Article I Court*THE SELECT COMMISSION RECOMMENDS THAT EXISTING LAW BE AMENDED TO CREATE AN IMMIGRATION COURT UNDER ARTICLE I OF THE U.S. CONSTITUTION.

The Select Commission is convinced of the need for a more equitable and efficient method of processing exclusion and deportation cases. Some Commissioners believe that the answer lies in the creation of a U.S. Immigration Board, with statutory independence from INS and the Attorney General, subject to the requirements of the Administrative Procedures Act. Such a mechanism, these Commission members argue, would also be an ideal body for adjudicating noncriminal actions taken against employers under an employer sanctions system.

A majority of Commissioners, however, is of the view that such a solution would still suffer from many of the current administrative inadequacies. The institution of an Immigration Court under Article I of the U.S. Constitution, they believe, would result in more efficient and uniform processing of cases.

*Commission vote

Yes-8; No-4; Pass-1; Absent-2.

*Congress, in creating an Article I Court, can provide flexible rules of procedure. For example, Congress can specify that (a) nonlawyers may be admitted to represent aliens in proceedings, and (b) the new court will not be bound by the Federal Rules of Evidence.

The Article I Court offers an advantage over a quasi-judicial system because it provides one hearing and one appellate review in place of the layering of review that characterizes the present system. The Immigration Court recommended by the Commission will include a trial division to hear and decide exclusion and deportation cases and an appellate division to correct hearing errors and permit definitive, nationally binding resolutions of exclusion and deportation cases.* The new court also offers the potential for introducing judicial uniformity into the review of denials of applications and petitions-- matters that now occupy the attention of district courts around the country. The elimination of potential disparate rulings by courts of appeals should discourage further litigation.

The Commission majority is also of the view that an Article I Immigration Court is more likely to attract outstanding adjudicators. Improvements in the caliber of personnel will enhance the quality of decisions and generally eliminate any need for further review. Some Commissioners believe that if the Article I Court cannot be instituted for several years, interim measures should be taken to improve the competency of the existing INS

*The remedy of Supreme Court review by petition for certiorari would remain available for the rare immigration case of great national importance; review of immigration decisions by U.S. Courts of Appeals would be eliminated.

immigration judges. At a minimum, they believe that the judges should receive additional training, have their positions upgraded and follow procedures identical with those set forth in the Administrative Procedures Act.

VII.C.2. Resources for Article I Court*

THE SELECT COMMISSION URGES THAT THE COURT BE PROVIDED WITH THE NECESSARY SUPPORT TO REDUCE EXISTING BACKLOGS.

All delays in the current exclusion and deportation process are not caused by the existing adjudicatory process. It frequently takes an inordinate period of time to prepare the transcript of a deportation hearing when an appeal is taken to the Board of Immigration Appeals. This delay is caused not by structural problems in the existing hearing system but rather by a lack of INS clerical resources devoted to the hearings process.

To eliminate this type of administrative delay, which harms the exclusion and deportation process, the Commission recommends that the new Court be provided with a sufficient number of clerical personnel and other resources to reduce existing backlogs and allow the expeditious processing of the court's new caseload.

*Commission vote

Yes-8; No-4; Pass-1; Absent-2.

VII.D. ADMINISTRATIVE NATURALIZATION*

THE SELECT COMMISSION RECOMMENDS THAT NATURALIZATION BE MADE AN ADMINISTRATIVE PROCESS WITHIN THE IMMIGRATION AND NATURALIZATION SERVICE WITH JUDICIAL NATURALIZATION PERMITTED WHEN PRACTICAL AND REQUESTED. IT FURTHER RECOMMENDS THAT THE SIGNIFICANCE AND MEANING OF THE PROCESS BE PRESERVED BY RETAINING MEANINGFUL GROUP CEREMONIES AS THE FORUM FOR THE ACTUAL CONFERRING OF CITIZENSHIP.

Select Commission research has found that the naturalization process--currently divided between the Immigration and Naturalization Service and the judicial system--is duplicative, costly and time-consuming for petitioners, the INS and overburdened judges. The Commission's analysis of the naturalization process has also shown a lack of uniformity in decisions made among the hundreds of naturalization court jurisdictions.

An INS naturalization examiner now recommends that an applicant's petition to the Court for naturalization be granted or denied, and it is rare that a judge does not follow this recommendation. Nevertheless, naturalization requires an appearance before a

*Commission vote

Yes-14; Absent-1.

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Proposed: A Specialized Statutory Immigration Court

MAURICE A. ROBERTS*

The retired Chairman of the Board of Immigration Appeals examines the mechanisms for formal adjudication of excludability and deportability under our immigration and nationality laws. Analyzing the shortcomings which contribute to the system's malfunctioning, he concludes that a prime factor is the conflicting roles played by the Immigration and Naturalization Service. After reviewing various alternative structures which would remove such determinations from Service control, Mr. Roberts proposes a tribunal completely outside the Department of Justice—a specialized statutory article I immigration court, with trial and appellate divisions—and presents a draft of a statute to create it.

INTRODUCTION

Some years ago, in an article devoted to an examination of the increasingly important role and the expanded needs of the Board of Immigration Appeals (BIA), I concluded with a recommendation that the Board should be given statutory recognition and a more realistic salary classification, and that its members should be Presidential appointees confirmed by the Senate.¹ Recently confronted with a request to draft a bill to effectuate that recommendation, I find that intervening developments require a somewhat more expansive approach to the problem.

The Board, after all, merely writes the last act, administratively, in a drama that had its beginnings long before the case reached that tribunal. In the most important proceedings coming before the Board for adjudication, those involving the exclusion and ex-

* Editor, *Interpreter Releases*, American Council for Nationalities Service. J.D., Rutgers University Law School, 1932. Mr. Roberts served as Chairman of the Board of Immigration Appeals, United States Department of Justice, from 1968 to 1974 and as Head of the Immigration Litigation Unit, Criminal Division, United States Department of Justice, from 1965 to 1968.

1. See Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29, 43-44 (1977).

pulsion of aliens, the charges have been laid, the issues framed, the evidence presented and the adjudication made in a trial before an immigration judge.² It is his³ decision, based on the record made before him, that the BIA reviews. Recent disclosures, made before the Select Commission on Immigration and Refugee Policy⁴ and elsewhere, present a picture that casts grave doubt on the adequacy of the entire structure. I am now satisfied that it would be futile to concentrate only on the Board when the overall system itself seems badly in need of reappraisal and overhaul.

It will be the purpose of this article to analyze the existing mechanisms for formal adjudication of excludability and deportability under our immigration and nationality laws, examine their shortcomings, and present feasible alternatives.

THE EXISTING SYSTEM

It is becoming increasingly apparent that the present system of decision-making under the immigration and nationality laws simply isn't working. This malfunction is due, in part, to the frequently conflicting roles which must be played by the Immigration and Naturalization Service (INS), the agency charged by the statute with the bulk of the decision-making.⁵ For one thing, the statutory provisions themselves are exceedingly technical and complex, and become increasingly so. From simple beginnings, the statutory grounds for exclusion and deportation have multiplied and proliferated through the years, followed at intervals by provisions for discretionary amelioration when the full sweep of the hardship involved has been exposed.⁶ The result is

2. The statute itself refers to these officials as *special inquiry officers*. Immigration and Nationality Act §§ 101(b)(4), 235, 236, 242, 8 U.S.C. §§ 1101(b)(4), 1225, 1226, 1252 (1976). They are now called immigration judges, 8 C.F.R. § 1.1(1) (1980), and will be so referred to throughout this article.

3. It is easier to refer to "his" than to "his or her," and the use of the masculine form in referring to an immigration judge should be taken as also including the feminine. Some immigration judges are women.

4. The Select Commission on Immigration and Refugee Policy (hereinafter the Select Commission) was created pursuant to the Act of Oct. 5, 1978, Pub. L. No. 95-412, 92 Stat. 907 (1978), to study and evaluate existing laws, policies and procedures governing the admission of immigrants and refugees to the United States and to make administrative and legislative recommendations to the President and the Congress. The sixteen-member commission and its staff have held numerous public hearings and consultations in various parts of the United States. Its final report is due by March 1, 1981.

5. Immigration and Nationality Act § 103, 8 U.S.C. § 1103 (1976); 8 C.F.R. § 2.1 (1980).

6. See Roberts, *The Grounds of Deportation, Statute of Limitations on Deportation, and Clarification of the Nature of Deportation*, 57 INTERPRETER RELEASES 157 (1980).

a melange of mandates for making decisions which sometimes casts the Service in the role of prosecutor, sometimes in the role of judge, and sometimes, alas, in both roles at the same time.

The Immigration and Nationality Act abounds with provisions for exclusion, deportation, and the imposition of penalties, both civil⁷ and criminal.⁸ These, plus the responsibility for policing the borders, involve the Service in functions which are essentially of an enforcement and prosecutorial nature. The bulk of the Service's personnel are engaged in enforcement activities of this nature.

In juxtaposition stand the many statutory provisions authorizing various benefits and forms of relief for citizens and aliens, which bring into play the public service functions of the INS. Typical are the provisions for the grant of exemptions and preferences in the issuance of immigrant visas, based on family reunification,⁹ business needs,¹⁰ and humanitarian concerns for refugees and those seeking asylum here.¹¹ Finally, there are the numerous provisions for waivers of inadmissibility and relief from deportation which frequently confront the INS with the need for making decisions in cases involving a combination of both its enforcement and its service functions.¹²

Coupled with the difficulties inherent in such a dual role is the

7. The grounds for exclusion are stated in Immigration and Nationality Act § 212(a), 8 U.S.C. § 1182(a) (1976 & Supp. III 1979); for deportation, in § 241(a), 8 U.S.C. § 1251(a) (1976 & Supp. III 1979). Civil penalties of an administrative nature are prescribed in Immigration and Nationality Act §§ 231, 233, 237, 239, 243, 251, 254, 255, 256, 271, 272, 273, 8 U.S.C. §§ 1221, 1223, 1227, 1229, 1281, 1284, 1285, 1286, 1321, 1322, 1323 (1976), 1253 (1976, Supp. III 1979 & Supp. IV 1980).

8. Criminal violations are spelled out in Immigration and Nationality Act §§ 266, 274, 275, 276, 277, 278, 8 U.S.C. §§ 1306, 1325, 1326, 1327, 1328 (1976), 1324 (1976 & Supp. III 1979), as well as in various provisions of the Criminal Code, 18 U.S.C. §§ 371 (conspiracy), 911 (false claim to United States citizenship), 1001 (false statements to government officers), 1546 (falsification or misuse of entry documents), 1621 (perjury) (1976).

9. Immigration and Nationality Act §§ 201(b), 202(b), 203, 204, 8 U.S.C. §§ 1151(b), 1152(b) (1976), 1153, 1154 (1976 & Supp. III 1979).

10. Immigration and Nationality Act §§ 101(a)(15)(E), (H), 203(a)(3), (6), 204, 8 U.S.C. §§ 1101(a)(15)(E), (H) (1976), 1153(a)(3), (6) (1976 & Supp. III 1979), 1154 (Supp. III 1979).

11. Immigration and Nationality Act §§ 207, 208, 209, 243(h), 8 U.S.C. §§ 1157, 1158, 1159, 1253(h) (Supp. IV 1980), as amended by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

12. Immigration and Nationality Act §§ 211(b), 212(b), (c), (d), (e), (g), (h), (i), (j), 213, 244, 245, 248, 249, 8 U.S.C. §§ 1181(b) (1976), 1182(b), (c), (d), (e), (g), (h), (i), (j) (1976 & Supp. III 1979), 1183 (1976), 1254 (1976 & Supp. III 1979), 1255, 1258, 1259 (1976).

undeniable fact that Congress has provided the Service with little real support in carrying out its conflicting and sometimes irreconcilable duties. For example, in the Act, as enacted in 1952, and in the patchwork of amendments which followed,¹³ Congress has reflected no clear immigration policy. This failure has made it necessary for the Service (and the BIA on appeal) to improvise and make ad hoc determinations, shifting positions from time to time as best seemed to suit the needs of the moment.¹⁴ The most dramatic evidence of the congressional failure to provide a clear immigration policy is the fact that in recent years the INS has not been given resources adequate to cope with the proliferating

13. Since enactment of the basic Immigration and Nationality Act in 1952, significant amendments have been made (singly or in batches) in 1953, 1954, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1965, 1966, 1970, 1976, 1977, 1978, 1979 and 1980.

14. Illustrative is the administrative position with respect to out-of-wedlock children as stepchildren. The precise question is whether and under what circumstances an alien's illegitimate child can be considered the stepchild of his spouse. The problem arose because under Immigration and Nationality Act § 101(b)(1)(D), 8 U.S.C. § 1101(b)(1)(D) (1976), an illegitimate child can claim or confer immigration benefits only in relation to its natural mother and not in relation to its natural father. This discrimination has been sustained by the Supreme Court. *Fiallo v. Bell*, 430 U.S. 787 (1977). A remedy was fashioned years ago in *Nation v. Esperdy*, 239 F. Supp. 531 (S.D.N.Y. 1965), where the court recognized the spouse of the natural father as the child's stepmother within the meaning of Immigration and Nationality Act § 101(b)(1)(B), 8 U.S.C. § 1101(b)(1)(B) (1976), when the three had lived together in a close family unit. The Service did not appeal that decision and the BIA accepted it as a rule of general applicability, over Service objection. *In re The*, 11 I. & N. Dec. 449 (1965). However, when the same court in *Andrade v. Esperdy*, 270 F. Supp. 516 (S.D.N.Y. 1967), extended the *Nation* rule to a situation where there had never been a close family unit, the Board balked and refused to apply that holding in cases outside the jurisdiction of the court that rendered it. *In re Harris*, I.D. No. 2308 (1974); *In re Amado and Monteiro*, 13 I. & N. Dec. 179 (1969); *In re Soares*, 12 I. & N. Dec. 653 (1968).

After a number of years had passed without any further court ruling on the issue, the INS changed its position. In a memorandum dated December 11, 1978, in *In re Moreira*, File No. A 22 211 458 (Dec. 11, 1978), the Service recommended to the BIA that the *Andrade* rule should be applied nationwide. Without committing itself, the Board in an unreported order dated January 5, 1979, remanded the case to the INS for reconsideration in light of the new Service position. 56 INTERPRETER RELEASES 12 (1979). Both the Service and counsel sought reconsideration, urging the Board to overrule its prior precedents to the contrary (which are binding on the Service) and come out with a new precedent decision accepting the *Andrade* formulation. In the interim, another court in an unpublished opinion had endorsed *Andrade*. *Hyppolite v. Sweeney*, Civ. No. 77-1865 (S.D. Fla. Jan. 6, 1979), reported in 56 INTERPRETER RELEASES 62 (1979). The Board's response was its published precedent decisions in *In re Moreira [Moreira I]*, I.D. No. 2720 (1979), and *In re Moreira [Moreira II]*, I.D. No. 2792 (1980), in which, far from accepting the INS position, it placed a new gloss on *Andrade*. The Service codified the new *Moreira* standards in an amendment to its regulations, 8 C.F.R. § 204.2(c)(3), (5), 45 Fed. Reg. 41392 (1980). Since then, however, the first court of appeals to consider the issue has rejected the Board's new gloss on the meaning of "stepchild" in *Moreira I* and has endorsed the holdings in *Andrade* and *Hyppolite*. See *Palmer v. Reddy*, 622 F.2d 463 (9th Cir. 1980). The Board at first applied that ruling only in cases arising in the Ninth Circuit, *In re Bonnette*, I.D. No. 2840 (1980), but has now accepted it nationwide, *In re McMillan*, I.D. No. 2844 (1981).

problems engendered in both its enforcement and service functions. The study now in process by the Select Commission should yield some meaningful policy guidelines for congressional consideration. But unless Congress provides sufficient funding to carry out the policies seemingly manifest in its legislation, it is a fair inference that Congress does not really intend those policies to be carried out. Effective administration of the laws, whether by way of enforcement or the delivery of services, cannot thrive under such conditions.

Some of the fault may properly be attributed to indifference on the part of the Service's parent organization, the United States Department of Justice. Although the INS has been part of that Department for forty years, departmental interest has been focused largely on components with greater "sex appeal,"—the F.B.I., the Antitrust Division and the Criminal Division, for example. Until relatively recently, when the subject matter of its problems became more newsworthy (undocumented aliens, Iranian students, refugees), the INS has been afflicted with a severe case of benign neglect. I very much doubt that any Attorney General in recent years would have suffered a real feeling of loss if the immigration function were taken out of the Department of Justice and assigned to some other agency of the government.

The inadequacy of INS resources to meet both its enforcement and its public service responsibilities has caused unwarranted backlogs in both areas as emphasis has shifted from time to time between both functions.¹⁵ This enforcement/service dichotomy has only aggravated an already bad situation and intensified serious morale problems within the INS as competing groups become more polarized. The enforcement-minded District Directors now have their own employee organization. The more quasi-judicial and service-oriented immigration judges have theirs. The interplay between the two groups is revealing.

15. Thus, late in 1974, following the onset of the recession and the allegations that millions of aliens were here illegally and were depriving United States citizens and lawfully resident aliens of jobs, the then INS Commissioner reordered Service priorities, with increased emphasis on enforcement functions and diminished emphasis on service functions. 51 INTERPRETER RELEASES 278 (1974); 52 INTERPRETER RELEASES 62 (1975). With a new administration and a new INS Commissioner, as well as a change in the economic situation, greater resources were shifted to the delivery of services. 54 INTERPRETER RELEASES 310 (1977); 55 INTERPRETER RELEASES 73 (1978); 56 INTERPRETER RELEASES 462 (1979).

The INS is headed by the Commissioner of Immigration and Naturalization, who functions from its Central Office in Washington, D.C.¹⁶ Administratively, the INS field service is broken down into four regions, each headed by a Regional Commissioner. Each region is further broken down into a number of districts, each headed by a District Director. It is at the District Office level that the bulk of the Service's activity takes place;¹⁷ there, applications are filed, investigations conducted, adjudications made, inspections of arriving aliens performed and deportation proceedings begun. The District Director bears responsibility for all such Service functions in his district and most Service decisions are made by, or in the name of, its District Directors.¹⁸ Some decisions of District Directors are appealable to the Regional Commissioners.¹⁹ Others are appealable to the BIA.²⁰ Still others are not subject to appeal, but the denied application may be renewed before an immigration judge in later deportation proceedings.²¹ Some decisions are not subject to further administrative review and may be further challenged only by resort to the courts.²² It is the District Directors who determine, in the exercise of prosecutorial discretion, whether a deportation proceeding shall be initiated and prosecuted to a conclusion.²³

That the District Directors are imbued with enforcement fervor should not be surprising. As one commentator put it:

The internal structure and promotional plans of the Service foster the divergent philosophies of law enforcement and service. Border Patrol Agents become Investigators, become Supervisors, become top Administrators including District Directors. Naturalization Examiners become Trial Attorneys, become Special Inquiry Officers or "Judges." While such a system certainly produces some checks and balances it pits one school against another.²⁴

16. Immigration and Nationality Act § 103(b), 8 U.S.C. § 1103(b) (1976); 8 C.F.R. § 2.1 (1980). Since the resignation of Commissioner Leonel J. Castillo in September 1979, there has been a vacancy. During that period INS General Counsel David L. Crosland has served as Acting Commissioner.

17. The Service's uniformed Border Patrol, though functioning on a field office level, has a separate field organization. 8 C.F.R. § 103.1(r) (1980). Border Patrol sector headquarters and stations are listed in 8 C.F.R. § 100.4(d) (1980).

18. The jurisdiction of District Directors is set forth in 8 C.F.R. § 103.1(n) (1980).

19. See 8 C.F.R. § 103.1(m) (1980).

20. See 8 C.F.R. § 3.1(b) (1980).

21. See, e.g., 8 C.F.R. §§ 245.2(a)(4), (d), 249.2 (1980).

22. See, e.g., 8 C.F.R. § 244.2 (1980).

23. Lopez-Telles v. INS, 564 F.2d 1302 (9th Cir. 1977); *In re Vizcarra-Delgadillo*, 13 I. & N. Dec. 51 (1968).

24. U.S. COMMISSION ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR 41 (1980) (Bruce D. Beaudin, consultant).

The Immigration Judges

The INS decisions having greatest immediate impact are those involving the exclusion of aliens seeking admission to the United States and those involving the expulsion of aliens already within this country, many of whom have long years of residence and deep roots here. Decisions of this sort are made by the Service's immigration judges after trial-type hearings designed to accord with current concepts of due process.²⁵

The Service has made tremendous advances since the old days when exclusion and deportation proceedings were summary affairs, conducted by officers who were neither lawyers nor legally trained. Exclusion hearings were held before a Board of Special Inquiry, consisting of three members, one of whom was invariably a clerk who recorded the proceedings. Deportation proceedings were conducted before a presiding inspector, usually an Immigrant Inspector, who combined prosecutorial and quasi-judicial functions and might even be the person who had investigated the case, assembled the evidence, and recommended the initiation of the deportation proceedings.²⁶ Responding to criticism contained in the report of the Wickersham Commission in 1931²⁷ and the Secretary of Labor's Committee on Administrative Procedure in 1939,²⁸ serious attempts at separation of functions were made once the Service was transferred to the Department of Justice in 1940.²⁹

It was not until the enactment of the Administrative Procedure Act in 1946³⁰ and the Supreme Court's 1950 decision in *Wong Yang Sung v. McGrath*,³¹ however, that the need for truly independent hearing officers was brought squarely home to the Service. In *Wong Yang Sung*, the Court held that the Administra-

25. Immigration and Nationality Act §§ 236, 242(b), 8 U.S.C. §§ 1226, 1252(b) (1976); 8 C.F.R. §§ 236, 242 (1980).

26. A good description of the former procedure in deportation cases is set forth in *Wong Yang Sung v. McGrath*, 339 U.S. 33, 36-45 (1950).

27. WICKERSHAM COMMISSION, REPORT ON THE ENFORCEMENT OF THE DEPORTATION LAWS OF THE UNITED STATES 162 (1931).

28. The INS was then part of the Department of Labor. THE SECRETARY OF LABOR'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, THE IMMIGRATION AND NATURALIZATION SERVICE 101 (1940).

29. Reorg. Plan No. 5 of 1940, 5 Fed. Reg. 2,223 (1940).

30. The Administrative Procedure Act is now codified in 5 U.S.C. §§ 551-706 (1976 & Supp. III 1979).

31. 339 U.S. 33 (1950).

tive Procedure Act's hearing provisions applied to deportation proceedings and that the Service was not exempt from the requirement that such hearings be conducted by Administrative Procedure Act hearing examiners. The Service succeeded in stampeding Congress into exempting exclusion and deportation proceedings from the Administrative Procedure Act's hearings requirements by insisting that effective immigration law enforcement would otherwise break down. However, the lesson of *Wong Yang Sung*, that the Constitution requires a hearing before a tribunal "which meets at least currently prevailing standards of impartiality,"³² had been learned. When the Immigration and Nationality Act was enacted in 1952, its deportation hearing provisions contained sufficient built-in protections to be ultimately sustained as providing the functional equivalent of the Administrative Procedure Act safeguards.³³

The immigration judges are now all lawyers selected through civil service procedures from among candidates who either have or acquire civil service status. They are now, and have been for years, classified for pay purposes in grade GS-15, with a theoretical salary range of \$44,547 to \$57,912.³⁴ They have endeavored, with some success, to achieve the added stature and trappings of their role models in the judicial branch of government. They wear robes, refer to their tribunal as the "immigration court," and are in theory relatively free from undue influence by the District Directors and other enforcement officials in their decision-making.

When it comes to the realities, however, the immigration judges are far from free. Despite their semi-autonomous status, they are directly dependent on the District Directors, and indirectly on the Regional Commissioners, for 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. In determining what portion of their limited resources they can afford to allocate to the needs of the immigration judges, the District Directors are subject to a number of influences which tend to depreciate the importance of those needs.

For one thing, in many areas there is hostility and suspicion between the District Directors and their enforcement officers on the one hand, and the immigration judges on the other. Many District Directors evidently view the immigration judges as pushy intrud-

ers whose demands in the name of due process only obstruct the Service mission. Thus, a memorandum by the Association of Immigration Directors of its December 14, 1977 conference with then INS Commissioner Castillo contemptuously refers to the robes of the immigration judges as the "black nightgowns they frequently wear when conducting hearings," and states:

Special Inquiry Officers, aka "Immigration Judges" (8 CFR 1.1(1)) and the evolution of the complicated hearings function by rule making particularly since issuance of 8 CFR 1.1(1) on April 4, 1973, which made use of the term judge permissible [sic] in lieu of special inquiry officer. It was pointed out that no individual change added to SIO authority to veto decisional authority historically exercised [sic] by DIDIR's was, in itself, of major significance, but that in the aggregate the many changes had resulted in creation of a complex legal bureaucracy [sic] that hindered Service mission accomplishment, increased costs and was of more benefit to the legal trade than to the aliens.³⁵

This unflattering perception of the immigration judges by many District Directors is further confirmed by the following testimony delivered before the Select Commission in April 1980 on behalf of the Association of Immigration Directors:

The need for economy and efficiency in the delivery of public service dictates a review of the statutory basis, if any, for the costly and inefficient system of so-called "Immigration Courts" and "Immigration Judges" that seems to have been dictated by the cry for due process . . . [T]he system as it has developed over the past decade particularly, has gone from a relatively simple but complete "lay" hearing to a most complex legal bureaucracy [sic] serving only to confuse and make it costly to the aliens and the government in the process.³⁶

These antagonistic attitudes are not lost on the immigration judges. "It is now clear," one immigration judge wrote to the Select Commission, "that these Directors and their subordinates view our role as renegade Immigration Officers who are usurpers of authority and frauds in our role as Judges. When one understands that this is their position, one can understand the whyfor [sic] of these many manifestations of disrespect toward us."³⁷ Letters to the Select Commission from immigration judges in different parts of the United States relate various types of provocative meddling on the part of enforcement personnel into their operations. "Fair and impartial hearings are not possible," reported another immigration judge to the Select Commission,

35. SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, IMMIGRATION HEARINGS AND APPEALS: A STRUCTURAL STUDY 2 (1980) (unpublished report by Peter Levinson on file with the Select Commission).

36. *Id.* at 2-3.

37. *Id.* at 3-4.

32. *Id.* at 50.

33. *Marcello v. Bonds*, 349 U.S. 302 (1955).

34. The range is theoretical because Congress has imposed a flat limit of \$50,112.50.

"when one of the parties in each case controls the court system." He further asserted that "[t]he strong desire to influence the judges directly or indirectly is repugnantly clear."³⁸

Added to these attitudinal factors, malicious or subconscious, which might make a District Director feel righteously justified in restricting to a bare minimum the resources made available to immigration judges, is the undoubted element of self-interest. When it comes to the allocation of budgetary resources for the processing of deportation cases, the District Directors and the immigration judges have different perceptions of the priorities. As the former Chief Immigration Judge testified:

First of all, the district director is a law enforcement officer, and as such, when he institutes proceedings against an alien, he is interested in seeing that it is carried through to a successful conclusion; otherwise he would not have instituted the proceedings in the beginning. The immigration judge, on the other hand, takes no stand either way, either for the Service or for the alien.

Secondly, the priorities arise because the district director has no responsibility for the immigration judge's activity. If the immigration judge's activity is very successful, the district director gets no credit. If it is unsuccessful, if it is very poor, he gets no blame. So, on the other hand, if his investigative staff does a poor job, he gets blamed for that. If his adjudicators fall behind, he will get complaints from Members of Congress and from members of the public.³⁹

Apart from the petty annoyances and inconveniences to immigration judges inadequately provisioned by the District Directors, such a lack of needed resources can directly impede the entire deportation process. For example, absence of the clerical support needed to transcribe a deportation hearing automatically delays the decision in many cases. Immigration judges ordinarily deliver an oral decision at the end of the hearing. However, if the case is such that a printed form order cannot be used,⁴⁰ the oral decision must be transcribed. In cases having large records or complex legal issues, an immigration judge may reserve decision and await a transcript of the hearing before formulating his opinion. In such cases, lack of clerical facilities is an obvious obstacle to prompt disposition of pending cases.

Where there is no appeal from an immigration judge's decision, there is usually no need to transcribe the hearings. However, where there is an appeal to the BIA, ordinarily the hearing is transcribed before the record on appeal is transmitted to the Board. Since there is an automatic stay of deportation pending

38. *Id.* at 4.

39. U.S. COMMISSION ON CIVIL RIGHTS, *THE TARNISHED GOLDEN DOOR* 110-11 (1980) (statement of Herman Bookford, Chief Immigration Judge).

40. Summary decisions on printed form orders are authorized in some instances by 8 C.F.R. § 242.18(b) (1980).

the appeal,⁴¹ delay in transcribing the hearing necessarily causes delay in the ultimate consideration and disposition of the appeal. As far back as 1972, the BIA noted the acute clerical shortage in some INS districts and the opportunities available to obtain substantial delay in frivolous cases by the simple expedient of filing an ingeniously contrived notice of appeal.⁴² The Board suggested administrative shortcuts, including the possibility of dispensing with the transcript in appropriate cases. When there is a dispute between the immigration judge and the District Director as to whether a record on appeal should be transcribed, the District Director's control of the clerical resources determines the result, at least until the Board intervenes.⁴³ But even in the absence of an appeal, clerical help is needed to transcribe an immigration judge's oral opinion or to type his written decision.

The situation is further complicated by the absence of an appropriate conduit for the provisioning and support of the immigration judges. True, administrative regulations provide for a Chief Immigration Judge in the INS headquarters office in Washington, D.C., who is charged with the general supervision and direction of the immigration judges and with scheduling the various proceedings assigned to them.⁴⁴ But even that small degree of support is no longer available. The last Chief Immigration Judge retired over a year ago and the vacancy has not been filled. Instead, over the objections of the National Association of United States Immigration Judges, the immigration judges have been placed under the administrative supervision of the INS Regional Commissioners.

It is high time that the adjudication of exclusion and deportation proceedings be removed entirely from the Service. The adjudicators, by whatever name they are called, should be placed in a position where they can hear and decide the cases fairly and promptly, free from dependence on and influence by enforcement

41. 8 C.F.R. § 3.6 (1980).

42. *In re Gamboa*, 14 I. & N. Dec. 244 (1972); see also *In re Lopez*, 14 I. & N. Dec. 424 (1973).

43. See, e.g., *In re Holani*, I.D. No. 2804 (1980), in which an appeal from an immigration judge's exclusion order was frustrated for over a year by the District Director's refusal to accede to the immigration judge's request for transcription of the hearing and his oral decision. The BIA remanded for completion of the record without deciding the merits.

44. 8 C.F.R. 103.1(f) (1980).

The Board of Immigration Appeals

Very little has changed at the Board in the three years since I made my critical analysis in these pages.⁴⁶ The Board has been removed from the administrative supervision of the Deputy Attorney General and placed under the supervision of the Associate Attorney General.⁴⁷ Physically, it has been transplanted from the District of Columbia to nearby Fairfax County, Virginia. It is still, however, only the creature of regulation, lacking statutory recognition or status. It is still dependent on the Department of Justice for staffing, housing and provisioning. Its members are still classified in grade GS-15 and its Chairman in grade GS-16. It is still theoretically independent of the influence of enforcement officials in its decision-making, but in that regard a small cloud has recently appeared.⁴⁸

45. The Service's insensitivity to the needs of the adjudicatory process as opposed to enforcement needs is nowhere better illustrated than in its indifference to the dissemination of precedent-setting decisions. Both the Service and the BIA, within their respective jurisdictions, make adjudications which are administratively final. Selected opinions, designed to be both informative and binding as precedents, are from time to time designated for publication. Provision for designation of INS decisions as precedent is contained in 8 C.F.R. § 103.3(e) (1980). BIA decisions are covered by 8 C.F.R. § 3.1(g) (1980). Publication is provided for in 8 C.F.R. § 103.9(a) (1980). These decisions appear initially in slip form as serially numbered Interim Decisions and are ultimately published in bound volumes entitled *Administrative Decisions Under Immigration and Nationality Laws of the United States* (I. & N. Dec.). The decisions are followed carefully, not only by INS and BIA personnel, but also by other government agencies and private practitioners who must keep abreast of such developments. Until recently, the Service had responsibility for actual publication of these precedent-setting decisions. It failed abysmally, largely through niggardliness in making adequate resources available. Finally, this responsibility was removed from the Service and entrusted to the BIA. Volume 16 of the Decisions, the first one chargeable to the BIA, has recently been published. Meanwhile, Volume 15, which is still the Service's responsibility and should contain Interim Decisions 2301 through 2525, designated for publication as precedents during the period 1974-1976, has yet to make its appearance. To make matters worse, even in the publication of the slip opinions themselves the Service has been guilty of unexplained delay. Interim Decisions Nos. 2757 through 2774, important Service precedent decisions dated from August 26, 1977 to January 18, 1980, were not printed and distributed until the summer of 1980.

46. See Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29 (1977).

47. 8 C.F.R. § 3.1(a), as amended, 45 Fed. Reg. 9893 (1980).

48. In *Accardi v. Shaughnessy*, 347 U.S. 260 (1954), the Court held that under the regulations the Attorney General cannot dictate the actions of the BIA. Following that decision, the Attorney General, in Order 45-54 of April 23, 1954, directed the Board and all other subordinates of the Attorney General to exercise their own independent judgment in deciding cases, and to exercise discretion "on the basis of their own understanding and conscience directed by the facts of each individual case, uninfluenced by any extraneous statements by persons official or unofficial." 1 C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE 1-79

Apart from its lack of statutory recognition, a number of additional disadvantages inherent in the Board's present posture have recently come to the fore. These must be seriously addressed in any critical appraisal of the Board. For instance, no longer do the majority of Board cases originate on the eastern seaboard. The center of gravity has shifted sharply. Immigration cases now spring up in profusion all over the country, and immigration practitioners may now be found not only in the large centers of population on both coasts but also in the Midwest. The opportunity for ready access to the Board for oral argument on the part of practitioners outside the Washington, D.C. area is becoming a real need which the Board, as now constituted, cannot fill.

Moreover, constitutional challenges to the immigration and nationality laws, to which the Supreme Court has recently opened the door a chink,⁴⁹ may not be entertained by the Board. The Board has consistently held that it lacks power to adjudicate such issues.⁵⁰ Even more important, the Board's role as final administrative arbiter in settling all questions of law on a national level has been seriously undermined in recent years by sectional differences among the courts on review of Board decisions. The Board

n.68 (rev. ed. 1980). Recently, in *In re Sandoval*, I.D. No. 2725 (1979), the Board departed from its prior course of decisions and held that the exclusionary rule does not apply in deportation proceedings because they are civil in nature. Dissenting in part, Board Member Appleman made the following disquieting point:

The rule having been accepted and followed for so many years, the natural inquiry is—what reason is there for a change now? The majority decision fails to answer this satisfactorily. The Service has advanced no argument for a change beyond mere reliance on the civil nature of deportation proceedings, and advice that, according to a memorandum of the Associate Attorney General, the Department of Justice is adopting, generally, the rule which the Service is now urging upon us. We, of course, are not bound by the enunciation of position of the Associate Attorney General. See *U.S. ex rel Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

49. The Supreme Court has consistently held that in legislating on the classes of aliens who may enter and remain in the United States, Congress exercises political judgment which is immune from judicial scrutiny. Recently, however, the Court stated: "Our cases reflect acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens. . . ." *Fiallo v. Bell*, 430 U.S. 787, 793 n.5 (1977). No case was cited for this proposition. In *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976), the court construed Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1976), as providing relief for aliens who had not departed from the United States, on the theory that to do otherwise would render the provision vulnerable as a denial of equal protection.

50. *In re Cortez*, 16 I. & N. Dec. 289 (1977); *In re Chery and Hassan*, I.D. No. 2405 (1975); *In re Lennon*, I.D. No. 2304 (1974); *In re Wong*, 13 I. & N. Dec. 820 (1971); *In re Santana*, 13 I. & N. Dec. 362 (1969).

has consistently held⁵¹ that it is bound to apply the rule of law laid down by the court in future cases arising within the territorial jurisdiction of that court. As issues of this nature proliferate, we are being increasingly confronted with situations in which the Board applies one rule in one geographical area and another rule in the rest of the country.⁵²

Judicial Review

In recent years, the availability, form, and scope of judicial review have played an increasingly important role in the direction of immigration law enforcement. Not only do the courts' developing concepts of due process affect immigration procedures,⁵³ their construction of the substantive provisions of the statutes themselves has had a marked effect on the direction the law has taken.⁵⁴

Because judicial review provides a ready avenue of additional delay, the Immigration and Nationality Act was amended in 1961 to add section 106(a) providing a statutory form for review of final deportation orders. This provision was designed to streamline the mechanics of review by eliminating access to the district courts altogether. Petitions for review are now filed directly in the courts of appeals. But not all BIA decisions are thus reviewable. In deportation cases, habeas corpus in the district court is still preserved for the alien under official restraint,⁵⁵ and for aliens ordered excluded it is the sole remedy.⁵⁶ Moreover, Board deci-

51. And rightly so, in my estimation. See *Ithaca College v. N.L.R.B.*, 623 F.2d 224 (2d Cir. 1980), and cases cited therein.

52. See, e.g., *In re Bonnette*, I.D. No. 2840 (1980); *In re Bowe*, I.D. No. 2819 (1980); *In re Fulgencio*, I.D. No. 2816 (1980); *In re Cienfuegos*, I.D. No. 2746 (1979); *In re Kim*, I.D. No. 2735 (1979); *In re Anwo*, 16 I. & N. Dec. 293 (1977); *In re Gonzalez*, 16 I. & N. Dec. 134 (1977); *In re Amado and Monteiro*, 13 I. & N. Dec. 179 (1969). Cf. *In re Mangabat*, 14 I. & N. Dec. 75 (1972) (Board's jurisdiction is nationwide and a contrary ruling of a lower federal court is not necessarily dispositive).

An additional critical comment on the Board should be noted in passing. One immigration judge, who formerly, as the BIA Chairman's Executive Assistant/Chief Attorney Examiner, also served as Alternate Board Member, has recently questioned both the Board's independence and its competence. He has recommended that the Board be abolished altogether, and that the immigration judge's decision be the final administrative decision, subject to further review only in the courts. I cannot agree with this recommendation. In view of the diversity of views among the 40 immigration judges scattered throughout the United States, there is a real need for an appellate body such as the Board to harmonize conflicting positions and provide uniform authority nationwide. At the same time, the nature of that tribunal (whether it is in the form of a statutory Board or other structure) should be such as to overcome the deficiencies noted by this critic.

53. See, e.g., *United States v. Rangel-Gonzales*, 617 F.2d 1349 (9th Cir. 1980).

54. E.g., *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976).

55. Immigration and Nationality Act § 106(a)(9), 8 U.S.C. § 1105a(a)(9) (1976).

56. Immigration and Nationality Act § 106(b), 8 U.S.C. § 1105a(b) (1976).

sions on visa petitions, not being final orders of deportation, are still reviewable in the district courts in actions for declaratory judgments.⁵⁷ So also are determinations affecting deportability made outside the deportation proceedings before the immigration judge.⁵⁸

The long-sought elimination of delay by the streamlining of the judicial review process is not yet at hand. This failure may be attributable, in part at least, to the mounting tide of civil litigation of all sorts now confronting the federal courts.⁵⁹ In part, it is due to the increasing complexity of the immigration laws and of the issues, factual and legal, that must now be dealt with.

Need for a Change

It seems clear that there is an urgent need for some fundamental changes in the system. Delay is built into the existing structure.⁶⁰ District Directors give low priority to the needs of the immigration judges. The resultant lack of adequate facilities delays hearings and chronic clerical shortages delay transcripts and opinions. The layering of review, administrative and judicial, and the multiplicity of opportunities for review open the door to additional delay.

When it comes to the administrative decision-makers themselves, the immigration judges and the BIA members, the ques-

57. *Beltre v. Kiley*, 470 F. Supp. 87 (S.D.N.Y. 1979), *aff'd per curiam*, 614 F.2d 1285 (2d Cir. 1980).

58. *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968).

59. The overloaded condition of the federal courts is a matter of such common knowledge that no citation of authorities should be necessary. To meet this mounting problem, additional judges have been provided, elimination of diversity jurisdiction is in process, and many innovative ideas are under study. See *Hufstедler & Nejelski, A.B.A. Action Commission Challenges Litigation Cost and Delay*, 66 A.B.A. J. 965 (1980).

60. It should not be supposed that delay is in the best interests of the subject of the proceedings. Delay as an end in itself can hardly be justified. It is understandable that an alien who is clearly deportable and ineligible for any relief from deportation should want to defer his enforced departure as long as possible, but that can hardly warrant resort to procedures which are purely dilatory. On the other hand, undue delay can be prejudicial to many persons who must deal with the INS. The United States citizen or permanent resident alien who files a visa petition for a close relative abroad is adversely affected by the delay. So is the transnational corporation seeking to bring in executive personnel from abroad. So is the alien here who is seeking, either within or outside deportation proceedings, to adjust his status to that of a permanent resident, which will enable him not only to confer preference benefits on close relatives abroad but also to proceed toward ultimate naturalization.

tion arises whether the time has not come to make changes in the method of their selection and their placement in an essentially enforcement agency. Should immigration judges continue to be recruited almost exclusively from INS personnel with largely prosecutorial and enforcement backgrounds? In view of the growing tension between the immigration judges and the District Directors, shouldn't the immigration judges be completely removed from the INS? And in view of the apparent indifference of the Department of Justice in immigration matters generally, isn't it time to consider moving both the immigration judges and the Board into an environment better adapted to their needs?

SOME ALTERNATIVES

In considering any alternatives to the present system, the weaknesses now exposed in the existing apparatus must be taken into account. To function effectively, any replacement mechanism must be designed to achieve the following objectives: (1) *Qualified personnel*. The salary structure and tenure of office should be in keeping with the great responsibilities involved. The present scale of compensation for both immigration judges and BIA members is wholly out of proportion. The level should be raised to the point needed to attract and keep lawyers with the high qualifications required for both the trial and appellate functions. (2) *Independence*. The adjudicators must be completely separated organizationally from enforcement officials, so that their independence from prosecutorial influence, direct or indirect, is not only actual but perceived to be so.⁶¹ Public confidence in the fairness of the system will be undermined by anything less. (3) *Adequate support*. The adjudicators must not only receive the support services needed for prompt decision-making, but must also be in a position organizationally to compete effectively for adequate budgets.

The Administrative Procedure Act

One suggested solution would be to amend the Immigration

61. As one commentator aptly put it:

I think it is very much advisable, not only from the standpoint of carrying out the work efficiently, but from the standpoint of a public view of the operation. We must not only be independent but we must, I think, give the appearance of independence. We must convince the aliens, the public, the members of the bar that our decisions are independent, and when we are so closely allied with and a part of the Immigration Service, it's very difficult to convince these people that we are indeed independent.

U.S. COMMISSION ON CIVIL RIGHTS, *THE TARNISHED GOLDEN DOOR* 111 (1980) (quoting Herman Bookford, Chief Immigration Judge).

and Nationality Act to require that hearings and decisions in exclusion and deportation cases be committed to administrative law judges appointed in accordance with the Administrative Procedure Act. Administrative law judges are now widely employed in the federal establishment. Over a thousand administrative law judges attached to various federal agencies now carry out quasi-judicial functions. A more demanding selection and screening process is applied to candidates for administrative law judge positions and those selected have greater job security than immigration judges. Their compensation, promotion and tenure would not depend on the approval of INS enforcement officials and, in view of the high level of the responsibilities involved, the pay level assigned by the Office of Administrative Law Judges would probably be set at grade GS-16. Undoubtedly, greater independence from pressures by INS enforcement officials in their decision-making would be achieved by administrative law judges and a higher calibre of adjudication could be expected since the more exacting administrative law judge standards could be expected to screen out immigration judges whose present performance is marginal or less. However, if the administrative law judges remained within the INS and depended on the INS for provisioning and support, the present intolerable situation would remain. The only alternative would be to remove the administrative law judges from the INS entirely and attach them to another entity within or outside the Department of Justice.

A New Independent Statutory Agency

Another alternative would be to create a new independent statutory agency within the Department of Justice on the model of the United States Parole Commission. The immigration judges could be placed within this agency, thereby removing them from the influence of and dependence on INS enforcement officials. The BIA could be included within the new agency as an appellate body, thereby giving it statutory recognition and greater stature while at the same time removing it from direct control by the Attorney General. The judges of this new tribunal, both trial and appellate levels, could be appointed by the President and confirmed by the Senate for fixed and staggered terms of, say, six years. Appointments should be made at higher grades: GS-18 for the appellate level and GS-17 for the trial level. This upgrading

would help to attract better-qualified applicants. Such a new agency would be a marked improvement over the present set-up.

At the same time, certain disadvantages would still remain. The new agency, with functions entirely adjudicatory, would still be part of the Department of Justice, which is essentially an enforcement entity. As an administrative tribunal, the new agency could not adjudicate constitutional challenges to the governing statutes or regulations, any more than the BIA now can. In addition, the final decisions of the new agency, being administrative, would still be subject to further review in the courts. This would not only continue the present opportunities for delay but would still permit different results in different localities when the reviewing courts disagreed.

A New Statutory Immigration Court

It seems to me that the best solution to the problem of the proper placement of the functions now performed by immigration judges and the BIA would be to transfer both trial and appellate functions to a new specialized article I court. The change would not be very drastic. The work now performed by immigration judges is essentially judicial. They already conduct due process hearings comparable in most respects to judicial hearings. The Federal Rules of Evidence and the Federal Rules of Civil Procedure would not apply. Rules of the new court could conform the practice to the needs of this specialized field of law, eliminate unnecessary features and streamline procedures. Immigration judges already make final decisions in the cases coming before them, as distinguished from the merely recommended decisions made in most cases presided over by administrative law judges.

Moreover, the issues that now arise in deportation and exclusion cases are precisely the sort that have been traditionally entrusted to the courts. Although the proceedings themselves are technically civil in nature, the courts are sensitive to the fact that what is actually at stake is the freedom of an individual. Issues of much less consequence to the parties are commonly accepted as appropriate for judicial resolution. The jealously-guarded separation of functions principle makes for a judicial tradition of independence that renders courts less likely than other agencies of government to yield to political pressures. This is especially true with respect to aliens, whom the courts have recently come to recognize as a politically powerless minority.

The appellate division of the new court could perform all the appellate functions now committed to the BIA and would have many additional advantages. For example, it could determine

constitutional issues, which the BIA may not do.⁶² With adequate staffing, it could permit oral argument in all parts of the country before roving panels of the court. Having nationwide jurisdiction, it could apply its decisions uniformly all over the country. If its decisions were made subject to further review only by the United States Supreme Court on certiorari, this would not only eliminate an additional layer of review but would close the door to different rules being applied in different parts of the country as a result of conflicting holdings in the courts of appeals.

Set forth in the Appendix is the draft of a bill to create a United States Immigration Court.⁶³ Judges of the court would be appointed by the President and confirmed by the Senate for fixed terms of fifteen years and at compensation comparable to that of other federal judges. This change should help to attract the best qualified candidates and a screening panel to make recommendations to the President could be suggested. While there is no provision for "grandfathering in" the present immigration judges and BIA members, many undoubtedly would be found qualified for the new court.

The rules of the new court could be expected to continue those attributes of the present practice which have proved their worth through the years. Various non-attorney specialists, found qualified to appear for the nonprofit voluntary agencies long active in this field, have been permitted to practice before immigration judges and the BIA under the rules of the Board. The rules of the new court would continue this practice.

As drafted, the jurisdiction of the trial division is restricted to the types of cases now heard by immigration judges: those requiring an opportunity for trial-type hearing, such as exclusion, deportation and rescission of adjustment. The jurisdiction of the appellate division is restricted to the types of cases now committed to the BIA, which include not only appeals from immigration judges but also from District Directors in a limited number of areas. Additional types of cases could later be added to the court's jurisdiction in the light of experience. Adjudications made by the INS in proceedings not requiring trial-type hearings, on applica-

62. *Palmore v. United States*, 411 U.S. 389 (1973).

63. The bill is modeled after, and elaborates upon, one drafted by Peter Levinson and submitted to the Select Commission staff in an unpublished memorandum dated August 18, 1980. A much more detailed and intricate draft bill had been submitted on behalf of the organization of immigration judges.

tions not renewable in trial-type proceedings before the trial judges of the new court, could be made directly appealable to the court's appellate division. The naturalization function, now reposed in the United States district courts and selected state courts, could be transferred to the trial division.

A court of this type would afford the litigants, alien and citizen alike, a fair trial before a competent tribunal qualified to dispense justice and exercise discretion without undue influence from the enforcement officials. Any aggrieved party would have an appeal as of right to a competent and independent appellate tribunal. There should be little, if any, need for further judicial review. While some may argue that such a specialized court tends ultimately to identify with the enforcement agency, and that opportunity for review by a court of generalist judges is imperative, this need not be. If the judges of the new court are carefully and conscientiously selected, their judgments should be sufficient guarantee of justice and equity.

Elimination of further review, save for certiorari in the Supreme Court, would have a number of benefits. It would ease the burden of the existing courts without diluting the quality of the decisions. It would make for speedier disposition of cases and help eliminate backlogs. It would establish uniformity of decision throughout the United States. And further review would be uncalled for by the underlying system of independent, competent and compassionate judges.

APPENDIX

UNITED STATES IMMIGRATION COURT

Section 1. *Establishment of court.* There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Immigration Court. The United States Immigration Court shall consist of an appellate division, composed of seven members (including the chief judge), and a trial division, composed of fifty members (including the chief judge). The chief judge and judges of the appellate division and the chief judge and judges of the trial division shall be appointed by the President, by and with the advice and consent of the Senate, for terms of fifteen years. Judges of the United States Immigration Court shall be appointed solely on the basis of fitness to perform the duties of the office.

Section 2. *Compensation of judges.* Each judge of the appellate division shall receive salary at the same rate and in the same installments as judges of the district courts of the United States. Each judge of the trial division shall receive salary at the same rate and in the same installments as commissioners of the United States Court of Claims.

Section 3. *Removal of judges.* Judges of the United States Immigration Court may be removed by the President during their terms of office only for incompetency, misconduct in office, neglect of duty, or physical or mental disability. Before any order of removal is entered by the President, he shall furnish a full specification of the charges to the judge, who shall be accorded an opportunity to be heard on the charges by a panel of three judges to be selected by the Chief Justice of the United States from among the senior judges of three different circuits of the United States Court of Appeals.

Section 4. *Rules of court.* The appellate division shall promulgate rules of court governing practice and procedure in the appellate division and in the trial division. The rules shall be designed to accord all parties to proceedings in the trial division and in the appellate division a fair and prompt hearing and determination. To this end, neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure shall apply to proceedings in the United States Immigration Court. However, selected provisions of those Rules may be adapted and incorporated, as deemed appropriate, in the rules of the United States Immigration Court.

The _____s shall contain provisions for the representation of non-government parties in proceedings before the court by counsel of their own choice without expense to the government, as well as by qualified nonattorneys who appear without fee or as accredited representatives of nonprofit voluntary agencies of a religious, charitable, social service or similar nature recognized by the court as having at its disposal adequate knowledge, information and experience.

Section 5. *Appellate division administration.* The chief judge of the appellate division shall have administrative responsibility for the proper functioning of the appellate division and shall have power to appoint such administrative assistants, attorneys, clerks, and other personnel as may be needed for that purpose. In accordance with the rules of the court, the chief judge may either designate any three appellate division judges to hear and decide any case within the jurisdiction of the appellate division or may refer any such case to the appellate division en banc. A judge of the trial division, pursuant to designation of the chief judge of the appellate division in accordance with rules of the court, may sit temporarily in place of a judge of the appellate division. The appellate division shall have its headquarters office in Washington, D.C. and shall hear oral argument there in accordance with its rules. From time to time, at such intervals as may be deemed appropriate in the judgment of the chief judge of the appellate division, a panel or panels of three judges of the appellate division may travel to other areas of the United States outside the headquarters office for the purpose of hearing oral argument in cases arising in those areas.

Section 6. *Appellate division jurisdiction.* The appellate division shall have jurisdiction to hear and determine appeals from final decisions of judges of the trial division. The appellate division shall also have jurisdiction to hear and determine appeals from final decisions of the Immigration and Naturalization Service in the following types of proceedings: (1) administrative fines and penalties under sections 231, 233, 237, 239, 243, 251, 254, 255, 256, 271, 272, and 273 of the Immigration and Nationality Act; (2) applications for the exercise of the discretionary authority contained in section 212(c) and section 212(d)(3) of the Immigration and Nationality Act; and (3) applications for classification as immediate relatives under section 201(b) of the Immigration and Nationality Act and for preference classification under section 203(a) of the Immigration and Nationality Act. The appellate division shall also have power to direct that any determination of a judge of the trial division or of the Immigration and Naturaliza-

tion Service within the appellate jurisdiction of the appellate division be certified to it for review and final determination. In considering and determining cases before it, the appellate division shall exercise such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for a just and equitable disposition of the case.

Section 7. *Trial division administration.* The chief judge of the trial division shall have administrative responsibility for the proper functioning of the trial division and shall have power to appoint such administrative assistants, attorneys, clerks and other personnel as may be needed for that purpose. In accordance with the rules of the court, the chief judge of the trial division may designate any trial division judge to hear and decide any case falling within the jurisdiction of the trial division.

Section 8. *Trial division jurisdiction.* The trial division shall have jurisdiction to hear and determine the following types of cases: (1) exclusion cases under section 236 of the Immigration and Nationality Act; (2) deportation cases under section 242 of the Immigration and Nationality Act; and (3) rescission of adjustment of status cases under section 246 of the Immigration and Nationality Act. In considering and determining cases coming before them, the trial division judges shall determine all applications for discretionary relief which may properly be raised in the proceedings, including determinations relating to bond, parole or detention of an alien in such proceedings, and shall exercise such discretion conferred upon the Attorney General by law as is appropriate for the just and equitable disposition of the case.

Section 9. *Savings provisions.* The enactment of this Act shall not result in any loss of rights or powers, interruption of jurisdiction, or prejudice to matters pending in the Board of Immigration Appeals or before special inquiry officers (immigration judges) on the day that this Act shall take effect. Under rules to be promulgated by the appellate division, with respect to such pending cases the appellate division shall be deemed to be a continuation of the Board of Immigration Appeals and the trial division shall be deemed to be a continuation of special inquiry officers (immigration judges) for the purpose of effectuating the continuation of all existing rights, powers, and jurisdiction. Pending promulgation of those rules, the Board of Immigration Appeals and the special inquiry officers (immigration judges) shall continue to

function with such jurisdiction and powers as exist on the day that this Act is enacted.

Section 10. *Finality of decision.* A final decision of the appellate division shall be binding on all judges of the trial division and on all officers of the United States, and shall be subject to further review only by the Supreme Court of the United States on petition for certiorari.

A Critique of the Establishment of a Specialized Immigration Court

TIMOTHY S. BARKER*

Maurice Roberts' article accurately describes the current state of the immigration courts and the Board of Immigration Appeals. His portrayal of the system as one plagued by delays and tainted by the lack of independence from the enforcement branch of the Immigration and Naturalization Service reflects the common perception amongst practitioners before the immigration courts and the Board. Like Mr. Roberts, such practitioners, as well as the immigration judges themselves, feel there is a pressing need to change the current structure of the immigration courts and the Board. There is disagreement, though, on what the nature of the change should be.

The debate over the structure of the future immigration court system involves the question of whether a specialized immigration court and appellate division should be established under article I of the Constitution or whether the existing system should be removed from the Immigration and Naturalization Service (INS) and established as an independent agency within the Department of Justice. Mr. Roberts advocates the creation of an article I specialized court. I respectfully disagree and contend that independent agency status within the Department of Justice is the optimum solution. My disagreement is basically directed toward the elimination of judicial review by the courts of appeals which would result if a specialized immigration court system were established.

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The arguments generally advanced for the creation of a specialized court to handle a particular area of administrative law are: (1) it provides caseload relief for the courts of general jurisdiction; (2) it creates uniformity and certainty of law by eliminating decisions by the various district courts and circuit courts of appeals; and (3) the highly technical nature of administrative decisions are better understood by the specialist as opposed to the generalist judge.¹ Application of these considerations to the current immigration court system, however, fails to offer a persuasive argument for the creation of the new specialized court.

First, the caseload relief to the courts of appeals would be inconsequential. In 1979 only 194 petitions for review were filed in all the various circuits.² This represents a continuing decline in the number of petitions for review being filed each year.³ Second, the problem of conflicting decisions between the courts of appeals⁴ is in no way unique to administrative agencies in general, or to the immigration courts in particular. Conflicts result from the nature of the federal judicial system and it is the function of the Supreme Court to resolve the varying positions. Due to the exigencies of the Supreme Court's caseload the resolution of conflicts is taking substantially longer than in the past. Regardless, the nature of the conflicting decisions facing the immigration courts is far from the crisis proportions necessary to justify the creation of a specialized court to resolve the problem.⁵ Finally,

1. See Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 62-68 (1975).

2. [1979] DIRECTOR AD. OFF. OF U.S. COURTS REP. A6.

3. In 1978 there were 257 petitions filed, compared to 295 in 1977 and 387 in 1976. The reason for the decline may be partly attributed to sanctions being imposed upon attorneys who file petitions for review for the purposes of delay. See, e.g., *Chour v. INS*, 578 F.2d 464 (2d Cir. 1978) (\$1000 fine and double costs imposed); *Acevedo v. INS*, 538 F.2d 918 (2d Cir. 1976) (double costs imposed); *In re Bithoney*, 486 F.2d 319 (1st Cir. 1973) (one year suspension and \$500 fine).

4. The major example of this type of conflict arose between the Second and Ninth Circuits over the availability of relief under 8 U.S.C. § 1182(c) (1976) in deportation proceedings. Compare, *Francis v. INS*, 532 F.2d 286 (2d Cir. 1976) with *Bowe v. INS*, 597 F.2d 1158 (9th Cir. 1979). This conflict was recently resolved with the Ninth Circuit accepting the *Francis* position. *Tapia-Acuna v. INS*, — F.2d — (9th Cir. 1981). Another example of this type of conflict arose concerning the eligibility of children for immigration through their stepparent. The BIA required evidence of "active parental interest" in the stepchild's support and general instruction. *In re Moreira*, I.D. No. 2792 (1980). The Ninth Circuit rejected this position and held the stepchild eligible for immigration merely on the basis of a valid marriage between the parents. *Palmer v. Reddy*, 622 F.2d 463 (9th Cir. 1980). This conflict has also been resolved with the recent BIA decision to apply the Ninth Circuit's position nationwide. *In re McMillian*, I.D. No. 2844 (1981).

5. It is questionable whether the Board has to follow the ruling of a court of appeals in other cases arising within the court's jurisdiction. In *Castillo-Felix v. INS*, 601 F.2d 459 (9th Cir. 1979), the court indicated that the Board was not so bound. Similar problems have been experienced by the Tax Court. It was not un-

the nature of the issues raised in deportation proceedings, although somewhat technical in nature, is in no way beyond the intellectual grasp of an appellate court judge. Unlike the issues raised in the customs, patent, or bankruptcy areas, deportation cases mainly involve simple factual situations, due process considerations and discretionary determinations. Appellate judges experienced in handling criminal, civil and administrative cases from a host of different agencies are well suited to handle these issues.

The argument for a new specialized immigration court is even weaker when the disadvantages are considered. The specialized court would eliminate review by the courts of appeals. In practical terms this would mean an almost total loss of review by courts of general jurisdiction since the Supreme Court's caseload would basically preclude review in all but the most exceptional cases. The loss of the contribution made by the courts of appeals to the administration and development of justice in the immigration and deportation area would be devastating. The courts of appeals, with their generalist perspective and diverse views gained through extensive experience in the whole spectrum of substantive and procedural areas, make a great contribution to the creative development of administrative law in general and immigration law in particular.⁶ The judges of the courts of appeals provide an essential counterbalance to the inevitable prejudices and limited perspectives which develop within an agency solely concerned with its operation in one limited area of law. Additionally, the development of varying positions by different circuits is beneficial to the illumination and analysis of issues before final resolution by the Supreme Court. These dynamics would be lost if a specialized immigration court were to be established.

The resolution of the problems now being experienced by the immigration courts and the Board can be solved without the crea-

til 1970 that the Tax Court decided to consider itself bound by courts of appeals decisions. See *Golsen v. Commissioner*, 54 T.C. 742 (1970).

6. See, e.g., *Navia-Duran v. INS*, 568 F.2d 803 (1st Cir. 1977) (involuntary statements inadmissible in deportation proceedings on fifth amendment grounds); *Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977) (failure to give attorney 72 hours notice of execution of deportation order voids removal of alien and Service ordered to readmit him to the country); *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976) (relief under 8 U.S.C. § 1182(c) (1976) granted to all otherwise eligible permanent residents in deportation hearings on equal protection grounds).

tion of a specialized court. The problem of delay is one of economics and the solution is merely one of affording the immigration courts and the Board adequate resources to handle their caseloads. In all probability the amount of funding necessary for the establishment of the specialized court would far exceed the cost of upgrading the present system. The problem of independence can be remedied by separating the immigration courts and the Board from the INS and establishing them as another agency within the Department of Justice similar to the Parole Commission. The authority to control budgetary allocations and the administration of the courts could rest with the Board. The supervision of the immigration judges would no longer rest within the enforcement branch of the INS. The immigration courts and the Board would then become self-sufficient, with their independence firmly established.

Constitutional and Policy Considerations of an Article I Immigration Court

ROBERT E. JUCEAM*
STEPHEN JACOBS**

Drawing upon scholarly research and his many years of distinguished service as a government lawyer, Chairman of the Board of Immigration Appeals, and editor, Maurice Roberts has provided an accurate description of many of the current problems with the Immigration and Naturalization Service (INS) and offers a provocative proposal that Congress create an article I immigration court to deal with them. As such, the Roberts article is a significant addition to the literature at a time when the public's interest and emotions again are focused directly on immigration issues, including governmental costs, "illegal" aliens, foreign workers, and "new seed" immigration.¹

Before examining the wisdom of establishing a specialized im-

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1. The U.S. Select Commission on Immigration and Refugee Policy, which will soon report to Congress, is deeply split over many controversial issues. The lengthy record following nationwide hearings is replete with contradictory proposals to remedy the problems Mr. Roberts identifies and contains many conflicting statements as to the current objectives of U.S. policy. There is little disagreement,

migration court. The constitutionality of the court as proposed, it is appropriate to consider whether the proposal properly addresses priorities in institutional reform.² Most aliens never face exclusion or deportation hearings or become enmeshed in motions to reconsider or judicial or administrative appeals. Indigent and unrepresented (by attorneys or others), they usually attain their goals or abandon their efforts on the first pass in the application process. Thus, their nightmare is not the nicety of cross-examination rights, but substantive complexity, confusing forms (for which they often wait in lines which queue at 6 A.M. in metropolitan centers for hours, sometimes only to be ordered to return another day), language barriers, inadequate time to consult poorly trained INS contact representatives, unanswered correspondence, lost files, and outrageous administrative delay often affecting substantive rights.³ These matters are only compounded by morale problems in the dissension-ridden and politicized INS.⁴

Despite the criticisms of specific portions of Mr. Roberts' proposal which appear below, it is important to reaffirm his deep concern for the quality of the process by which decisions interpreting the Immigration and Nationality Act (INA) are made and for the rights of the participants in the process. Although much could be said in favor of reducing the role of immigration lawyers and judges alike by reforming the "intake system" and many of the substantive rules which are presently applicable, the most urgent problem is that so many aliens, including those who do have counsel, find it impossible to vindicate their legal rights in a fair, inexpensive and expeditious manner.

THE LIMITED SCOPE OF MR. ROBERTS' PROPOSAL

Perhaps because of his own experiences, Maurice Roberts places primary emphasis on the conflicting roles of the Immigration and Naturalization Service in performing both enforcement

however, that there are serious inadequacies in the present policies and practices of the INS and the statute it administers.

2. It should be recognized, of course, that the Roberts proposal does not purport to be a panacea. A court, nonetheless, will be part of the Select Commission's proposals.

3. It is not our intent to disparage the many dedicated and capable INS career officers who are sensitive to the public and devoted to a fair administration of the immigration laws.

4. Roberts vividly describes the tensions between those in the INS who perform enforcement functions and those who have service functions. See Roberts, *proposed: A Specialized Statutory Immigration Court*. INS morale also suffers from the politicization of immigration policy and control from outside the Service, such as occurred recently in connection with the measures taken against alien students and others from Iran when the White House staff was itself directing INS policy.

and service functions. He perceptively describes the friction between officials charged with performing these functions, and, more specifically, the unacceptable dependence of immigration judges, formerly known as Special Inquiry Officers, and other service personnel on enforcement officials. He notes, moreover, the indifference of the Department of Justice toward the INS and cites insufficient remuneration and prestige as contributing to an environment which discourages many qualified individuals from seeking to become immigration judges. He also criticizes the inability of immigration judges to adjudicate constitutional claims and identifies a number of logistical problems, including judicial dependence on the District Director's budgetary largesse and insufficient secretarial and other resources, which result in unwarranted delays in the appellate process.⁵

Maurice Roberts states that proposed reforms in the existing system should be measured against three objectives: (1) immigration judges should receive compensation and security commensurate with the nature of their responsibility; (2) the independence of immigration judges should be safeguarded by insulating them from direct or subtle pressures from enforcement officials; and (3) the judges should receive adequate support services.⁶

While we share these laudable goals, there are additional deficiencies in the adjudicatory process that merit equal attention in statutory reform. The evidentiary standards in exclusion and deportation hearings are excessively lax.⁷ Illegally obtained evidence and unreliable hearsay are admissible.⁸ Respondents lack

5. Roberts criticizes the fact that the Board of Immigration Appeals has to follow the conflicting decisions of circuit courts of appeals. As pointed out by Timothy Barker and Leon Wildes in their adjoining comments, this situation, rather than being a problem, has illuminated issues for Supreme Court and legislative review. See note 13 *infra*.

6. Roberts, *supra* note 4, at 16.

7. The loose evidentiary standards that have been applied in exclusion and deportation hearings are described in 1A C. GORDON & H. ROSENFELD, *IMMIGRATION LAW AND PROCEDURE* §§ 3.20f, 5.10 (rev. ed. 1980).

8. Several courts have recently refused to decide whether the exclusionary rule is constitutionally required in deportation hearings. See, e.g., *Lee v. INS*, 590 F.2d 497, 502 (3d Cir. 1979). See Fragomen, *The "Uncivil" Nature of Deportation: Fourth and Fifth Amendment Rights and the Exclusionary Rule*, 45 BROOKLYN L. REV. 29 (1978). Whether or not constitutionally mandated, the exclusionary rule should, as a matter of policy, be applied to the INS. Moreover, prohibiting the INS from making any use whatsoever of illegally obtained evidence would enhance the public perception of the Service.

to compel the attendance of witnesses and their own testimony may be involuntarily compelled.⁹ Hearing records are controlled by the immigration judges and the transcription of these records is not always accurate in material respects. The denigration of immigration judges, therefore, is only one of our concerns with the existing system which fails to provide aliens and other interested parties with sufficient guarantees that, without unnecessary expense, they can secure a prompt and fair adjudication of their legal claims.

Merits of a Specialized Immigration Court

A number of factors suggest that a specialized immigration court is undesirable and that political considerations make its creation unlikely. Such a court cannot be justified on any of the grounds that have previously led Congress to establish other specialized courts.¹⁰ As described by Mr. Justice Harlan in *Glidden v. Zdanok*:¹¹

In certain areas of federal judicial business there has been a felt need to obtain, first, the special competence in complex, technical and important matters that comes from narrowly focused inquiry; second, the speedy resolution of controversies available on a docket unencumbered by other matters; and, third, the certainty and definition that comes from nationwide uniformity of decision.¹²

Immigration law is neither so straightforward nor so simple as other areas of law, such as trade regulation, which require considerable knowledge of economics and other non-legal matters. It has not been singled out for specialized court treatment in any of the respectable proposals to do so. Furthermore, unlike fields in which other specialized courts have been created, such as patent law, there is no reason why the immigration law need be as complex as it is today. It is hoped that proposals to revise the Immigration and Nationality Act will result in a significant simplification.

⁹ See 1A C. GORDON & H. ROSENFELD, *supra* note 7, at § 5.10f. Specialized courts currently operating include: the courts of the District of Columbia; the territorial courts of Puerto Rico, the Canal Zone, Guam, and the Virgin Islands; the Court of Claims; the Customs Court; the Court of Customs and Monetary Appeals; the Tax Court and the Bankruptcy Court. See P. BATOR, P. D. SHAPIRO, & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 47-49 (2d ed. 1973). In addition, Congress created a number of specialized courts which no longer exist. These included: the territorial courts, the Court of Private Land Claims, the Choctaw and Chickasaw Citizen Court, the Commerce Court, the consular courts, the United States Court for the District of Columbia, and the Emergency Court of Appeals. See 1 MOORE'S FEDERAL PRACTICE ¶ 1.01 (2d ed. 1980).

¹⁰ *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).
¹¹ *Id.* at 560.

Moreover, if the goal of allowing immigration judges to reach constitutional issues and exercise supervisory powers over the administrative process is realized, the adjudicatory authority of immigration judges will be broadened considerably, extending to the application of such basic constitutional concepts as due process and equal protection.

Neither would a specialized immigration court, per se, significantly expedite the resolution of cases. The current delays do not arise primarily from congestion in the federal courts or from the lack of resources afforded immigration judges. The delays mainly stem from overregulation, unnecessarily complex forms, administrative inefficiency, an understaffed and underfunded agency overwhelmed by a multitude of cases deserving of prompt attention and applicants' seemingly limitless opportunity to seek to reopen or supplement the record in review proceedings. This situation is exacerbated by the fact that an individual especially aggrieved by a delay is left without effective judicial recourse to a reasonable and inexpensive means of obtaining prompt adjudication.

Mr. Roberts also has not made the case for nationwide uniformity, the third traditional justification for a specialized court. Quite to the contrary, a diversity of opinion has resulted, on a number of occasions, in a more sensible and sympathetic application of the immigration laws.¹³ Furthermore, under the Roberts proposal, where review of the immigration court's decisions would be only by a grant of certiorari by the U.S. Supreme Court, we would lose the active participation of the courts of appeals whose decisions clarify issues for ultimate resolution.

Writing on behalf of the American College of Trial Lawyers in opposition to recent proposals to establish a specialized bankruptcy court,¹⁴ former Judge Simon H. Rifkind stated:

[T]he vitality of the Federal courts depends on the fact that district courts

¹³ For example, in *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976), the Second Circuit applied § 212(c) of the Immigration and Nationality Act to deportation proceedings on the ground that a strict construction of the waiver provision, which on its face applies only to exclusion hearings, would violate equal protection. See Mailman, "Francis"—A Current Comity of Errors, N.Y.L.J., Dec. 31, 1980, at 1, col. 1.

¹⁴ The American College of Trial Lawyers was only one of a number of distinguished groups to oppose the creation of a specialized bankruptcy court. See, e.g., *Bankruptcy Court Revision: Hearings on H.R. 8200 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 215-37 (1977) (statement of former Attorney General Griffin B. Bell).

are courts of general jurisdiction, whose judges are required to deal, on a daily basis, with the full range of substantive law. Because of this basic structure, changes in one area of the law influence the development of other areas of law. New ideas are allowed to filter through the legal system, so the law does not become stagnant.¹⁵

We agree and consider it particularly important to preserve a role for the lower federal courts in considering immigration issues. Analysis of immigration law matters is not confined to review of the four corners of the Immigration and Nationality Act. The immigration laws directly affect fundamental interests in our foreign affairs and the rights of aliens and their American relatives and employers and, as such, they clearly have constitutional dimensions. Thus, for example, the due process clause of the fifth amendment clearly applies to procedures by which aliens may be deported.¹⁶ Similarly, there are some limitations, under the equal protection clause, on the extent to which the immigration laws may discriminate between certain classes of aliens.¹⁷ Such constitutional issues should not be removed from the consideration of the district courts and courts of appeals where judges frequently confront similar issues in different contexts.¹⁸ Addressing the prospect of a specialized bankruptcy court, Judge Rifkind emphasized that "[i]f bankruptcy cases are tried in a specialized bankruptcy court, they will be insulated from the rest of the law."¹⁹ He also noted with alarm, that the creation of a specialized court would lead to a further specialization of the bar and discourage general practitioners.²⁰

In sum, we are not impressed by the grounds for creating a specialized immigration court. Confining immigration cases almost

15. Rifkind, *Bankruptcy Code-Specialized Court Opposed*, AM. BANKR. L.J. 187 (1978).

16. See 1A C. GORDON & H. ROSENFELD, *supra* note 7, § 5.5.

17. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (referring to a "limited scope of judicial inquiry into immigration legislation"). See also *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976), discussed at note 13 *supra*.

18. Although the statute proposed by Maurice Roberts would preclude direct appeals to the U.S. courts of appeals, it does not attempt to restrict the relief that can presently be obtained in federal district court in certain cases. Section 106(a)(9), of the Immigration and Nationality Act preserves the right to attack an order of deportation in a habeas corpus proceeding, which under § 106(b) is presently the only avenue for review of exclusion orders. In addition, suits for declaratory judgment and injunctive relief may be brought to obtain review of determinations which are not final orders of deportation or exclusion. See Roberts, *Judicial Review of Administrative Decision Under the Immigration and Nationality Laws*, reprinted in Twelfth Annual Immigration and Naturalization Institute at 593 (P.L.I. Handbook No. 147, 1979). Congress may, in at least some circumstances, restrict habeas corpus proceedings to article I courts. See *Swain v. Pressley*, 430 U.S. 372 (1977) (upholding such a restriction in the District of Columbia Code).

19. Rifkind, *supra* note 15, at 188.

20. *Id.*

exclusively to such a court might well have a decidedly negative impact upon the evolution of the law. Finally, judging from the opposition that was recently directed at proposals for a specialized bankruptcy court, it is very likely that any proposal to create a specialized immigration court would encounter significant, if not insurmountable, opposition.²¹

THE CONSTITUTIONALITY OF THE PROPOSED ARTICLE I COURT

Although Maurice Roberts' presentation does not expressly address the constitutionality of establishing a legislative or article I immigration court with nontenured judges, the constitutionality of such a court cannot be taken for granted. The question may be stated simply as follows: would an immigration court with judges appointed for fifteen-year terms run afoul of the requirement of article III, section 1 of the Constitution that judges, both of the Supreme and inferior courts, be appointed for life? Unfortunately, the analysis required to answer this question is by no means simple. As stated by one scholar, "this is a most difficult area of constitutional law. The precedents are horribly murky, doctrinal confusion abounds, and the constitutional text is by no means clear."²²

It should be stressed at the outset that although the Supreme Court has on a number of occasions considered the constitutionality of article I courts, it has never found an article I court to be per se unconstitutional. Indeed, the only limitations that the Supreme Court has placed on the jurisdiction of non-article III courts have occurred in the unique context of the military courts.²³ At the same time, however, the relevant precedents

21. In opposing creation of the bankruptcy court, Judge Rifkind made two other, albeit less substantial, objections which give some indication of the political opposition that a proposal to create a specialized immigration court might provoke. First, he argued that a significant increase in the number of article III judges would dilute the significance and prestige of district judgeships. Secondly, he expressed concern about the ability to find an adequate number of persons to fill the new bankruptcy judgeships without the wholesale appointment of bankruptcy referees. See Rifkind, *supra* note 15.

22. Letter from Prof. Thomas G. Krattenmaker to Hon. Peter Rodino (June 30, 1976) reprinted in *Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 2d Sess., pt. 4 at 2689 (1976) (hereinafter cited as Krattenmaker Letter).

23. The Supreme Court has held that the military courts may not constitutionally try: civilian dependents of servicemen, *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); civilian employees of the armed forces, *McElroy v.*

evinced two markedly dissimilar approaches to the ability of Congress to establish a court with non-tenured judges. The approach articulated in the most recent cases focuses on the existence of "particularized needs" for such a court and suggests that the immigration court proposed by Maurice Roberts would be unconstitutional. By contrast, the other approach inquires into whether the jurisdiction of an article I court would impermissibly include matters that are "inherently judicial" and suggests that the proposed immigration court would be constitutional. After a brief overview of the policy justifications for, and the implications of the language of, article III, each of these approaches will be considered below.

An Overview of Article III, Section 1

The constitutionality of the immigration court proposed by Maurice Roberts is called into question by the requirement of lifetime tenure of article III, section 1 of the Constitution which provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.²⁴

Any analysis of the implications of the requirement that article III judges receive tenure for life must take note of the highly significant public policy considerations involved. This requirement, along with the guarantee that judicial salaries not be reduced, reflects the importance the framers of the Constitution placed on an independent judiciary. Thus, the Supreme Court has stated that the provisions "were designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government."²⁵

Since the "judicial Power of the United States" includes "all

United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); former servicemen, United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955); or servicemen charged with offenses that are not service-connected, O'Callahan v. Parker, 395 U.S. 258 (1969).

24. U.S. CONST. art. III, § 1.

25. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 16 (1955). See also *Palmore v. United States*, 411 U.S. 389, 410-22 (1973) (Douglas, J., dissenting). A recent commentary identifies the following policies underlying the tenure and salary provisions: the preservation of the separation of power among the three branches of the federal government and between the national government and the states; the promotion of the judiciary as an institution and the protection of judicial individualism; and the guarantee of impartiality and due process. Note, *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act*, 80 COLUM. L. REV. 560, 582-85 (1980).

Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States,"²⁶ it would appear, at first blush, that either all issues arising under federal law must be adjudicated before a tenured article III court or that, at a minimum, all courts established by Congress must conform to article III. Although either interpretation appears clearly consistent with the text of article III, both have been uniformly rejected. In *Palmore v. United States*,²⁷ the most recent Supreme Court decision to consider the constitutionality of an article I court, the Court stated:

It is apparent that neither this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law, or even every criminal prosecution for violating an Act of Congress, to be tried in an Art. III court before a judge enjoying lifetime tenure and protection against salary reduction. Rather, both Congress and this Court have recognized that state courts are appropriate forums in which federal questions and federal crimes may at times be tried. . . .²⁸

As set forth below,²⁹ the Court then indicated that Congress may, in certain circumstances, establish courts under article I of the Constitution³⁰ without affording judges the protections of arti-

26. U.S. CONST. art. III, § 2.

27. 411 U.S. 389 (1973).

28. *Id.* at 407.

29. See pp. 13-15 *infra*.

30. Article I, § 8 delegates to Congress the powers, *inter alia*:

To establish an uniform Rule of Naturalization and uniform Laws on the subject of Bankruptcies throughout the United States;

To constitute Tribunals inferior to the supreme Court;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings,—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

U.S. CONST. art. I, § 8.

In *Ex parte Bakelite Corp.*, the Supreme Court stated:

It long has been settled that Article III does not express the full authority of Congress to create courts, and that other Articles invest Congress with power in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution.

279 U.S. 438, 449 (1929).

cle III. Thus, it is clear that the constitutionality of the proposed immigration court rests on the authority of Congress to establish such a court in the exercise of powers delegated to it from sources other than article III.³¹ Before analyzing the approaches that the Supreme Court has used in dealing with the relationship between article III and other grants of authority to Congress, it should be stressed that article III must mean more than that the judges of the Supreme Court are entitled to lifetime tenure. Indeed, it would seem that article III creates a presumption, albeit a rebuttable one, that if Congress decides to create judicial tribunals, it must establish courts that comport with article III requirements.³² Such a presumption is strongly supported by both the text of article III and the important policy considerations of judicial independence which support it.

*The "Particularized Needs" Approach of *Palmore**

In *Palmore*, the Supreme Court enunciated what appeared to be a general approach to the authority of Congress to create article I courts without the guarantees of article III when it stated:

[T]he requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment.³³

It is unclear whether the Court meant that the article III requirements always apply where "laws of national applicability and affairs of national concern are at stake" or that, even when such laws and concerns are at stake, Congress may by a plenary grant of power dispense with those requirements "with respect to specialized areas having particularized needs and warranting distinctive treatment."³⁴ This ambiguity, unfortunately, was not clarified in the analysis which led the *Palmore* Court to uphold the constitutionality of the Congressional assignment of local crimi-

31. Unlike other specialized article I courts, an immigration court would not be based on any of the specific delegations contained in article I. Although the Supreme Court initially viewed congressional authority regarding immigration to be based upon its article I power to regulate foreign commerce, it has since analyzed the regulation of immigration as an incident of national sovereignty. Compare, e.g., *The Passenger Cases* (Smith v. Turner), 48 U.S. 283 (1849) with, e.g., *The Chinese Exclusion Case* (Chae Chan Ping v. U.S.), 130 U.S. 581 (1889). Such a view, however, should not affect the analysis of whether an immigration court with non-tenured judges would be constitutional.

32. See note 43 *infra*; Krattenmaker Letter, *supra* note 22, at 2690.

33. 411 U.S. 389, 407-08 (1973).

34. The court's use of the term "specialized areas" is also ambiguous. Although it has been suggested that the term seems directed at geographic areas, rather than particular subject matter areas, Note, *supra* note 25, at 577, such an interpretation seems, as a matter of semantics, overly restrictive.

nal cases in the nation's capital to the Superior Court of the District of Columbia, an article I court with non-tenured judges.³⁵

Nevertheless, both interpretations of *Palmore* are consistent with the results, if not always the logic, of many prior decisions upholding the constitutionality of other legislative courts. For example, the Supreme Court has upheld the validity of territorial courts,³⁶ the Court of Private Land Claims,³⁷ the Choctaw and Chickasaw Citizenship Court,³⁸ courts created in unincorporated areas outside the mainland,³⁹ and consular courts established by concessions from foreign countries.⁴⁰ As stated in Mr. Justice Harlan's plurality opinion in *Glidden Co. v. Zdanok*: "The touchstone of decision in all these cases has been the need to exercise the jurisdiction then and for a transitory period."⁴¹

These precedents do not support the constitutionality of an article I immigration court. Such a court would consider exclusively "laws of national applicability" and "affairs of national concern." Moreover, even if immigration is deemed to be a "specialized area," within the meaning of *Palmore*,⁴² it is doubtful whether it "[has] particularized needs and [warrants] distinctive treatment." Except insofar as an article I immigration court might be considered as experimental, it could not, in contradistinction to

35. In concluding that the local courts for the District of Columbia warranted distinctive treatment as article I courts, Justice White relied upon a number of significant facts. Initially, he noted that the courts in question were designed to handle primarily local cases and to serve as "a local court system for a large metropolitan area." 411 U.S. at 408 (1973). He then recognized the Congressional concern about the congestion previously existing in the federal district court and court of appeals for the District and two critical needs resulting therefrom: first, "to confine the work of those courts to that which, for the most part, they were designed to do, namely, to try cases arising under the Constitution and the nationally applicable laws of Congress;" and, second, "to establish an entirely new court system with functions essentially similar to those of the local courts found in the 50 states of the Union with responsibility for trying and deciding those distinctively local controversies that arise under local law, including local criminal laws having little, if any, impact beyond the local jurisdiction." *Id.* at 409. Finally, the Court took note of Congress' deliberate decision to follow the great majority of states in creating judgeships with fixed terms, because "[i]t was thought that such a system would be more workable and efficient in administering and discharging the work of a multifaceted metropolitan court system." *Id.*

36. *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828) (Marshall, C.J.).

37. *United States v. Coe*, 155 U.S. 76 (1894).

38. *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899).

39. *Downes v. Bidwell*, 182 U.S. 244 (1901).

40. *In re Ross*, 140 U.S. 453 (1891).

41. 370 U.S. 530, 547 (1962).

42. See note 34 *supra*.

the territorial courts, be regarded as transitory. Also, unlike the local courts for the District of Columbia, an article I immigration court would not, to a significant extent, be in response to congestion in constitutional courts. Finally, there is no apparent policy justification for denying judges of a specialized immigration court the guarantees of article III, section 1.

Thus, adherence to the approach enunciated in *Palmore* would lead to the conclusion that Congress could not constitutionally establish a specialized immigration court with non-tenured judges in view of the national applicability of the immigration laws, the affairs of national concern at stake, and the absence of particularized needs warranting distinctive treatment.⁴³

The "Inherently Judicial" Approach of *Bakelite*

Although *Palmore's* approach would seem to be one of general applicability, a number of prior cases utilized an entirely different approach to article I courts. These cases stand for the proposition that the guarantees of article III need apply only to the adjudication of matters that are "inherently judicial." Since it would appear that claims against the United States arising under the immigration and nationality laws generally involve "public rights" which are not "inherently judicial," this approach leads to the conclusion that an article I court would be constitutional.⁴⁴

The doctrinal source of this approach is *Murray's Lessee v. Hoboken Land & Improvement Co.*,⁴⁵ where the Court upheld the audit of accounts of customs officials by the Treasury and stated that

there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may

43. The conclusion that an article I immigration court would be unconstitutional draws some support from Justice Harlan's statement in *Glidden* that:

Whether constitutional limitations on the exercise of judicial power have been held inapplicable has depended on the particular local setting, the practical necessities, and the possible alternatives. . . . [T]his Court has in the past entertained a presumption that even those territorial judges who have been extended statutory assurances of life tenure and undiminished compensation have been so favored as a matter of legislative grace and not a constitutional compulsion. . . . By a parity of reasoning, however, the presumption should be reversed when Congress creates courts the continuing exercise of whose jurisdiction is unembarrassed by such practical difficulties.

370 U.S. 530, 547-48 (1962).

44. Suits brought by private parties against the United States were initially held to be entirely outside the article III judicial power. See *Williams v. United States*, 289 U.S. 553, 565, 578 (1933). This view, however, was subsequently repudiated. E.g., *Glidden v. Zdanok*, 370 U.S. 530, 562-66 (1962).

45. 59 U.S. (18 How.) 272 (1856).

deem proper.⁴⁶

There, Mr. Justice Curtis further noted that "we do not consider congress can . . . withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity or admiralty"⁴⁷

An analysis of whether or not matters are "inherently judicial" was found relevant in the context of article I courts in *Ex Parte Bakelite Corp.*⁴⁸ and *Williams v. United States*,⁴⁹ which, respectively, held that the United States Court of Customs and Patent Appeals and the United States Court of Claims had been established under article I. In *Bakelite*, the Supreme Court stated that "[l]egislative courts . . . may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it."⁵⁰ Since in the Court's view the jurisdiction conferred on the Court of Customs and Patent Appeals included "nothing which inherently or necessarily requires judicial determination,"⁵¹ it could have been and was created as a legislative court. In *Williams*, the Supreme Court applied a parallel analysis in upholding the validity of the Court of Claims as an article I court.⁵²

Because *Bakelite* assumes that if Congress can delegate certain matters to executive discretion, it may delegate the adjudication of those matters to an article I court, decisions bearing upon the authority of the Immigration and Naturalization Service become pertinent. Initially, it should be noted that, shortly after its decision in *Bakelite*, the Supreme Court in dicta quoted the first of the above passages from *Bakelite* and stated: "[f]amiliar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to . . . immigration. . . ."⁵³

To our knowledge, the Supreme Court has never found that aliens have a constitutional right to a plenary hearing as to their status in an article III court. To the contrary, the Court has up-

46. *Id.* at 284.

47. *Id.*

48. 279 U.S. 438 (1929).

49. 289 U.S. 553 (1933).

50. 279 U.S. at 451.

51. *Id.* at 453.

52. See, e.g., 289 U.S. at 579.

53. *Crowell v. Benson*, 285 U.S. 22, 51 (1932).

held the power of Congress to provide for the exclusion of aliens solely by means of executive determination without creating any right to judicial review of the propriety of an executive determination.⁵⁴ Indeed, to the extent subsequent cases have deemed judicial review constitutionally required, the Court has allowed only for the narrow review available in habeas corpus proceedings.⁵⁵

Although these cases provide strong support for the constitutionality of an article I immigration court, the *Bakelite* approach is not without its problems. First, the Supreme Court decision in *Glidden* casts some doubt on the continuing vitality of the *Bakelite* analysis.⁵⁶ Moreover, the failure of *Palmore* to make any reference to cases utilizing the "inherently judicial" test, much less to explain the relationship between that test and its own "particularized needs" test, is perplexing. Finally, it can be argued that although article III is not implicated when matters are left to the resolution of the executive branch, its requirements apply once matters come within the province of the federal judiciary.⁵⁷ Thus, a recent commentator has stated that the "argument relying on administrative agencies as precedents . . . begs the question, because agencies do not implicate the policies of article III to the

same extent as legislative courts."⁵⁸

Desirability of an Article III Court

In sum, the constitutionality of an article I immigration court with non-tenured judges cannot be taken for granted.⁵⁹ Although the constitutionality of such a court might well be upheld, it is not at all clear why, assuming *arguendo* the desirability of a specialized court, it would not be preferable from a public policy standpoint to establish the court under article III and grant its judges lifetime tenure. An article III immigration court would further the goal of raising the status and increasing the independence of immigration judges. It would also have the advantage of allowing immigration judges an opportunity to sit by designation in article III courts. This opportunity, which apparently would not be opened to non-tenured article I judges,⁶⁰ would widen the per-

54. See, e.g., *United States v. Ju Toy*, 198 U.S. 253 (1905) (excluded alien who claimed to be citizen was not entitled to challenge correctness of administrative decision in habeas corpus proceeding). But see note 55 *infra*.

55. See, e.g., *Ng Fung Ho v. White*, 259 U.S. 276 (1922) (excluded alien who claimed to be a citizen was entitled to due process); *Chin Yow v. United States*, 208 U.S. 8, 12 (1908) ("The decision of the Department is final but that is on the presupposition that the decision was after a hearing in good faith, however summary in form.").

56. In *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), a divided Court held that the Court of Customs and Patent Appeals and the Court of Claims were, contrary to the conclusions of *Bakelite* and *Williams*, article III courts. Although Justice Harlan's plurality opinion quoted from *Murray's Lessee*, *Glidden Co. v. Zdanok*, 370 U.S. at 550-51, it also expressed "certain reservations" about the statements in *Bakelite* and *Williams* that the jurisdictions of the courts in question included "nothing which inherently or necessarily requires judicial determination," and declined to "explore the extent to which Congress may commit the execution of even 'inherently' judicial business to tribunals other than Article III courts." *Id.* at 549. In a cryptic footnote relating to his reservations about the nature of the jurisdictions of the courts in question, Justice Harlan stated:

Williams itself recognized that the jurisdiction conferred on the Court of Claims by the Tucker Act, now 28 U.S.C. § 1491, to award just compensation for a governmental taking, empowered that court to decide what had previously been described as a judicial and not a legislative question. . . . As for *Bakelite*, its reliance . . . on *Cary v. Curtis*, 3 How 236, for the proposition that disputes over customs duties may be adjudged summarily without recourse to judicial proceedings, appears to have overlooked the care with which that decision specifically declined to rule whether all right of action might be taken away from a protestant, even going so far as to suggest several judicial remedies that might have been available.

Id. at n.21 (citations omitted).

57. See Note, *supra* note 25, at 577-81.

58. *Id.* at 581. The same commentator also criticizes the "inherently judicial" approach as follows:

[T]he "public rights" cases in which the test was first presented were traditionally resolved by the political branches because the doctrine of sovereign immunity prevented article III courts from hearing them. But once sovereign immunity is lifted such cases fall within the article III subject matter jurisdiction. Accordingly, allocation of such cases to a legislative court raises the same constitutional questions as would any allocation of article III cases to a non-article-III federal tribunal. Thus, the "inherently judicial" test, which looks to past practice, offers little guidance concerning the future scope of congressional power to circumvent article III's tenure and salary provisions.

Id. at 580-81.

From this perspective, mention should be made of Justice Brandeis' statement in *Tutun v. United States*, 270 U.S. 568 (1926) (district court decision in naturalization proceeding was a "case or controversy" and therefore appealable), that "[w]hether a proceeding which results in a grant is a judicial one, does not depend upon the nature of the thing granted, but upon the nature of the proceeding which Congress has provided for securing the grant." *Id.* at 576. Although *Tutun* does not imply that naturalization is "inherently judicial", it is consistent with the notion that if Congress provides for judicial proceedings for certain immigration matters, they must take place in an article III court. See also note 56 *supra*.

59. The law regarding article I courts may be clarified if the Supreme Court rules on the constitutionality of the Bankruptcy Court or the Magistrate Act of 1979. See Note, *supra* note 25; Plumb, *The Tax Recommendations of the Commission on the Bankruptcy Laws—Tax Procedures*, 88 HARV. L. REV. 1360, 1457-69 (1975).

60. The premise of *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), was that Congress may not authorize judges of a legislative court to sit by designation on an article III court. See also Note, 69 HARV. L. REV. 760 (1956). This premise necessarily implies certain limitations on the extent to which "judicial power" can be conferred on article I courts.

spectives of immigration judges and thus lessen the risk that a specialized immigration court would become insular.

Shortcomings of the Proposed Statute Creating an Immigration Court

Notwithstanding our opposition to the creation of a specialized immigration court, the Roberts proposal does not fulfill all the goals we would seek were one to be established. Perhaps the most important defect in the proposed statute is that appeals from the appellate division of the immigration court lie only by certiorari to the United States Supreme Court. In addition to insulating the new court and drastically reducing the beneficial role the inferior federal courts now play in interpreting the immigration laws, this provision would prevent all but a handful of litigants from obtaining appellate review in a constitutional court.

The only possible justification for restricting appeals in this manner would be a belief that the appellate division of the immigration court would almost always provide a sufficient forum for appeal and that to provide automatic appeals from that body would result in an unnecessary proliferation of litigation. Such a justification, however, is unpersuasive. Litigants from adverse decisions of other specialized courts, such as the Tax Court and the Bankruptcy Court, can appeal as of right to the courts of appeals.⁶¹ Although the statute proposed by Maurice Roberts does not attempt to preclude the relief that can now be sought in district courts,⁶² its failure to allow review of immigration cases in the courts of appeals is unnecessary as a matter of law and unwise as a matter of policy.

Moreover, the Roberts proposal overly restricts the jurisdiction of the immigration court. The jurisdiction of the trial division could profitably be expanded to include naturalization cases, adjudication of applications for discretionary relief and appeals from adverse decisions of the Regional Commissioner. In addition, consideration should be given to using the immigration court to review certain foreign consular visa decisions and appeals from adverse decisions of the State Department's Board of Appellate Review.

The proposed statute does not go nearly as far as it should to provide additional procedural safeguards for aliens. Instead, it leaves critical decisions regarding the formulation of rules of evidence and procedure to the discretion of the new court. As noted

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above, aliens should be granted the substantial equivalent of the benefits of the rules applicable in article III courts.

Finally, the Roberts proposal misses the opportunity to provide for the creation of supervisory powers over the INS in the manner that the federal courts of appeals oversee the functioning of the district courts. Such supervision could significantly reduce the delays which so often severely prejudice those who have to deal with the immigration service.

CONCLUSION

Maurice Roberts' proposal to create an article I immigration court achieves, in large measure, the important goal of elevating the status of immigration judges and isolating them from the influence of the enforcement side of the INS. At the same time, however, it leaves unremedied many existing problems and creates new ones. The serious problems inherent in any specialized court would reach a clearly unacceptable level if, as proposed, the role of federal district courts and courts of appeals were to be restricted severely. Yet, even if the present jurisdiction of the courts of appeals to review immigration cases were protected, the merits of creating a specialized immigration court would remain dubious. Moreover, the establishment of a specialized immigration court under article I, rather than under article III, is questionable on both constitutional and policy grounds.

The Roberts proposal also fails to enhance the procedural rights of aliens who currently have little assurance that their cases will be adjudicated in an expeditious and fair manner. Although the desire to elevate the status of immigration judges and to furnish them with adequate resources is important indeed, the need to provide aliens with guarantees of basic justice is equally, if not more, pressing. It may well be that truly meaningful change can only come as a result of a major revision of the immigration laws and a new commitment of resources to a restructured Immigration and Naturalization Service. However, whether within the contours of the present decision-making structure of the INS or under new structures, such as the one proposed by Maurice Roberts, additional protections for the rights of aliens and of our national interests should be incorporated.

The need to improve the plight of immigration judges cannot be separated from the need to address the systemic problems that

61. See 28 U.S.C.A. §§ 160, 1293 (West Supp. 1980) (appeals from Bankruptcy Court); 26 U.S.C. § 7482 (1976 & Supp. III 1979) (appeals from Tax Court).

62. See note 18 *supra*.

plague those whose rights are affected by the administration of the immigration laws. Indeed, these two needs are inexorably intertwined. One must question the extent to which the changes proposed by Maurice Roberts will improve the existing system as a whole. One must also ask whether, without more fundamental changes that ultimately alter the public perception of the INS, many more qualified and gifted people will seek career positions, as judges or agency personnel, in the immigration field.

Comments on "A Specialized Statutory Immigration Court"

JAMES J. ORLOW*

Maurice Roberts has, again, provided a unique and rare public service by proposing reforms of the Immigration Judge/Board of Immigration Appeals system and by making his proposals available for instant public debate and critique. This is characteristic of his leadership, scholarship, energy and integrity. I am honored to have been asked to comment.

In criticizing the present system Mr. Roberts notes certain salient features which produce weaknesses. These include:

(1) The governing law is overly technical. It is the result of ad hoc legislation and political compromise. Regulations interpreting the law emanate from the Commissioner of the Immigration and Naturalization Service and the INS central office. These sources are not noted for their creative approach toward the Immigration Judge/Board of Immigration Appeals process. Perhaps this is inevitable insofar as the Service is a party-litigant in the process.

(2) Regulations divide the appellate process between the enforcement authority of the District Director (and Regional Commissioner, for certain applications) and the Immigration Judge/Board of Immigration Appeals process for others. Mr. Wildes, in his comment, has characterized this division as "schizophrenic." The process for decision and review is unduly delayed, and the

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The Need for a Specialized Immigration Court: A Practical Response

LEON WILDES*

It is a privilege to comment upon Maurice Roberts' proposed statute for a specialized statutory immigration court with separate trial and appellate divisions. My comments will be restricted to a review of the *practical* problems posed by the present system and consideration of whether the proposal of Mr. Roberts would be useful in remedying these problems.

At the outset, I must admit to be prejudiced in favor of any reasonable proposal which might follow so incisive an analysis of the inherent inconsistencies in our current immigration system, particularly one which might be suggested by the distinguished former Chairman of the Board of Immigration Appeals. Mr. Roberts correctly describes the built-in schizophrenic condition of the present immigration system as the root cause of many of the basic failings of the existing system.

THE PRESENT SYSTEM—BUILT-IN SCHIZOPHRENIA

The present system invests district directors with the power

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The author would like to express grateful appreciation to his associate, David Grunblatt, J.D., New York University School of Law, who assisted in the preparation of this article.

and responsibility to take action necessary to remove illegal aliens. At the same time, it vests the same district directors with a mandate to adjudicate numerous benefit and relief provisions for the benefit of aliens. It is no wonder, given the contemporary pressures for the removal of illegal aliens as unfair competition in the work market, that the work force of the Immigration and Naturalization Service focuses on the discharge of its enforcement duties. As a result, applications and petitions for immigration benefits may languish for months and even years before they are adjudicated, resulting in a condition which has hardly enhanced the public perception of the effectiveness of the Service.

It would seem, therefore, that it is to everyone's advantage to separate the Service's enforcement functions from those within its benefit-adjudicative jurisdiction. My initial reaction to Mr. Roberts' proposal is that it does not really accomplish this noble goal.

The Proposal Has Surface Appeal

There are distinct advantages to a proposal for the establishment of a United States Immigration Court and an Appellate Division. Prior to the proposal of this enticing plan, the most enlightened view which had been presented was that of the statutory formalization of the Board of Immigration Appeals. That appellate body, while very much an integral part of our present immigration system, is nevertheless still a creature of regulation and subject to abolition by mere regulatory amendment.

Under the proposed system, the District Director is clearly a prosecuting officer whose function would be to issue charges commencing exclusion, deportation and rescission proceedings. The deportation order would not be entered by an administrative official, but would bear the imprimatur of a judicial body.¹ Presumably, the District Director's trial attorneys would appear to represent him before the court as they now do before the immigration judge. Such a court would not only command greater public respect, but would also have greater independence from the Immigration Service than ever before in immigration history.

With appointments made by the President and confirmed with the advice and consent of the Senate for an extensive term and

1. See § 8 of the proposed statute, *Trial Division Jurisdiction*, which would give jurisdiction to the trial court to hear exclusion, deportation and rescission hearings. There is no direct indication as to how the Immigration Service would be represented before this body, but we are assuming that the District Director, rather than the United States Attorney, will undertake the function of prosecuting matters before this court.

with compensation which would be commensurate with those of federal district judges,² the positions would attract lawyers of greater competence. No longer would these positions be held almost exclusively, as at present, by former trial attorneys, many of whom have difficulty in making the transition from prosecutor to judge.

The proposed system would also have the advantage of avoiding many of the claims of procedural improprieties which now clutter the decisions of the Board of Immigration Appeals. This would necessarily follow from the gradual adoption of the Federal Rules of Civil and Criminal Procedure which one hopes would occur. A multiplicity of applications, petitions, and appeals would be avoided if the trial division judges had the full power to adjudicate all applications for discretionary relief and also had the exercise of the full range of discretionary authority granted to the Attorney General by law.³ This would presumably free other immigration officials for the more prompt adjudication of other applications for benefits in cases which did not involve trials. One would expect the morale of Service officers to be much higher once the backlog of unadjudicated applications is cleared and applications are reached more promptly in the general course of business.

RADICAL SURGERY—BUT WILL IT CURE THE PATIENT?

One could almost be lulled, by such a positive and optimistic analysis, into a feeling of hope for the entire immigration process. Unfortunately, the *practical* facts of the situation do not permit so optimistic a conclusion. More sober reflection leads this writer to question the efficacy of Mr. Roberts' proposed panacea.

No one who has practiced extensively in the field of immigration law can argue with the basic premise motivating Mr. Roberts' proposal, namely, that the existing administrative and judicial

2. See proposed statute §§ 1, 2.

3. Note, however, that the proposal as it stands does not provide for this authority and does not as yet address the problem of the limited jurisdiction of immigration judges in deportation proceedings. For example, there is no authority within the course of the deportation proceeding before an immigration judge to adjudicate a petition for preference status pursuant to the terms of § 204 of the Immigration and Nationality Act as amended, 8 U.S.C. § 1154 (1976 & Supp. III 1979) or applications for nonimmigrant standing pursuant to § 214 of the Immigration and Nationality Act, 8 U.S.C. § 1184 (1976). See also 8 C.F.R. §§ 204, 214 (1980).

mechanisms for adjudicating immigration-related matters such as excludability and deportability are vastly in need of streamlining and overhaul. However, on a practical level, there is clearly some question as to whether the radical surgery which he has proposed is required in order to effect the necessary changes.

It would seem that if, in actuality, the creation of a statutory immigration court does not eliminate all areas of both administrative and judicial concurrent jurisdiction, the practical effect of the proposal will be to further duplicate the legal process. Alternatively, if such a proposal is successful in eliminating concurrent jurisdiction and insulates the adjudicative and appeal procedures within a single specialized statutory court dealing only with immigration matters, the restrictions and self-insulation of this single system will result in great prejudice to aliens.

The present system calls for decision-making processes and adjudications taking place at all levels of the Immigration Service in a variety of jurisdictions. Sections 236 and 242 lay out the jurisdiction of immigration judges in exclusion and deportation proceedings and section 106(a) provides for direct appeal to the United States circuit courts.⁴

Concurrently, petitions for certain exemptions, waivers and preferences⁵ are decided at the district office level, subject to appeal to the Regional Commissioner, or the Board of Immigration Appeals and ultimately to the Attorney General.

Applications for waivers and relief can in certain circumstances be made or must be made to the Immigration Service,⁶ while in other circumstances immigration judges have been granted jurisdiction. Similarly, claims for asylum and refugee status are sometimes required to be presented to the District Director and on other occasions in the course of a proceeding before an immigration judge.

All denials of applications and/or petitions are subject to motions to reopen and/or reconsider in accordance with procedures prescribed by regulation.⁷ In addition to the supposed "exclusive" remedy of appeal to the courts of appeals in exclusion and

4. There is no statutory provision nor any mention in the statute whatsoever of the Board of Immigration Appeals, which is an administratively created board. See 8 C.F.R. § 3 (1980).

5. With regard to exemptions and waivers, see 8 C.F.R. §§ 212.2(c), (d), 212.3, 212.7 (1980). With regard to preferences, see 8 C.F.R. § 204.1(a) (1980).

6. Examples of relief within the granting power of the immigration judge are voluntary departure, suspension of deportation and adjustment of status pursuant to the Immigration and Nationality Act §§ 244, 245, 8 U.S.C. §§ 1254, 1255 (1976 & Supp. III 1979).

7. See 8 C.F.R. §§ 3.2, 3.8, 103.5 (1980).

deportation proceedings⁸ there exist numerous collateral actions which can be brought to secure mandamus, declaratory relief, injunctive relief or habeas corpus. These, and other forms of relief at the district court level, have evolved to protect other aspects of the alien's status in the United States against prejudicial action by immigration and labor department officials.⁹

The question must be asked: Does this proposal of establishing an article I court improve the situation? Perhaps, if the rights of the alien would be strengthened by the implementation of Federal Rules of Civil Procedure, or the Federal Rules of Criminal Procedure. The proposal does not address this very difficult question and probably cannot due to the unique character of an immigration proceeding.¹⁰

What is proposed, rather than a broadening of the alien's rights, is a mere upgrading of the stature of immigration judges, with no assurance whatsoever that the alien will receive any tangible benefit from the fact that he has appeared before an article I court. Moreover, there is no appeal to a non-immigration court where the principles of general law may be brought to bear upon this special area of the law and a broader perspective achieved.

At present, the alien appears before an administrative judge who is, without doubt, unduly fettered by the supervisory and other powers of the United States Department of Justice over the facilities and activities of the immigration judge. The judge is beholden to the government for all his physical facilities as well as his administrative amenities. This is doubtless a condition which must be changed. The alien now appears before the immigration judge with the benefit of a clear statutory right to have re-

8. See Immigration and Nationality Act § 106(a), 8 U.S.C. § 1105a (1976).

9. For actions under the Declaratory Judgment Act see 28 U.S.C. § 2201 (Supp. III 1979); for actions under the Administrative Procedure Act see 5 U.S.C. §§ 701-706 (1976).

10. Although the federal courts have acknowledged for years that deportation and banishment can deprive an individual of "all that makes his life worth living," *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922), protection of the alien has never been allowed to parallel completely that provided for an individual accused of a criminal offense based upon the established principle that deportation proceedings and immigration matters are civil rather than criminal in nature. See, e.g., *Bufalino v. INS*, 473 F.2d 728 (3d Cir.), cert. denied, 412 U.S. 928 (1973); *Marcello v. Kennedy*, 194 F. Supp. 750, 753 (D.C. Cir. 1961) (maintaining that deportation statutes are not penal in nature and deportation is not punishment).

tained counsel present¹¹ and to certain other aspects of a fair hearing assured to him by his fifth amendment right to procedural due process. However, he continues to be frustrated in achieving his rights in such crucial aspects of a fair hearing as, for example, his ability to compel the attendance of witnesses necessary for his own defense. For this vital right, which is clearly encompassed in the procedural due process to which he should be entitled, he must necessarily present his request for the issuance of a subpoena to the immigration judge. The proposed article I court procedure makes no change in this unfortunate situation. Although it might be implied that an article I court would accord the alien compulsory process, there can be no assurance that this type of problem would be solved without the formal acceptance of the federal procedural rules by statutory fiat.

The Power to Adjudicate

Nor is the proposed legislation likely to solve most of the problems inherent in the present litigative process before administrative immigration judges. The essence of the practitioner's primary objection to the current procedures is the bifurcation of jurisdiction to grant the alien needed relief. The immigration judge does not have the full panoply of jurisdictional authority that he requires to truly dispose of all the issues involved in the litigation before him. Petitions for preference status, for example, must be transmitted to the District Director for his adjudication.¹²

Independence of the Immigration Judge

The practitioner's second basic objection to the present system lies in the lack of independence of the immigration judge. In the overwhelming majority of cases the government still relies upon interrogating the alien himself to establish not only the elements of deportability, excludability or rescission, but also the alien's eligibility for those few discretionary benefits which the judge has jurisdiction to determine as well. The alien often cannot distinguish which is the government's prosecuting trial attorney and

which is the government's impartial adjudicator.¹³ The alien often faces, in the trial attorney and the immigration judge, what he perceives to be two representatives of the interests of the government. This gives the impression of unfairness.

While the advent of an article I immigration court would be welcomed by the bar, such an innovative institution is not necessary to cure the present ills of the system. Indeed, unless sweeping revisions of substantive and procedural law are a part of such legislation, it may cause more problems than it cures. The problems perceived by the alien and his counsel as to the immigration judge's impartiality could be cured, in large part, by according immigration judges broad jurisdiction to adjudicate petitions and applications for immigration benefits and waivers. In addition, the incorporation into present procedures of more of the Federal Rules of Civil Procedure would cure many of the procedural ills of the present system and result in a fairer hearing. A rule, for example, permitting compulsory process by the respondent in a deportation proceeding without having to request the issuance of a subpoena from the immigration judge, is sorely needed. Likewise, a closer adherence to the evidentiary rules of federal courts would avoid the admission in evidence of many questionable documents, whose sources are not subject to cross-examination. Since the right to cross-examine is a *present* statutory right of an alien in such proceedings,¹⁴ there should be no difficulty in securing this right without a major statutory overhaul. A revision of the current regulation would suffice. Some protection against the admissibility, for example, of a report of an investigation by a consular staff member who is not available for cross-examination is needed to assure a fair due process hearing in behalf of the alien respondent. This might be secured by a regulation authorizing an alien to *depose* the Consul or his staff member in writing. It is to be noted that none of this necessarily requires an article I court. Nor, under the proposed plan, would the advent of an article I court necessarily cure this type of problem which occurs continuously in contested proceedings before immigration judges.

11. Immigration and Nationality Act § 292, 8 U.S.C. § 1362 (1976). See also Immigration and Nationality Act § 242 (b)(2), 8 U.S.C. § 1252 (b)(2) (1976).

12. Immigration judges have no authority to grant temporary waivers of inadmissibility, waivers of the foreign residence requirement on J visas, extensions of temporary stay, change of status from one immigrant status to another, reinstatement of student or other temporary status or certain waivers of inadmissibility for immigrants. They cannot even terminate proceedings pending before them for humanitarian reasons or because they were providently begun. Nor can they hold a recalcitrant alien in contempt. See C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 5.7(g) (1973).

13. See 8 C.F.R. § 242 (1980), particularly § 242.8 designating the powers of the special inquiry officers in § 242.9 which does not provide for the mandatory assignment of a trial attorney.

14. Immigration and Nationality Act § 242(b)(3), 8 U.S.C. § 1252 (b)(3) (1976). There is no statutory authority for the right of cross-examination in exclusion proceedings, but this is provided for in the regulations. 8 C.F.R. § 236.2(a) (1980)

The proposal implies that the creation of a statutory court will have the effect of streamlining the procedure for administrative and judicial review. However, this apparent result is quite deceptive when one focuses upon the problem of initial administrative review. Here there is a dilemma. If all decisions of the District Director are subject to review in the statutory court, an onerous burden is placed upon an applicant who requires reconsideration of a decision based upon incomplete information or blatant error.¹⁵

A typical example would be the review of a denial of an application for change of nonimmigrant status from visitor to student where the denial was based on a failure to file a timely application for such benefit. The present procedure, which permits the filing of a motion to reconsider, explaining the excusable circumstances or the submission of proof of timely filing, is much more appropriate than the onerous burden of filing a formal appeal in a formal judicial tribunal, particularly for an unrepresented alien. Similar examples abound, *e.g.*, appeals of denials of petitions or applications for alleged failure to prosecute such applications in cases where, because of changes of the applicant's address, notification by the Service did not reach the alien or, in recent years the common occurrence, where notices given by the alien did not reach his file at the Immigration Service. A full court appeal in such a case would be tantamount to using a cannon to hit a fly.

If one is precluded from administrative review in such circumstances he is severely prejudiced. On the other hand, if such opportunity for administrative review is still allowed under the proposed system, there will be a burgeoning new area of conflict and litigation as to the scope of this administrative review which, as past history has shown, will develop into an entire administrative-judicial system interplaying with such established issues and problems of administrative law as exhaustion of administrative remedies. This would hardly simplify the present procedures.

JUDICIAL REVIEW BY GENERALIST JUDGES—IS IT DESIRABLE?

Perhaps more significant than the futility of attempting to streamline a system by adding a new layer to it is the general policy question of whether we in fact do wish to insulate all immigration procedure and review within one specialized body. Given the

15. Parenthetically, an enormous burden would be placed upon this new statutory court requiring them to adjudicate an enormous volume of work which is basically trivial in nature.

potential for delay and occasional conflicting or inconsistent decisions which may result from allowing general federal jurisdiction in appeals and collateral actions, the desirability for analysis by generalists should never be underestimated. It is one extremely valuable ingredient which is added when courts of general jurisdiction review immigration matters. Much of the innovation, progress and forward-looking law which has been developed and created in the immigration field is a direct result of the opportunity given to courts of general jurisdiction to take a fresh look at a policy, procedure or ruling which has been developed and taken for granted by the Service, immigration judges and even by the Board of Immigration Appeals.

Numerous examples abound. The decision in *Lennon v. INS*¹⁶ established that use of the term "illicit possession" in section 212(a)(23) of the Immigration and Nationality Act implied a mens rea requirement before a conviction for possession of marijuana might be used to exclude the alien from the United States. This holding goes against the mainstream of administrative law in the immigration field with regard to the treatment of foreign convictions. The result would probably have been different had the argument and issue been presented before a specialized immigration court—a court perhaps overly enamored with the administrative and judicial history regarding the treatment of foreign convictions.

The evolution, at least in some circuits,¹⁷ of a right or benefit available pursuant to prescribed criteria of "deferred action"¹⁸ status also probably could not occur if cases were not presented before a "generalist" court.¹⁹ When a matter involving an issue as important as a person's liberty is at stake, particularly in a deportation or exclusion context, that person should rightfully have an opportunity to raise such issue before a court which has broad general experience and familiarity with how valuable rights in

16. 527 F.2d 187 (2d Cir. 1975).

17. See *Nicholas v. INS*, 590 F.2d 802, 807 (9th Cir. 1979), where the Ninth Circuit concluded that Operations Instruction § 103.1(a)(1) confers a "substantial benefit upon the alien rather than setting up an administrative convenience."

18. IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPT. OF JUSTICE, OPERATIONS INSTRUCTIONS, REGULATIONS AND INTERPRETATIONS § 103.1(a)(1) (1979).

19. See Wildes, *The Operations Instructions of the Immigration Service: Internal Guides or Binding Rules?*, 17 SAN DIEGO L. REV. 99 (1979).

other areas of civil and criminal practice are litigated and determined.²⁰

CONCLUSION

It is therefore this author's opinion that a less radical proposal would have the greatest potential to overcome the many inadequacies of the present system, while at the same time creating a minimum of new problems.

Clearly, it is necessary to deal with the major objection to the present system, namely, the lack of independence of the immigration judges. This would require the transfer, by statute, of hearings presently before such judges either to administrative law judges under the Administrative Procedure Act, or to a newly formed independent statutory agency, separate and apart from the Immigration Service. Enabling legislation must provide for adequate staffing and separate facilities. At the same time, the Board of Immigration Appeals necessarily must be given statutory authority, preferably within the same separate statutory body. Under such an arrangement, there would be no need to change the present direct appeal to the United States circuit courts of appeals prescribed under section 106(a). The alien would thus have his matter heard before an independent body of immigration judges with a direct appeal to a statutory Board of Immigration Appeals and a right to judicial review, as at present, in a court of general jurisdiction.

The limited authority of immigration judges under the present system to dispose of a matter completely because they lack jurisdiction to adjudicate many necessary related petitions and applications must likewise be remedied. This would require that authority to adjudicate many additional types of applications for benefits be granted to immigration judges in cases which are properly before them, perhaps on a concurrent basis with the immigration officers who presently enjoy such authority. The adoption of the Federal Rules of Civil Procedure or the Federal Rules of Criminal Procedure either in toto or selectively, to provide for a fair hearing is also necessary to assure compliance with procedural due process rights under the fifth amendment.

20. Interestingly enough, the evolution of the Immigration Service's administrative position with regard to "out of wedlock children as stepchildren" under the statutory definition as described in Mr. Roberts' footnote 14, where the Service was required to respond to decisions in *Nation v. Esperdy*, 239 F. Supp. 531 (S.D.N.Y. 1965), *Andrade v. Esperdy*, 270 F. Supp. 516 (S.D.N.Y. 1967), and *Hypolite v. Sweeny*, Civ. No. 77-1865 (S.D. Fla. Jan. 6, 1979), digested in 56 INTERPRETER RELEASES 62 (1979) highlights how courts of general jurisdiction can prod the Immigration Service to take a more liberal and compassionate view in interpreting the Immigration and Nationality Act.

The adequate funding of such a separate agency is essential to its independence and to assure that it will attract attorneys of the highest calibre to hold positions as immigration judges and members of the Board of Immigration Appeals. The enabling legislation should set minimal standards for judges, prescribe their terms of office, and assure the availability of support services so that decisions might be issued promptly. With the additional duties and broader jurisdiction, a larger number of immigration judges and a larger Board of Immigration Appeals may be required, permitting the Board to send roving panels to hear argument in various geographic locations throughout the United States, as needed.

The existence of different holdings in various circuits of the federal system in all areas of the law is simply a characteristic of the federal judiciary system. There is nothing which warrants addressing this situation separately within the field of immigration law. The present practice of the Board of Immigration Appeals of following the mandate of the local circuit court of appeals is appropriate and, in the opinion of this author, requires no change. Indeed, there is less conflict among circuits in the immigration field than in other fields of the law.

We must exercise caution that, in our efforts to achieve an acknowledged, desirable goal, our proposed solution does not create more problems than it solves. The prospect of requiring an unrepresented alien to present a request for the reconsideration of an application denied on some minor technicality in the austere atmosphere of an article I court is not at all enticing. Nor does it give the impression that one is being cost-conscious in problem solving. Likewise, the elimination of an appeal to a court of general jurisdiction is a change not lightly to be undertaken. While the proposal has many desirable aspects and would likely be a great boon to the legal profession, it appears to this writer to resemble radical surgery, not to be undertaken until all other alternative remedies have proved unavailing.

ance and enforcement of the Act, and for changing the procedures to achieve the Act's objectives.

3. In the absence of consensus by the affected agencies and interests as to where the Act's certification and civil money penalty proceedings should be adjudicated, Congress should amend the Act consistent with the following recommendations:

A. Authority for adjudicating civil money penalties against pilots and flight engineers should be transferred from the FAA to the NTSB, with all other civil penalty adjudication authority remaining at the FAA. This recommendation is contingent on Congress' transfer of necessary budgetary resources for this purpose to the NTSB.

B. The Act should provide that, for purposes of review of FAA enforcement actions, courts and the NTSB should defer to validly adopted FAA interpretations of its statutes and regulations, unless it is shown that such interpretations are arbitrary, capricious, or otherwise not in accordance with the law.⁶

C. The FAA should be given the right to appeal an NTSB administrative law judge decision to the Board, and to seek judicial review of a decision of the Board in the appropriate court of appeals.

This recommendation is directed only to this specific program and the special circumstances involved, and should not be read as implying any views as to the merits, generally, of the "split enforcement" model as compared to the "unitary agency" model of adjudication in other government programs.

4. In an NTSB adjudication under the Act, the range of possible sanctions for violations of the Act should include certificate revocation, certificate suspension and/or a monetary penalty, as found by the NTSB to be appropriate and consistent with rules

validly adopted by the FAA with respect to applicable standards or criteria for the imposition of sanctions. Notice of possible sanctions, as well as those proposed by the FAA in a particular enforcement matter, should be provided to the respondent upon the institution of the proceeding. The selected sanction(s) should be set forth in the ALJ's initial or recommended decision, together with the bases therefor, including a reference to any applicable FAA standard or criterion for the imposition of sanctions.

5. NTSB and FAA adjudicators, as well as FAA prosecutors, should place greater emphasis on alternative dispute resolution in individual cases. In particular, the FAA and NTSB, to the extent each has adjudicatory responsibility, should consider Recommendation 88-5, "Agency Use of Settlement Judges," and make greater use of the techniques described there.

[56 FR 67141, Dec. 30, 1991]

§ 305.91-9 Specialized Review of Administrative Action (Recommendation No. 91-9).

In recent years, there has been much talk of a crisis in the federal courts. In response, Congress empaneled the Federal Courts Study Committee, charging it with responsibility to examine the problems facing the courts and to develop a long-range plan for addressing them. The Committee issued its report in April 1990, touching on many different aspects of the problem, among them those related to judicial review of administrative action.

The Federal Courts Study Committee specifically rejected a proposal to divert all administrative appeals to a specialized court within the Article III judiciary. The Committee recognized that administrative review cases do not form a major percentage of the caseload of the federal courts of appeals. Yet assigning jurisdiction to a specialized court may provide more efficient or effective review for some types of administrative cases. It, therefore, proposed diversion of some cases now in the Article III courts to other adjudicatory bodies; in particular, the Committee recommended creation of an Article I court to review Social Security disability claims and perhaps, eventually, other administrative benefit claims.

Finding the optimal structure for review of administrative cases involves a complex balancing of various factors: the need for uniform law versus the benefits of "percolation" in the decentralized circuits; the value

Attachment H

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of expert decisionmakers versus the broader perspective of generalists; the efficiency of specialization versus the risk of bias that specialization entails. And the calculation can vary in the context of different administrative programs, which differ in the volume, complexity, and level of technical content of the caseloads they generate. For these reasons, the Conference, like the Federal Courts Study Committee, opposes allocating review of all administrative cases to a single specialized court, whether inside or outside the Article III system.

Should Congress consider the creation of specialized courts for review of particular administrative programs, this recommendation sets forth criteria for Congress to take into account in determining when to create specialized courts and how to structure them to enhance their effectiveness. Certain characteristics held in common by many federal regulatory and benefit programs raise particular problems within the existing system of judicial review. Uniformity in decisionmaking can be especially important in the context of administrative action under national programs. The agencies themselves are structured hierarchically, so as to speak with a single voice in applying law and policy to individual circumstances. But the federal court system that reviews these agency programs is decentralized, and different circuits often reach different outcomes on the same issue. The Supreme Court's capacity to resolve these conflicts is severely limited by the modest number of administrative law cases it considers each year. As a result, agencies often face the choice of refusing to acquiesce in decisions below the Supreme Court level abandoning policy positions they believe to be correct, or implementing programs differently in different regions (and, consequently, treating similarly situated individuals or entities differently and encouraging forum shopping).

Another special aspect shared by some federal regulatory programs is that they involve complex technical or scientific issues which may present great challenges to reviewing courts without special expertise in the relevant areas. Cases on review of agency rulemaking and ratemaking actions in particular, frequently involve lengthy administrative records filled with conflicting material on technical issues of fact and policy; the judges must devote extra time to poring over these records and to producing the longer opinions these cases often engender.

Other federal programs (such as individual benefit programs) produce masses of litigation involving primarily questions of specific fact. Resolution of these issues may be an inefficient allocation of the time of the federal courts.

⁶ See ACUS Recommendation 86-4, "The Split-Enforcement Model for Agency Enforcement," 1 CFR 305.86-4 (1991). See also *Martin v. OSHRC*, — U.S. —, 111 S. Ct. 1171 (1991). This Recommendation should not be read to suggest that deference should automatically be given to FAA prosecutors' litigation positions. *Id.* at 1179.

either within the Article III judiciary under Article I, to handle review of administrative cases.

2. Congress should recognize that it is appropriate to create specialized courts for particular administrative programs only if such programs are characterized by the following:

A. A program area in which one might reasonably expect a consistently large volume of cases, diversion of which might significantly alleviate burdens on the generalist federal courts;

B. The predominance of factual issues specific to particular cases, or the predominance of scientific or other technical issues requiring special expertise of decisionmakers; and

C. The particular importance of uniformity in agency administration of a program.

3. If Congress creates specialized courts to review particular administrative programs, it should, to the extent possible, structure the courts as follows:

A. To minimize jurisdictional uncertainty, the subject matter before the courts should be segregable from other claims.

B. To ensure that the courts maintain a balanced perspective on the issues before them, the courts' dockets should be designed to expose judges to all sides of pertinent controversies and the broadest possible scope of related issues within a field of law.

C. To encourage generalist judicial appointments, to minimize distortion of the standard of review resulting from loss of the generalist perspective, and to avoid the fact or appearance of capture by special interests, the courts' subject matter jurisdiction should be diverse.

If the court provides the final stage of judicial review before Supreme Court review, satisfaction of criterion C is essential.

4. If Congress creates specialized courts to review particular administrative programs, it should provide for periodic evaluation of those courts to determine whether there is a continuing need for specialized review.

5. In any legislation providing for specialized review of particular administrative programs, Congress should

assign to each court or reviewing body the type of functions it is best suited to perform and should minimize duplication of review functions. In particular, any such legislation should:

A. Avoid *de novo* review of factual issues already subject to formal adjudication at the agency.

B. Make the decisions of specialized courts final on review of questions of fact specific to the case (including the sufficiency of the evidence in that case by whatever standard it is reviewed).

C. When review has been assigned to an Article I specialized court, provide a subsequent layer of judicial review by an Article III court for questions of constitutional or statutory interpretation.

[56 FR 87143, Dec. 30, 1991]

§ 305.91-10 Administrative Procedures Used in Antidumping and Countervailing Duty Cases (Recommendation No. 91-10).

This recommendation discusses several possible reforms of the administrative procedures used in U.S. antidumping (AD) and countervailing duty (CVD) cases. These cases usually arise when a petition is filed on behalf of a U.S. industry by one of several statutorily specified interested parties asking the U.S. Government to impose special duties to offset dumping or subsidization. The Government itself can also initiate cases.

Dumping occurs when foreign companies export goods to the United States for sale at less than their "fair value." Fair value is generally based on the exporter's prices for such goods in its home (or a third country) market or on its cost of producing the goods (including a profit margin). AD duties are imposed to offset the margin of dumping (i.e., the difference between the foreign market value and the U.S. price) if the U.S. industry producing like goods has suffered or is threatened with material injury by reason of the dumped imports, or if the establishment of a U.S. industry producing such goods has been materially retarded.

Countervailing duties may be imposed on goods exported to the United States that benefit from certain types

of subsidies granted by a foreign government. In most CVD cases, duties may be imposed only if the U.S. industry producing like goods has suffered or is threatened with material injury by reason of the dumped imports, or if the establishment of a U.S. industry producing such goods has been materially retarded.

The decision whether dumping or subsidization has occurred is made by the International Trade Administration (ITA) of the Department of Commerce; the decision on injury is made by the U.S. International Trade Commission (ITC). These administrative decisions are subject to review, in the first instance, in the Court of International Trade, and then in the Court of Appeals for the Federal Circuit. In the case of Canadian exports, the decisions may be "appealed" instead to a binational panel established under the U.S.-Canada Free Trade Agreement.

In recent years, the use by the United States and other countries of AD and CVD laws has been controversial. While many of the complaints about these laws are essentially about their substantive provisions, a number of the complaints concern procedural matters. In particular, some critics have contended that the high cost of defending these cases, which are often quite complex proceedings involving the collection and analysis of vast amounts of data and which often continue for years, amounts to a new form of protectionism—process or procedural protectionism. At the same time, U.S. domestic producers complain that the great expense of invoking these laws virtually precludes their use by some petitioners deserving of relief.

The two concerns that seem to be foremost in the minds of trade law practitioners are reducing the time and expense associated with AD and CVD proceedings and improving the decisionmaking process under the relevant statutes. The Conference notes, at the outset, that the complex procedures for AD and CVD cases, involving a division of responsibilities between two agencies with appeals to a specialized court and then to a federal court of appeals, may contribute to the time and expense associated with these pro-