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THE ONCE AND FUTURE JUDGE: THE RISE AND  
FALL (AND RISE?) OF INDEPENDENCE IN U.S.  
IMMIGRATION COURTS

*Dory Mitros Durham\**

INTRODUCTION

In 2002, immigration appeals constituted nine percent of the total caseload before the U.S. Court of Appeals for the Second Circuit. By the middle of 2004, just two years later, the volume of immigration appeals had exploded to occupy an unbelievable *forty-four* percent of the total caseload before that court.<sup>1</sup> A similar flood of cases has landed in the Ninth Circuit, which, as of June of 2004, had over five thousand pending immigration appeals representing nearly half of its docket.<sup>2</sup> Lest this spike be dismissed as the result of nothing more than post-September 11th increases in enforcement efforts or a continuing rise in illegal immigration, it should be noted that during the same period, the agency courts from which immigration cases are eventually appealed to the federal courts have experienced only negligible increases in docket load,<sup>3</sup> and overall immigration rates are

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<sup>1</sup> *All Things Considered: Appeals Courts Flooded with Immigration Cases* (NPR radio broadcast Nov. 19, 2004), available at <http://www.npr.org/templates/story/story.php?storyId=4179087>.

<sup>2</sup> *Id.*

<sup>3</sup> The immigration courts themselves heard only an additional thirty thousand cases in fiscal year 2003, an increase of about three percent (as opposed to three hundred percent in the courts of appeals). EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2003 STATISTICAL YEARBOOK, at A1 (2004) [hereinafter FY 2003 REPORT], available at <http://www.usdoj.gov/eoir/statspub/fy03syb.pdf>. Appeals internally remained at a relatively constant level of sixteen percent in 2004, down one percent from 2003. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T

down over previous years by as much as twenty-five percent.<sup>4</sup> Nor has any change in substantive immigration law significantly limited the eligibility of aliens for relief. A backlog reduction program at the Board of Immigration Appeals (BIA or Board), the agency's appellate body, has increased the overall output of final decisions, but the percentage increase in petitions for review has far exceeded even that increase.<sup>5</sup>

Instead, the courts of appeals have been virtually singular in bearing an avalanche of cases—even in some cases requiring the borrowing of additional judges<sup>6</sup>—from the unremarkable decisions of a single administrative agency. For some reason, aliens are increasingly at the ready to challenge the ability of the relevant agencies to faithfully administer immigration laws to the parties before them.<sup>7</sup>

A brief review of several cases suggests the courts of appeals might in fact be more receptive to them. In the post-*Chevron* world, agency deference is the usual order of the day.<sup>8</sup> But in 2004, Judge Posner of the Seventh Circuit ended his opinion vacating orders of removal the agency had issued to the aliens with the following comment:

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OF JUSTICE, FY 2004 STATISTICAL YEARBOOK, at Y1 (2005), available at <http://www.usdoj.gov/eoir/statspub/fy04syb.pdf>.

4 Nina Bernstein, *Decline Is Seen in Immigration*, N.Y. TIMES, Sept. 28, 2005, at A1.

5 See FY 2003 REPORT, *supra* note 3, at T2 (showing a 148% increase in total cases decided beginning in 2002 as over previous years); *Immigration Appeals Surge in Courts*, 35 THIRD BRANCH, Sept. 2003, at 5, 6, available at <http://www.uscourts.gov/ttb/sep03ttb/immigration/> (showing a 385% increase in filings of petitions for review of immigration decisions in the Ninth Circuit and 781% in the Second Circuit).

In addition to the backlog-reduction program undertaken at the BIA, the agency appellate body, discussed *infra* Part II.B, other potential contributing factors suggested by those in the field include the confluence of increased enforcement efforts, substantive changes to eligibility for discretionary relief enacted in 1996, jurisdictional issues resulting in dual filings, and novel legal issues presented because of new law and new enforcement practice. See Stanley Mailman & Stephen Yale-Loehr, *Immigration Appeals Overwhelm Federal Courts*, N.Y.L.J., Dec. 27, 2004, at 3. The purpose of this Note is to examine the degree to which a more long-term factor—the direction of changes in procedure and structure for immigration adjudication in the last century—can explain some of the current issues in immigration adjudication.

6 *All Things Considered: Appeals Courts Flooded with Immigration Cases*, *supra* note 1.

7 Not everyone agrees that the signal sent by the wave of appellate review is the result of a crisis of confidence in the immigration adjudicatory structure: “some who favor limiting immigration say the real problem is the 800-pound gorilla of illegal immigration.” *Id.* Illegal immigration cannot be the genesis of the newfound swarm of appeals, however, as there has been no change to law or policy causing a significant rise in the number of illegal aliens present in the United States in the last three years. Clearly, the fact of illegal immigration is distinct from the recent tremendous growth in the filing of petitions for review of immigration agency action.

8 See *infra* Part III.

[The immigration judge's] analysis fell far below the minimum required to support an administrative decision. It is one more indication of systemic failure by the judicial officers of the immigration service to provide reasoned analysis for the denial of applications for asylum. We are mindful that immigration judges, and the members of the Board of Immigration Appeals, have heavy caseloads. The same is true, however, of federal district judges, and we have never heard it argued that busy judges should be excused from having to deliver reasoned judgments because they are too busy to think. The two cases under review, like the other cases in which we have reversed the board of late, are not so difficult that it is unreasonable for a reviewing court to expect and require reasoned judgments at the administrative level. The errors that have compelled us to reverse in these cases despite the deferential standard of judicial review of agency action are not subtle. Asylum seekers should not bear the entire burden of adjudicative inadequacy at the administrative level.

The petitions for review are granted, the orders of removal vacated, and the cases returned to the immigration service for further proceedings consistent with this opinion. We urge that these two cases be reassigned to other immigration judges in view of the striking inadequacy of the analysis by the immigration judges whose decisions we are vacating.<sup>9</sup>

The convergence of a dramatic increase in the number of cases brought on petitions for review and the increasing willingness of courts of appeals to take to task the administrative adjudication system suggests that, left unexamined at its core, the overwhelming burden on the federal courts is likely to continue. This Note will undertake to examine precisely that core and its causes with a view toward solving the immigration adjudication crisis faced by the courts today. It will modestly suggest that despite the recent increase in public interest in immigration in the context of national security, substantive changes to immigration laws and particularly immigration benefits have produced little tangible change in most immigration adjudication. Instead, the more subtle and insidious *procedural* changes, both to the mechanisms of immigration adjudication before agency courts and appellate structures, have resulted in a shifting of burdens to the federal courts. More interestingly, perhaps, this Note will suggest that

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9 *Guchshenkov v. Ashcroft*, 366 F.3d 554, 560 (7th Cir. 2004). A concurring opinion filed by Judge Evans suggested the court's analysis was overly harsh: "The decisions [under review today] demonstrate, as far as I'm concerned, that these judges have tried to discharge their responsibilities in a fair and professional manner. This court should not be so quick to criticize their efforts." *Id.* at 562 (Evans, J., concurring).

these recent changes run contrary to the evolution these mechanisms had experienced in the last century, and that greater attention to that evolution could properly animate reforms directed at easing the current and crushing burden on the federal courts.

The structure of adjudication in the immigration context has been in a state of near-constant movement since Congress first attempted to draft comprehensive immigration legislation at the turn of the last century. The immigration courts, now housed within the Executive Office for Immigration Review (EOIR), have not been creatures of statute for most of their history, nor have the judges who served in them been administrative law judges as defined by the Administrative Procedure Act (APA).<sup>10</sup> These structural oddities for agency courts, coupled with the often politically volatile issues accompanying immigration law, have led to vast changes in both substantive immigration law and procedural policy. Until recently, those procedural changes having the most significant impact have been implemented without legislative intervention, largely accomplished by regulation, and often by even less formal staffing and resource allocation decisions made by the Department of Justice.

Today's immigration judges are a far cry from their predecessor adjudicators under the immigration laws in place at the turn of the century, as well as under the original Immigration and Nationality Act of 1952.<sup>11</sup> Those early adjudicating officers lacked even a modicum of independence. Not only were they employed by the Attorney General, but they were answerable along the same chains of authority of Immigration and Naturalization Service (INS or Service) staff as were the prosecutors of immigration cases. They were likewise beholden to the agency on immediate regional levels for space, resources, and staff. As immigration policies evolved from turn-of-the-century restrictionist and ethnically charged standards, the adjudicators eventually gained statutory recognition of their existence and duties, and attained the status of "judge." Even after receiving that and various other dignities, however, the agency that housed them, EOIR, continued to struggle within the Justice Department as the ugly stepsister of the behemoth and powerful INS.

In recent years, following the September 11th attacks, the beginning of the war on terror, and the ensuing changes to immigration law and policy, the immigration judges have undergone yet another,

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<sup>10</sup> Ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

<sup>11</sup> The details of the early changes to immigration adjudication structures are discussed *infra* Part I.A–D.

and by all contemporary accounts, more positive change—while the benefit-granting and prosecutorial immigration functions of the federal government were transferred under the Homeland Security Act to the newly created Department of Homeland Security, EOIR was given statutory recognition and was retained within the Department of Justice.<sup>12</sup> This was viewed by many, including perhaps the judges themselves, as an important step toward improving upon the perception of fairness in truly adversarial adjudications involving serious, potentially life-altering rights of aliens.<sup>13</sup>

Since that change, however, few critics have endeavored to examine the history of immigration adjudication in order to assess its trajectory and the consequences of its newfound “independence.” Today, the courts sit within the Department of Justice, separated from the prosecutorial attorneys working on behalf of the Department of Homeland Security for the removal of aliens not lawfully present in the United States. At the same time, the Attorney General retains significant authority over the immigration courts, including the power to certify any decision to himself and issue new binding and precedent decisions in individual adjudications. Former Attorney General Ashcroft in his tenure did so on numerous occasions in emerging areas of law, including gender-based persecution cases and cases involving limitations on the ability of judges to grant discretionary relief to aliens who have statutory or regulatory bars to eligibility for immigration benefits under current law.<sup>14</sup>

Contemporaneous to these changes, the appellate structure for cases arising in immigration courts, the BIA, has undergone massive restructuring. The membership of the Board has been dramatically reduced, and appeals are now routinely heard by single members instead of the previous three-member panel review. The result has been a proliferation of “affirmance without opinion” decisions in which a single member summarily hears an appeal and, as the name indicates,

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12 See *infra* Part II.A.

13 See *infra* Part II.A.

14 See *In re Jean*, 23 I. & N. Dec. 373 (Att’y Gen. 2002); *In re R-A*, 22 I. & N. Dec. 906 (B.I.A. 1999), *vacated*, 22 I. & N. Dec. 906 (Att’y Gen. 2001), *remanded for reconsideration*, 23 I. & N. Dec. 694 (Att’y Gen. 2005). *Matter of R-A* (as the case of Rodi Alvarado is known to immigration practitioners) was remanded to the BIA for reconsideration, 23 I. & N. Dec. 694, two years after Ashcroft certified the case to himself, during which time the fate of Ms. Alvarado and similarly situated asylum seekers hung in the balance. The BIA has yet to rule.

accepts the ruling of the immigration judge without providing any reasoning whatsoever for the decision to affirm.<sup>15</sup>

These changes, while demonstrating administrative flexibility to adapt to changing circumstances, have also seriously troubled immigration judges. At the same time, a recent court decision has confirmed what few anticipated when the congressional decision to separate the judges from the prosecutors at the institutional level was made—that the Department of Homeland Security would perhaps now be viewed as the agency with the primary authority for administering the nation's immigration laws, and as such, it would be afforded agency deference on review.<sup>16</sup> The possible perverse result: the decisions of immigration judges emerge from an agency permeated by a prosecutorial atmosphere, and are then subject to review by the nation's cabinet-level law enforcement officer at his discretion. On review, such decisions may actually be overturned because the agency which houses the immigration prosecutors, and is a party before the judge in each adjudication, has taken an opposite position. One can certainly envision this situation proving to be disastrous for both agencies, and for the courts of appeals, already so overwhelmed by petitions for review in immigration cases.

This Note will look to the history of the immigration adjudicator's role and agency structure, as well as some of the surrounding debate between Congress, various regulatory structures, two congressional commissions, and the academic community. In particular, Part I will attempt to evaluate the history of this adjudicative process with an eye toward its goals and values throughout much of the last century. Part II will then discuss the most recent changes to immigration adjudication structures, and their practical effect on both practice and procedure. Part III will conclude by assessing the nature of the current problems in the context of that history, and by providing modest recommendations for legislative priorities to address them.

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15 The BIA's streamlining procedure has produced immense academic and practical commentary, and is not addressed with significant detail in this Note, which looks more directly at the role of the administrative judge throughout history. The BIA's contemporaneous changes are only a small part of that story, discussed briefly to shed light on the present crisis for the federal courts of appeals. For more comprehensive discussion of the contemporary changes to the BIA, see Peter J. Levinson, *The Facade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9 BENDER'S IMMIGR. BULL. 1154 (2004). For a long-range historical look at the structure of review of immigration decisions, see Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297 (1986).

16 *Lagandaon v. Ashcroft*, 383 F.3d 983, 987 n.3 (9th Cir. 2004).

## I. COURTS IN EVOLUTION: THE BACKGROUND AND HISTORY OF THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

### A. *Adjudication Under the Acts of 1907 and 1917*<sup>17</sup>

In the first half of the twentieth century, the immigration functions of the United States were carried out in accordance with the provisions of the Immigration Acts of 1907<sup>18</sup> and of 1917.<sup>19</sup> These Acts outlined distinctions between the two types of proceedings which for more than half a century governed the procedures for adjudicating cases involving the admission of aliens to the United States and the deportation of aliens already residing in the United States—exclusion and deportation.<sup>20</sup>

The Acts' procedural requirements were bare bones, establishing roles for "immigration inspectors" and "boards of special inquiry."<sup>21</sup> Immigration inspectors, essentially front-line guards for entry, were given primary responsibility for assessing whether an alien should be granted entry into the United States. In cases where an inspector determined the alien's right was not clearly manifest, the matter was referred to a board of special inquiry.<sup>22</sup> The power to administer immigration laws was vested in the Secretary of Labor by the Immigration Act of 1907,<sup>23</sup> but the Act itself provided little direction in the way

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17 Prior to the 1907 Act, immigration legislation, though prolific, was largely targeted at single discrete subjects and failed to provide for a comprehensive scheme or an agency structure. Much of the early immigration legislation either raised or lowered the requirements for naturalization or excluded from entry a particular group based on ethnicity, criminal history, or other category of persons seeking admission. The 1907 Act was the first truly comprehensive statute, and the first to create any semblance of structure or detail to adjudicative procedure, limited though it was. For a brief summary of some of the earlier legislation, see Immigration and Naturalization Legislation from the Statistical Yearbook, <http://uscis.gov/graphics/shared/aboutus/statistics/legishist/index.htm> (last modified June 9, 2003).

18 Act of Feb. 20, 1907, ch. 1134, 34 Stat. 898, *repealed by* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163. For clarity, the 1907 Act will be referred to throughout this Note as the Immigration Act of 1907.

19 Act of Feb. 5, 1917, ch. 29, 39 Stat. 874, *repealed by* Immigration and Nationality Act of 1952, 66 Stat. 163. For clarity, the 1917 Act will be referred to throughout this Note as the Immigration Act of 1917.

20 *Id.* §§ 3, 19.

21 *See id.* §§ 16, 17.

22 *Id.*

23 *See, e.g.*, § 1, 34 Stat. at 898 (specifying that the Commissioner-General's work shall be under the direction of the Secretary of Commerce and Labor). For an excellent discussion of the implementation of the authorities granted under the Immigration Act of 1907, see Michael Churgin, *Immigration Internal Decision-Making: A View from History*, 78 TEX. L. REV. 1633 (2000).

of particular procedural requirements. The formal requirements were simple: aliens seeking admission were inspected by an immigration officer and, if appropriate, referred to a board of special inquiry—made of three immigration inspectors—for a closed hearing and decision.<sup>24</sup> If the board's decision was unfavorable to the alien, the alien could appeal within forty-eight hours, and the appeal would be answered by the local commissioner, the national commissioner, and eventually the Secretary of Labor himself, whose decision was final.<sup>25</sup>

Accordingly, the governing structure, particularly up until the passage of the 1917 Act and the rapid growth in immigration thereafter, relied heavily upon the interpretative discretion of a few officers, including ultimately the Secretary himself, who was given final word on most immigration cases. This was particularly true given the staffing of the agency itself, which by design placed more conservative inspectors on the front lines with a labor-minded head of the Bureau of Immigration, with a more generous Secretary of Labor at the helm.<sup>26</sup> It was a period in which review was virtually nonexistent outside the agency, and the decision of the Secretary was often at odds with those working under him in the Bureau.<sup>27</sup>

The 1917 Act also prescribed that boards of special inquiry should be employed to hear the cases of aliens detained awaiting admission to the United States and refused by an initial inspector.<sup>28</sup> The boards of special inquiry were composed of officers on detail, not of specialized adjudicators—that is, they were the very officers engaged in the prosecution of like cases as the initial inspectors, assigned to perform the judging function in particular cases.<sup>29</sup> While this structure no doubt grounded the boards with the expertise unique to immigration line officers, it lacked the benefits of full-time adjudicators free of the appearance of conflict and perhaps more likely to possess a judicial temperament. Even with the apparent problems such a structure posed, it is certainly more detailed than the one the Act prescribed for the deportation of aliens already in the United States,

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24 Act of Feb. 20, 1907 §§ 24–25.

25 Act of Feb. 5, 1917 § 17.

26 Churgin, *supra* note 23, at 1638.

27 *Id.* The Bureau of Immigration in the Department of Labor became the INS in the Department of Justice under the 1952 Act, and then became the Department of Homeland Security under the Homeland Security Act of 2002. See discussion *infra* Parts I.D, II.A.

28 Act of Feb. 5, 1917 § 17.

29 *Id.*

which was accompanied by virtually no procedural requirements.<sup>30</sup> The Act gave the authority to the Secretary of Labor to issue warrants of arrest to deportable aliens, and then simply provided that the alien was to be removed to his country of origin or of citizenship.<sup>31</sup> The Act referred to “deportation proceedings” but did not in any way address the nature or substance of the proceedings.<sup>32</sup>

From the outset, it appears that the emphasis of Congress was on the development of a comprehensive body of substantive immigration law, incorporating social values, by requiring literacy,<sup>33</sup> and moral values, by excluding persons convicted of prostitution,<sup>34</sup> without significant development of *structural values* to assure appropriate and consistent implementation. Dozens of immigration laws were passed in the subsequent decades, with only minimal structural changes, with the exception of a transfer of functions from the Secretary of Labor to the Attorney General,<sup>35</sup> as immigration in the eras of the first and second World Wars emerged more as an issue of national security more than as one of purely economic and cultural significance.

During this period, full discretion was left to the agency to assess how to issue warrants and in what way the deportation proceedings should be conducted, and the resultant system in effect in the years before the Immigration and Nationality Act of 1952 fulfilled few of the current norms for administrative adjudication.<sup>36</sup> The officers serving as the primary adjudicators in this era bore almost no resemblance to the current immigration judges—either in form or in substance—although on the most basic level, they were responsible for adjudicating the same sort of controversies. Sidney B. Rawitz, a former adjudicator under the earlier system, recounts the pre-1952 procedures: upon the issuance of a general warrant by the Attorney General stating no factual allegations, a “Presiding Inspector” conducted hearings at which an alien presented a case in defense of the immigration service’s contention of deportability.<sup>37</sup> The presiding inspector was an

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30 *See id.* § 19.

31 *Id.*

32 *See id.* § 20.

33 *See id.* § 3 (requiring literacy in English or another language or dialect “including Hebrew or Yiddish”).

34 *See id.* § 19 (providing, inter alia, that the marriage of “a female of the sexually immoral classes” will not invest her with citizenship rights).

35 Act of June 4, 1940, ch. 231, 54 Stat. 230 (implementing a Presidential Reorganization Plan which included the transfer of functions).

36 Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 65 INTERPRETER RELEASES 453, 454 (1988) (stating that the entire statutory authority for deportation proceedings came from a single line in the Immigration Act of 1917).

37 *Id.*

immigration inspector who was also responsible for investigating similar cases, though without the alien's consent, he could not preside over a case that he himself had investigated.<sup>38</sup> Depending on the complexity of the hearing, an examining officer might also be present to articulate the government's case against the alien.<sup>39</sup> The norm, however, was a hearing in which the presiding officer himself presented the government's evidence against the alien, interrogated witnesses, and prepared a decision. He had access to the alien's entire file, without creation of a judicial file absent prejudicial and irrelevant evidence that he, as a prosecutor, might possess.<sup>40</sup>

Reduced to its most basic form, the pre-1952 system was one in which a single officer untrained as a judge, and instead regularly engaged in law enforcement functions, presented and weighed the government's evidence, perhaps in the absence of anyone but the alien himself. Sometimes, that officer was the very officer who had gathered the evidence he believed was sufficient to charge the alien. Appeals were taken to individuals, through regional lines and chains of command, eventually culminating with a cabinet-level officer who, given time and resource constraints, was usually unable to perform searching review. The battle for quasi-judicial independence was certainly to be fought uphill.

### B. *The Creation of the BIA*

The pre-1940s era saw one significant advance in the ability of the system to provide informed and neutral adjudication before the major reforms of the second half of this century. By regulation, the Attorney General established an internal BIA to hear appeals arising out of administrative decisions on immigration matters.<sup>41</sup> From the outset, the Board was established as a facially independent agency, a contrast to the trial-level immigration courts which had made only small strides toward independence while existing wholly within the immigration enforcement structure. The Board's members, while appointed by the Attorney General and serving at his pleasure, were not employees

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38 *Id.* One must question how often aliens must have consented to the simultaneous vesting of both prosecutorial and judicial authority in a single person, given the regularity with which aliens even today proceed pro se and what must have been a natural human eagerness to please the person who was about to decide their fate.

39 *Id.*

40 *Id.* at 455.

41 Creation of a Board of Immigration Appeals, 5 Fed. Reg. 3502, 3503 (Sept. 4, 1940) (codified as amended at 8 C.F.R. § 1003.1 (2005)).

of the immigration law enforcement agency, and were vested with decisional independence.<sup>42</sup>

While the Board was not a creature of statute and thus could have easily been abolished by an Attorney General dissatisfied with its decisions or procedure, the Board's regulatory creation seems to reflect the belief that the preexisting adjudicatory structures provided too few procedural protections for aliens facing exclusion or deportation from the United States. The Board was established as a national body, with a single, fixed location and authority to promulgate uniform interpretations of law through precedential decisions;<sup>43</sup> its creation presented a stark contrast to the previous appellate procedures which had taken aliens through regional chains of authority until they reached the Attorney General.

The Attorney General did retain control over the Board by reserving to himself the power to certify cases and issue new and binding precedent decisions.<sup>44</sup> This check on independence hardly seems outlandish in the context of the Board's creation as an intra-agency body with no statutory mandate. In the years that followed, however, this check, along with the agency's total reliance on the Attorney General to maintain its existence, became a powerful and sometimes political tool employed to drastically change the face of immigration adjudications and appeals.<sup>45</sup>

### C. *The Era of the APA and a Brief Shining Moment for Quasi-Judicial Independence*

In the early 1950s, immigration adjudication underwent a wholesale revolution—though short-lived—that echoed the revolutions in administrative agency adjudications generally that had been effected by the passage of the APA in 1946.<sup>46</sup> The APA created strict procedural requirements for formal agency rulemaking and adjudication, while essentially leaving informal adjudication to the discretion of the agency, imposing no immediately ascertainable procedural requirements.<sup>47</sup> The APA does not itself dictate what procedural system a specific adjudicatory scheme will require, but references the agency's own organic statute—the statute creating the agency and providing

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42 *Id.*

43 *Id.*

44 *Id.* at 3505.

45 For a discussion of the consequences of this authority, see *infra* Part II.B.

46 Ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

47 *Id.* § 5.

for administrative adjudication of specified controversies. That is, the adoption of procedures for formal adjudication is necessary under the APA only when the organic or other applicable statute refers to determinations made “on the record after an opportunity for an agency hearing.”<sup>48</sup>

In the years following the passage of the APA, each agency was forced to struggle to define the specific requirements that the APA itself, read together with individual organic statutes, placed upon its day-to-day procedures. With respect to its immigration duties, the Justice Department, upon examination, concluded rather curtly that based on the scant statutory language governing immigration adjudication, the adjudications were not formal under the APA and thus not subject to the stringent procedural requirements therein.<sup>49</sup>

In 1950, however, the Supreme Court disagreed.<sup>50</sup> In its decision in *Wong Yang Sung v. McGrath*,<sup>51</sup> the Court interpreted the language of the APA to require formal adjudication procedures not only when the statute specifically required a decision on the record after opportunity for hearing, but whenever the Due Process Clause of the Fifth Amendment so required.<sup>52</sup> The Court had no difficulty in concluding that the INS was bound to engage in formal adjudicative procedures under the Act. Specifically, the Court found that “the administrative [immigration] hearing [was] a perfect exemplification of the practices so unanimously condemned” under the Act.<sup>53</sup> The Court’s opinion reflected the agency-suspect climate of those times, and relied on independent studies conducted by the both the Labor and Justice Departments in developing a broad reading of the requirements of the APA that imposed its strict procedural requirements on the agency’s courts.<sup>54</sup> The period in which the INS was forced to operate its adjudications in conformity with the APA was brief: the agency successfully

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48 *Id.*

49 Rawitz, *supra* note 36, at 456.

50 *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). *See generally* Rawitz, *supra* note 36 (discussing the impact of *Wong Yang Sung* on procedures for immigration adjudication).

51 339 U.S. 33.

52 *Id.* at 49–51 (finding that the APA language which triggered its protections in cases of “adjudication required by statute to be determined on the record after opportunity for an agency hearing” covered circumstances in which the constitutional guarantee of procedural due process required such a hearing, though it was not explicitly provided for in the statutory language governing immigration procedures) (quoting APA § 5); *see also* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 548–49 (editorial comment in an excerpt from Rawitz, *supra* note 36).

53 339 U.S. at 41–46.

54 *Id.*

lobbied for a rider to an appropriations bill later that same year, which specifically exempted it from abiding by the formal adjudication requirements of the APA.<sup>55</sup>

In the pre-APA era, the agency had taken only minimal steps toward adopting formalities of procedure with respect to the pre-judge adjudicators and the controversies they decided. The Court's *Wong Yang Sung* decision gave the first hints of what would become a growing feeling that immigration adjudications were somehow special among the vast universe of administrative agency determinations.<sup>56</sup> The values in play were at the heart of the nation's view of itself, both born as a nation of immigrants and wrestling with that identity. And briefly, that confluence of factors produced a glimmer of procedural independence, clarity, and definitive structure. When the dust had settled, the Service had returned to more or less the same procedures, until Congress again intervened.

#### D. *The Immigration and Nationality Act*

In 1952, Congress again passed a comprehensive statute governing immigration to the United States, the Immigration and Nationality Act of 1952 (INA).<sup>57</sup> The INA, as amended, governs admission to the United States, both of immigrants<sup>58</sup> and nonimmigrants.

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55 Act of Sept. 27, 1950, ch. 1052, 64 Stat. 1044, 1048; Rawitz, *supra* note 36, at 456–57.

56 Critics seem to associate a peculiar call for greater procedural protections in the immigration context with the nature of penalties assessed in immigration proceedings, which can literally divide families, or in the asylum proceedings, result in the persecution and perhaps death of a person who does not qualify to remain in the United States but faces persecution abroad. See DANA MARKS KEENER & DENISE NOONAN SLAVIN, AN INDEPENDENT IMMIGRATION COURT 4 & n.10 (2002) (citing *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)), available at <http://www.woodrow.org/teachers/esi/2002/CivilLiberties/Projects/PositionPaperImmigrationJudges.pdf>.

57 Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.). By common practice in immigration law, the INA is cited in the remainder of this Note with reference to internal section numbers, not their counterparts in the U.S. Code. The INA, as amended, governs immigration law today, and supplants the immigration laws that preceded it.

58 These definitions had emerged in earlier legislation, but first became part of a comprehensive scheme of immigration laws under the INA. An immigrant is defined by the INA in the negative, as any alien except aliens classified as nonimmigrants, and the term generally is meant to refer to aliens in the United States with a “permanent” immigration status. *Id.* § 101(a)(15). Status is considered “permanent” in that the alien has a right to remain in the United States indefinitely, with the caveat that certain changes in circumstances, and particularly, criminal behavior, may allow for the stripping of “permanent” status and the removal of the alien.

grants,<sup>59</sup> the granting of immigration benefits, and proceedings in which aliens are removed from the United States. In the 1952 Act, these proceedings continued to be divided as they had under the Acts of 1907 and 1917, into categories of "deportation" and "exclusion," depending on whether an alien admitted to the United States was being removed, or an alien seeking to enter was being denied admission.<sup>60</sup>

The Act charged the Attorney General with the administration and enforcement of the majority of its provisions, with some powers belonging to the Department of State, principally relating to consular affairs and determinations of nationality of aliens.<sup>61</sup> In regards to the structure of the INS, Congress left much authority to the Attorney General, although it did continue to recognize a statutory position for a Commissioner of Immigration and Naturalization, who was given such duties under the Act as prescribed by the Attorney General.<sup>62</sup>

Beyond the statutory recognition of this single position, the original INA assigns duties to "immigration officers"<sup>63</sup> and "special inquiry officers." While the position of "immigration officer" is left particularly nebulous by the Act and continues today to be governed by regulation and practice, the special inquiry officers (SIOs) are of more particular interest; SIOs held the positions that have evolved into the modern immigration judge.<sup>64</sup>

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59 A nonimmigrant is defined by the INA as a member of one of the twenty-two classes of aliens listed in INA section 101(a)(15)(A)-(V). These classifications refer generally to aliens either not intending permanent residence in the United States, such as students, *id.* § 101(a)(15)(J), tourists, *id.* § 101(a)(15)(B), or temporary workers, *id.* § 101(a)(15)(H), or those in a transitional status which may eventually attain permanency, *id.* § 101(a)(15)(R), such as religious workers or certain family members of legal permanent residents awaiting the date on which they may apply for permanent residency, *id.* § 101(a)(15)(V).

60 Because admission in the immigration context is a term of art and not a reference to a physical entry in the United States, the distinction between deportation and exclusion is not as clear as it seems. Because subsequent massive changes to immigration law have virtually relegated deportation and exclusion to obsolescence, and because the substantive portions of the INA are of little moment here, the distinction between the procedures will not be further explored.

61 *Id.* §§ 103(a), 104(a).

62 *Id.* § 103(b).

63 The term "immigration officer" is defined in INA section 101(a)(18) as an officer designated to perform the functions of an immigration officer in the Act or in regulations (where the term regularly appears without any particular, artful use).

64 The position of SIO was replaced in statutory terms with the term "immigration judge" in the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 371(a), 110 Stat. 3009, 3009-645 to -646.

SIOs were defined within the text of the Act and charged with specific roles in the adjudication of claims to admission or rights to remain within the United States.<sup>65</sup> According to the 1952 Act, an SIO is

any immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings, in whole or in part, required by this Act to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General, individually or by regulation, to conduct such proceedings. Such special inquiry officer shall be subject to such supervision and shall perform such duties, not inconsistent with this Act, as the Attorney General shall prescribe.<sup>66</sup>

Notably, the circuitous definition in the Act did not develop any standards for the Attorney General to consider in making a determination that an officer was “specially qualified” to perform the role of SIO. The resultant qualifications emerging from the Attorney General’s discretionary decisions did not include a law degree, or even a college education.<sup>67</sup>

The SIOs were delegated specific duties with respect to exclusion and deportation proceedings. When an alien was not determined, for instance, to be “clearly and beyond doubt” eligible for admission to the United States by the examining immigration officer, his case was referred to an SIO for a final determination of excludability.<sup>68</sup> In conducting proceedings to determine excludability, an SIO was given the power by the Act to require by subpoena the presence or testimony of witnesses and the production of evidence, and was directed to make determinations only on the basis of evidence so produced.<sup>69</sup> In these proceedings, aliens were allowed to present themselves with one friend or relative, and a complete record of the proceeding was required.<sup>70</sup> A decision unfavorable to the alien was appealable to the Attorney General by the alien, and a similar right was afforded to the immigration officer in charge of the port at which the alien sought

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65 INA § 101(b)(4).

66 *Id.*

67 Rawitz, *supra* note 36, at 457. Qualifications did change in practice, and a plan was put in place in 1956 to phase out all nonattorneys from the SIO role. *Id.* at 458. This change was codified in 1996 when Congress amended section 101(b)(4), replacing the term “special inquiry officer” with “immigration judge” and requiring, among other changes, the appointment of qualified attorneys to serve in that role. Omnibus Consolidated Appropriations Act § 371(a).

68 See INA §§ 235, 236 (establishing the role of the SIO in exclusion proceedings); *id.* § 242 (outlining procedures for deportation of aliens).

69 *Id.* §§ 235(a), 236(a).

70 *Id.* § 236(a).

admission if he believed the SIO had admitted the alien in error.<sup>71</sup> The charging of the corps of SIOs with these duties accomplished an important objective that the BIA, though itself already separate from the immigration law enforcement agency, had not yet achieved—a statutory mandate for its existence and functions.

In the context of deportation, a proceeding applied to aliens who were either excludable at the time of entry or met some other ground of deportability, such as the subsequent commission of a crime in the United States, SIOs were given similar, though not identical, roles under the Act. In particular, deportation proceedings afforded greater procedural protections to both the alien and the Service. The alien was required to have notice, an opportunity for representation by counsel at no expense to the government, and access to evidence.<sup>72</sup> The Service, in turn, could have “an additional immigration officer” present, with the authority to present evidence, cross-examine witnesses, etc., acting essentially as opposing counsel, in any situation in which “the Attorney General believes that such procedure would be of aid in making a determination.”<sup>73</sup>

This final innovation—the potential for bifurcation of the officers with prosecutorial duties from the officers with adjudicative responsibilities—was a significant change from the prior system,<sup>74</sup> and was the first major step to enhance the appearance that the SIO acted as a semi-autonomous decisionmaker. For the first time, the statute itself called for the separation of the role of the presenter of evidence and the individual charged with weighing it.

The Act further established that in both deportation and exclusion proceedings, SIOs who had participated in the prosecutorial or investigative functions of the agency were forbidden from adjudicating the controversy.<sup>75</sup> This provision mirrored the growing consensus embodied in the APA that the commingling of prosecutorial and judicial functions at the individual level was impermissible.<sup>76</sup> It did not, however, address the fact that the judges and the prosecutors contin-

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71 *Id.* § 236(b).

72 *Id.* § 242(b)(1)–(3).

73 *Id.* § 242(b).

74 *See* Rawitz, *supra* note 36, at 454–55 (describing the usual mode of adjudication under the 1917 Act).

75 INA §§ 236(a), 242(b). This provision is unlike that in the preceding Acts of 1907 and 1917 in that those Acts had allowed individuals to fulfill both roles in individual cases. *See supra* Part I.A.

76 *See, e.g.*, APA, ch. 324, § 5(c), 60 Stat. 237, 240 (1946) (codified as amended at 5 U.S.C. § 554(d) (2000)) (providing in relevant part that “[n]o officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the

ued to report to the same immediate supervisor. Obviously, this reporting relationship could have a significant effect on agency culture, but more importantly, it is the genesis of most of the struggle regarding the agency's conflict of interest that continues to color decisions of an immigration judge adjudicating cases involving substantial individual rights.

It also bears noting that while the role of the SIO is strikingly like that of an administrative law judge, employed by the agency but adjudicating a controversy between the agency as prosecutor and the alien as defendant, the statute does not create a formal court structure or outline with any specificity the relationship of the adjudicating body to the rest of the INS in which it is housed.<sup>77</sup> Furthermore, as has been noted above, Congress elected to create a parallel though not identical procedure to that of the APA. The adjudicators, for instance, were not entitled to carry the title of "judge" under the original Act, nor were they appointed and retained under the APA rubric.<sup>78</sup> The adjudicatory structures were clear improvements over the pre-1952 system, but failed to address some of the needs for reform of culture and practice that had underpinned the Supreme Court's decision in *Wong Yang Sung*.<sup>79</sup>

The statutory advances for future judges under the original INA, though limited, provided the critical framework for the changes to come. They imposed, at least, a requirement that the Attorney General make a finding relating to the individual officer's appropriateness for the position (however standardless), that a person serve as an SIO as his position, not as an inspector on detail in a particular case, and a seemingly immutable independence on an individual level from participation in the investigatory or prosecutorial function in a given case. Again, any potential for ultimate independence remained distant, but the trajectory of change here gained its first clarity: the role occupied by the often final adjudicator should be accompanied by

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decision, recommended decision, or agency review pursuant to section 8, except as witness or counsel in public proceedings").

77 For a specific discussion of the differences between the positions of immigration judges and their administrative law judge counterparts, see Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 NOTRE DAME L. REV. 644, 647-49 (1981). In essence, administrative law judges are subject to greater requirements for appointment and entitled to greater civil service protections, as well as greater independence from the enforcement agency whose cases they adjudicate than are their immigration judge counterparts.

78 The Supreme Court has upheld this choice of a separate structure for adjudication and the rejection of the APA formal standards in the context of immigration hearings. *Marcello v. Bonds*, 349 U.S. 302, 309-10 (1955).

79 *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

greater process, greater separation from other functions of the agency, and more consistency. These basic principles guided the agency through decades in which Congress chose to legislate more often on substantive immigration, with little reference to procedure.

### *E. Continued Evolution Through Regulation*

From the time of the passage of the original INA to the statutory changes under the Homeland Security Act, the immigration adjudication structures continued to evolve through regulation and practice.<sup>80</sup> This evolution, as with prior changes, incrementally but significantly augmented procedural and structural protections in immigration proceedings.

In 1956, just four years after the passage of the Act and the statutory creation of the position of the SIO, Justice Department regulations made changes to the adjudication structure substantially increasing the independence of the SIOs. In 1956, the Service operated through regional district offices, under the control of a District Director answerable to the agency head.<sup>81</sup> Because the immigration courts were still wholly within the INS in 1956, they too were a part of the district divisions, and were, like other Service employees, answerable to their District Director. Internal Service reforms removed the SIOs from the direct supervision of the District Director and created a national position of Chief Special Inquiry Officer, though the SIOs still remained a part of the district system for other realities of life—such as facilities, office space, and staff.<sup>82</sup>

The practical dependence of the SIO on the District Director, though clearly an improvement over decisional dependence, prevented the insulation of the SIO from the enforcement mission of the Service. The District Directors publicly issued statements indicating a belief that the SIOs merely added to bureaucracy and hindered the mission of the Service.<sup>83</sup> Current immigration judges themselves recount the stories of retaliation for posing enforcement obstacles—in-

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<sup>80</sup> See generally STAFF OF S. SUBCOMM. ON IMMIGRATION AND REFUGEE AFFAIRS, S. COMM. ON THE JUDICIARY, 100TH CONG., U.S. IMMIGRATION LAW AND POLICY: 1952–1986 (Comm. Print 1988).

<sup>81</sup> This regional system continues to define the divisions in the post-Homeland Security Act immigration successor agencies (sometimes called “Legacy INS”). For an overview of the regional structure of the current agencies, see U.S. Citizenship and Immigration Services, About USCIS Field Offices, <http://www.uscis.gov/graphics/fieldoffices/aboutus.htm> (last modified Nov. 29, 2004).

<sup>82</sup> KEENER & SLAVIN, *supra* note 56, at 6–7.

<sup>83</sup> Levinson, *supra* note 77, at 646 n.17.

cluding the loss of a parking space for a judge after the issuance of a particular decision against a Texas District Director's interest.<sup>84</sup>

At the time, however, SIOs enjoyed a second major victory, beyond decisional independence from the District Director. They were permanently relieved of the duty of both presenting the government's case and assessing its strength in that an examining officer was required to appear on behalf of the government in each case in which the alien contested deportability.<sup>85</sup> While bifurcation had been possible under the 1952 Act itself, it was limited to situations in which the Attorney General believed the split would be of aid in making a determination.<sup>86</sup> The process of creating a record file also emerged at this time, in order to limit the decisionmaker's access to irrelevant and potentially prejudicial parts of the alien's entire immigration file.<sup>87</sup> These steps followed the thread that first appeared in the 1907 Act that forbade an officer from investigating and deciding a single case without the alien's approval and continued through the APA-era reforms regarding the separation of roles at the individual level. They demonstrated, yet again, that the direction of change was toward more process, not less, and toward greater procedural protections for the alien charged.

Some eighteen years later, in 1973, the Justice Department first authorized the use of the term "immigration judge" for SIOs, as well as the wearing of official robes to preside over immigration hearings.<sup>88</sup> In so doing, the Justice Department recognized what had certainly been clear to aliens for significantly longer—that the power to adjudicate these disputes had such a significant effect on individual rights that the adjudication should take place before a neutral judge. While the immigration judges were still employees of the INS itself, they now carried with them the trappings in title and appearance that lent credibility to the process and the appearance of impartiality inherent to judges.

During this time period, the immigration adjudication and appellate process was under significant review by the joint Presidential and

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84 KEENER & SLAVIN, *supra* note 56, at 7.

85 Rawitz, *supra* note 36, at 458. The 1956 reforms also included removing the warrant requirement and replacing it with the "Order to Show Cause," now slightly reformed into a "Notice to Appear." *Id.* These have been the alien's charging documents since 1956, and contain both factual allegations and the legal basis for deportability, excludability, or now, removability. *Id.*

86 INA, Pub. L. No. 82-414, § 242(b), 66 Stat. 163, 209 (1952).

87 Rawitz, *supra* note 36, at 458.

88 Immigration and Naturalization Service Definitions: Immigration Judge, 38 Fed. Reg. 8590, 8590 (Apr. 4, 1973) (codified as amended at 8 C.F.R. § 1.1 (2005)).

Congressional Select Commission on Immigration and Refugee Policy, chaired by then University of Notre Dame President, Theodore M. Hesburgh.<sup>89</sup> The Commission's report aimed at reform of the adjudicative structure, which exhibited, at least for some contemporary critics, "unhealthy dependence . . . , lack of adequate support services, and . . . debilitating conflicts with agency [enforcement] personnel."<sup>90</sup> The report proposed radical change to remedy the situation—the creation of a specialized Article I hearing and appellate courts with jurisdiction over immigration controversies and the elimination of current intra-agency adjudication structures.<sup>91</sup>

The call was for radical legislative change to the system, and was never adopted. It is, however, an important moment in the story we now observe: for all the advances that had been made in the preceding half-century, legislators and others remained impatient with the agency. The solution proposed was not simply greater internal independence, or more substantial procedural protections, or greater opportunity for judicial review, but rather the complete overthrow of the current system—the conversion of the quasi-judicial structure into a *purely* judicial one. Of course, the creation of a specialized court runs contrary to the general presumption in favor of generalist courts staffed with generalist judges.<sup>92</sup> Though the proposed solution would have been rare among agency adjudicatory structures, it would not have been isolated. Peter Levinson, who served as counsel to the Select Committee and author of its final report, later noted that at the time it was proposed, six other specialized federal courts had been created.<sup>93</sup> Each of those courts was created in an area, like immigration law, where the federal government enjoyed clear autonomy and perhaps a peculiar interest.

In the absence of the recommended legislative action, the responsibility for creating the greater independence of the immigration courts was left to the regulatory authority of the Attorney General. In 1983, he again moved toward fostering the appearance of impartiality and perhaps the eventual creation of an independent immigration court with some of the most significant reforms to date. By regulation, the Justice Department created EOIR and placed within it the

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89 Levinson, *supra* note 15, at 1162.

90 *Id.* (quoting Levinson, *supra* note 77, at 644) (alteration in original).

91 Levinson, *supra* note 77, at 651–55.

92 *Id.* at 654.

93 *Id.* at 654 & n.62 (citing the creation of the U.S. Court of Claims, the U.S. Court of International Trade, the U.S. Court of Customs and Patent Appeals, the U.S. Tax Court, the U.S. Court of Military Appeals, and the U.S. Bankruptcy Court).

Office of the Chief Immigration Judge<sup>94</sup> and the BIA.<sup>95</sup> While the regulations speak only of efficiency as the impetus for the change, the Justice Department could not have been blind to the fact that the creation of EOIR might improve the public's perception of fairness in immigration adjudication given the Select Commission's report of two years prior.

Practically speaking, this move was in the vein of the previous changes to the adjudications structures. In the preceding twenty years, a statutory position which simultaneously established qualifications and duties had been created for pre-judge arbitrators. Those duties defined distinctions between prosecutorial and judicial roles, for the first time creating solid, though thin, separation of functions. The adjudicators were then removed from the direct supervision of the District Directors, and their separation from the prosecutors was further solidified. They were then given the title of "judge," and were finally and most decidedly removed from the direct supervision of anyone within the prosecuting agency.

These were the basic parameters of the immigration adjudication system until of the mid-1990s. Immigration judges were adjudicating the same types of controversies that their predecessors had adjudicated since the turn of the century, although with greater independence from the much larger and more powerful INS. Problems certainly remained, but the trajectory over the history of adjudication

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94 Executive Office for Immigration Review, 48 Fed. Reg. 8038 (Feb. 25, 1983) (codified as amended at 8 C.F.R. § 1003 (2005)). The actual language of the 1983 regulations creating EOIR refers to the Office of the Chief Special Inquiry Officer. While the 1973 regulations allowed for the use of the term "immigration judge," Immigration and Naturalization Service Definitions: Immigration Judge, 38 Fed. Reg. 8590, 8590 (Apr. 4, 1973) (codified as amended at 8 C.F.R. § 1.1) until a conforming amendment in 1987 made all references to Special Inquiry Officers instead references to immigration judges, the terms were used interchangeably in the regulations. Office of the Chief Special Inquiry Officer, Designation of Judges, 52 Fed. Reg. 2941, 2941 (Jan. 29, 1987) (codified as amended in scattered sections of 8 C.F.R.). EOIR also houses other bodies, including the Office of the Chief Administrative Hearings Officer, in which administrative law judges appointed under APA rules preside over matters involving employment and discrimination. See KEENER & SLAVIN, *supra* note 56, at 17 n.24.

95 Executive Office for Immigration Review, 48 Fed. Reg. at 8039. The Board itself had been created by regulation as the appellate body, also within the Justice Department, with jurisdiction essentially to hear appeals from the decisions of EOIR. Creation of a Board of Immigration Appeals, 5 Fed. Reg. 3503, 3502-04 (Sept. 4, 1940) (codified as amended at 8 C.F.R. § 1003.1). For a discussion of the evolution of the appellate structures in immigration (the BIA and the Administrative Appeals Unit) prior to some of the recent changes discussed in this Note, see Legomsky, *supra* note 15, at 1307-09.

of immigration disputes clearly pointed in the direction of growing independence and, implicitly, of public perception of greater and more appropriate procedural fairness.

While the creation of EOIR was a significant step towards independence, its effects should be kept in context: the separation was not total, as EOIR and the Service remained sister agencies of the Justice Department, each working at the direction of the Attorney General. This is certainly not unusual among administrative agencies with the power to perform, among enforcement activities, quasi-judicial functions, but certain elements unique to this particular relationship made this arrangement continue to fall short of expectations. By virtue of its sheer size and the enormity of its task, as well as the wider law enforcement mission of the Justice Department, the Service remained the dominant partner. Moreover, as has been noted, it is frequently the case in situations such as this that the adjudicators are administrative law judges, with tenure and salary protections that the immigration judges do not enjoy. Finally, it should be noted that the Attorney General also retained much power in practice over both agencies, and, in particular, the power to certify decisions of the Board to himself for rededecision.<sup>96</sup>

#### F. *Immigration Reform in the 1980s and 1990s*

As evidenced by the findings and recommendations of the Select Commission, discontent had been brewing with the agency's performance for years, and internal agency attempts at reform, however well intentioned, proved insufficient. In late 1990, Congress established the bipartisan U.S. Commission on Immigration Reform (USCIR) to study the immigration process and the agencies involved and to make recommendations.<sup>97</sup> In making its conclusions on the structure of adjudication, USCIR argued for total independence of the courts from the benefits-granting and law enforcement functions of the federal government. The Commission stated:

Experience teaches that the review function works best when it is well insulated from the initial adjudicatory function and when it is conducted by decisionmakers entrusted with the highest degree of independence. Not only is independence in decisionmaking the

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<sup>96</sup> 8 C.F.R. § 1003.1(d)(6). The frequency with which the Attorney General has exercised this right has varied, but has, in the last two administrations, differed significantly in purpose. For a discussion of the current problems this poses, see *infra* Parts II.B and III.

<sup>97</sup> Immigration Act of 1990, Pub. L. No. 101-649, § 141, 104 Stat 4978, 5001-04.

hallmark of meaningful and effective review, it is also critical to the reality and the perception of fair and impartial review.<sup>98</sup>

The Commission's recommendations were to create a wholly independent administrative agency charged with the review of agency determinations and responsibility for presiding over removal proceedings, with reviewing officials "not . . . beholden to the head of any Department."<sup>99</sup> In assessing possible locations for the adjudicative function, the Commission specifically considered and rejected seating it with the then current structure of immigration judges within EOIR, itself within the Department of Justice.<sup>100</sup> In so doing, the Commission invoked a number of reasons critical to the current discussion. First, the Commission noted that seating the courts within the Department of Justice, even if they were separated from enforcement functions, would be undesirable because the Department itself remains "ultimately and predominately a law enforcement agency."<sup>101</sup> Second, the Commission pointed to the authority of the Attorney General to certify cases to himself, modifying or reversing decisions of the BIA, a practice "troubling because, at a minimum, it compromises the appearance of independent decisionmaking, injects into a quasi-judicial appellate process the possibility of intervention by the highest ranking law enforcement official in the land, and, generally, can undermine the [immigration court's] autonomy and stature."<sup>102</sup>

Ultimately, however, the Commission rejected the retention of the adjudication function within an agency housed in the Department of Justice because the simultaneous recommendations of the Commission with respect to other reforms involved the transfer of benefits-granting functions in immigration to the Department of State. The Commission panned as "unworkable" the EOIR-within-Justice option because of "the inherent difficulty of a reviewing agency in one Department rendering decisions in cases initially decided by another Department."<sup>103</sup> The Commission also rejected the previous Select Commission recommendation, the creation of specialized Article I immigration courts, because it was persuaded that removing the review function to the judicial branch would compromise the "flexibility and coordination of function" necessary for the operation of an overall immigration system within the Executive Branch.<sup>104</sup> In the end, the

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98 U.S. COMM'N ON IMMIGRATION REFORM, BECOMING AN AMERICAN 175 (1997).

99 *Id.* at 178.

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.* at 178-79.

Commission endorsed the creation of an independent Agency for Immigration Review within the Executive Branch.<sup>105</sup>

Again, of course, the call was for legislative action. And it had arrived at precisely the right moment: at that juncture, Congress was poised to enact the most sweeping reforms of substantive immigration law since the first attempts at a comprehensive statute had been made at the turn of the century.<sup>106</sup>

In the mid-1990s, the newly Republican Congress passed hundreds upon hundreds of pages of legislation to accomplish "immigration reform," largely structured around limiting or eliminating various forms of immigration relief for those who had violated immigration laws.<sup>107</sup> The acts seriously affected the rights of immigrants residing in or coming into the United States, but they did little to change the intra-agency structures for adjudication, or to change other structures as had been recommended by the bipartisan Commission. The *process* of adjudication, however, did change significantly as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)<sup>108</sup> eliminated the exclusion and deportation proceedings that had been the core of adjudications since the Act of 1907. Instead, immigration judges were given the authority to preside at "removal" hearings.<sup>109</sup> Removal hearings were and are conducted as a mechanism for securing an order to remove, or deport, both inadmissible (but present within the United States) and deportable aliens.

IIRIRA also created a new procedure for those aliens seeking admission to the United States at a port of entry. These aliens, who had previously been entitled to an "exclusion" hearing, were now subject to a new procedure termed "expedited removal."<sup>110</sup> Expedited removal is a procedure in which certain arriving aliens who are deemed inadmissible to the United States may be summarily removed by an officer within the INS, without further review by an immigration judge. The officers making these determinations were low-level adjudicators at the border or ports of entry, without significant specialized training or minimum qualifications. They were, and are, employed

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105 *Id.* at 179.

106 The Commission's work was ongoing prior to the enactment of the sweeping immigration reforms of 1996, though the final report cited here was not published until 1997.

107 See Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546.

108 Pub. L. No. 104-208, 110 Stat. 3009-546.

109 IIRIRA § 304(a).

110 *Id.* § 302(a).

directly by the investigatory and prosecutorial branches of the agency. In these respects, the creation of expedited removal harkened back to the pre-INA era when the judge and the prosecutor were one and the same. This provision of IIRIRA had the effect of removing a significant number of arriving aliens from the jurisdiction of the immigration courts and seriously diminishing procedural rights that had been afforded under the law as previously in effect.

The 1996 immigration laws simultaneously removed significant chunks of immigration cases from judicial review, declaring the agency ruling to be final in certain cases involving criminal aliens or discretionary grants of relief. These provisions changed dramatically the landscape of immigration and the scope of review of agency decisions. However, none of the acts mandated a change to the structures of adjudicating authority in either the Office of the Chief Immigration Judge, the courts, or the BIA. In fact, while removing certain cases from the jurisdiction of the judges and certain others from avenues of judicial review, IIRIRA simultaneously expanded the authority of immigration judges in one important respect—by granting them contempt power.<sup>111</sup>

This contempt power provision became the embodiment of growing frustration and anger from the immigration judges with the conflict fostered by the retention of EOIR within the Justice Department.<sup>112</sup> Though the power was authorized by statute in 1996, it has never been implemented by regulation because the INS has objected to the application of contempt power to its attorneys “by *other attorneys* within the Department, *even if they do serve as judges.*”<sup>113</sup> Clearly, the intra-agency relationship continued to pose problems of authority for immigration judges.

Thus, the history of the immigration judge for the better part of the twentieth century was a story of growing independence—and growing demand for it. In the end, even at a time when the immigration legislation passed by Congress seemed to signal a desire to close the borders, the court’s stature and relative steps toward independence remained undisturbed. That the degree of independence remained unsatisfactory was not surprising, given that the movements through the century for greater independence had all been at least moderately successful, though they had never fully accomplished the reforms for which two separate congressional commissions had now

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111 *Id.* § 304(a) (inserting new provisions dealing with removal, including the authorization of contempt power to be codified as § 240(b)(1) of the INA).

112 See KEENER & SLAVIN, *supra* note 56, at 9.

113 *Id.* (emphasis added).

called. This may have rightly suggested that the reforms of the day were not, perhaps, the final word.

## II. SEPTEMBER 11TH AND ITS AFTERMATH: MASSIVE CHANGES TO IMMIGRATION LAW AND AGENCY STRUCTURE

In 2002, in response to the terrorist attacks of the year before, Congress undertook to reorganize the national security functions of the government. Because immigration failures were perceived as pivotal to the September 11th tragedies and because there was growing discontent with the inefficiencies and problems within the INS itself,<sup>114</sup> Congress placed a radical reorganization of the immigration structure at the center of its Homeland Security agenda.

### A. *The Homeland Security Act*

The Homeland Security Act of 2002<sup>115</sup> abolished the INS.<sup>116</sup> Its functions were transferred into a newly created Department of Homeland Security, and redivided into border control, enforcement, and benefits adjudication.<sup>117</sup> More importantly—for the purposes of this Note—EOIR received statutory recognition for the first time in its history.<sup>118</sup> It also received literal separation, albeit in somewhat of an odd fashion. While the vast majority of immigration functions were

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114 INS reorganization was a hot-button issue for years before the September 11th attacks, and was no doubt fueled into becoming a congressional priority in response to the attacks. *See, e.g.*, INS Reform and Border Security Act of 1999, S. 1563, 106th Cong. (1999); Immigration Reorganization and Improvement Act of 1999, H.R. 3918, 106th Cong. (1999).

115 Pub. L. No. 107-296, 116 Stat. 2135 (codified in scattered sections of 6 U.S.C., 18 U.S.C., 42 U.S.C., and 50 U.S.C.).

116 *Id.* § 471.

117 *Id.* §§ 441–478. The reorganization has established the United States Citizenship and Immigration Service, the Bureau of Customs and Border Protection, and United States Immigration and Customs Enforcement. Because this Note does not deal with the different functions of these separated agencies within the Department of Homeland Security, the generic “Department of Homeland Security” will be used to denote the agency-level functions of federal immigration law enforcement.

118 *Id.* § 1101.

transferred to the Department of Homeland Security,<sup>119</sup> the Department of Justice retained control over the immigration courts.<sup>120</sup>

Certainly this seemed to be a victory for immigrants—separation between not just the individual prosecutor and adjudicator, but between prosecuting agency and the adjudicative agency, had finally been achieved.<sup>121</sup> Given the climate of the times, it seems to have been a rather unlikely scenario for a positive, and seemingly pro-immigrant, change. The mere fact that the Act had for the first time dealt with the existence of an agency for immigration courts was hugely significant. That it had done so in the context of creating a mammoth agency vested with immense powers was remarkable. That it had specifically chosen to erect structural separations so significant as to place the immigration courts under the power of one cabinet-level officer and the prosecutors under another is at least equally so.

While the separation was a victory for advocates of greater procedural protections in immigration proceedings—particularly significant given the atmosphere of the times—it should be remembered that this victory in separation fell far short of what many, and in particular, the official Commissions studying the problem had recommended in the course of the debate which preceded the Act. The Commission of the 1980s, of course, had recommended that the immigration courts be transformed into specialized federal courts, and

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119 As noted at the outset, other departments play a significant role in specific areas of immigration law, such as the State Department's responsibility for consular affairs, the Labor Department's functions in employment-related matters, and the Justice Department's responsibilities in civil rights and criminal immigration matters. However, the primary immigration benefits-granting and enforcement functions were transferred to the newly formed Department of Homeland Security. *Id.* § 441 (a) (transferring from the Commissioner of Immigration and Naturalization to the Secretary of Homeland Security responsibility for detention and removal, Border Patrol, inspections, investigations, and intelligence); *id.* § 451 (b) (transferring from the Commissioner to the Director of the Bureau of Immigration and Customs Enforcement—a position within the Department of Homeland Security—responsibility for adjudication of immigrant visa petitions, naturalization applications, asylum applications, and all other adjudications performed by the INS prior to the effective date of the Homeland Security Act).

120 Section 1101(a) of the Homeland Security Act reads in part: "EXISTENCE OF EOIR.—There is in the Department of Justice the Executive Office for Immigration Review, which shall be subject to the direction and regulation of the Attorney General."

121 Previous, unaccepted discussion drafts of the legislation had in fact created a wholly independent agency, though that alternative was ultimately rejected in the version that became law. Congressional immigration advocates seemed to think even if total independence could be an ultimate goal, the timing was not quite right.

the 1997 Commission had recommended the creation of a completely independent executive branch agency.<sup>122</sup>

Despite the failure to fulfill earlier recommendations, the action of formally separating the quasi-judicial functions from the enforcement function continued to signal the same thing that had been signaled by virtually all of the previous changes—that procedural fairness is a value to be sought in immigration adjudications, and that fostering a perception of fairness in proceedings is best accomplished by measures which seek to create deeper separation between the judge and the prosecutor.

### B. *Changes at the BIA*

Almost simultaneous with the passage of the Homeland Security Act and the structural changes it created for the entirety of immigration procedures, including adjudications before the immigration courts, the Attorney General undertook significant reforms of the BIA. In 1999, then Attorney General Janet Reno had published regulations indicating that the Board would begin streamlining its procedures.<sup>123</sup> The Board had grown from an original five members to twenty-three.<sup>124</sup> Even with the increase in size of the Board, the caseload continued to grow, resulting in a backlog, primarily because of the rapid growth in the number of cases being brought before the Board each year.<sup>125</sup> The Board had, throughout its history, reviewed cases by three-member panel. The regulations issued in 1999 allowed for single-member review and affirmance without opinion of the order of the immigration judge when certain conditions were met.<sup>126</sup> Under these initial streamlining procedures, more than fifty percent of the cases received by the Board were assigned for decision by a single member for summary affirmance.<sup>127</sup>

In 2002, then Attorney General John Ashcroft announced his intention to expand streamlining procedures.<sup>128</sup> In particular, his final rule further modified the already existing streamlining procedures for

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122 See *supra* Part I.E.

123 Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135 (Oct. 18, 1999) (codified as amended at 8 C.F.R. § 1003 (2005)).

124 Levinson, *supra* note 15, at 1154.

125 *Id.*

126 Board of Immigration Appeals: Streamlining, 64 Fed. Reg. at 56,136.

127 Levinson, *supra* note 15, at 1155.

128 Press Release, U.S. Dep't of Justice, Department of Justice Unveils Administrative Rule Change to Board of Immigration Appeals in Order To Eliminate Massive Backlog of More than 56,000 Cases (Feb. 6, 2002), available at [http://www.usdoj.gov/opa/pr/2002/February/02\\_ag\\_063.htm](http://www.usdoj.gov/opa/pr/2002/February/02_ag_063.htm).

individual decisions.<sup>129</sup> Single-member review was announced as the new dominant method for the Board, and the rule removed former limitations that it be used only in cases where affirmance without opinion was appropriate.<sup>130</sup> More interestingly, however, the Attorney General announced that the Justice Department had decided that backlog reduction would best be achieved by cutting the membership of the Board by more than one-half, leaving only eleven members.<sup>131</sup> This move was highly suspect at the time as a way to control on a more systematic level what the Attorney General already had the power to do by vacating individual board judgments.<sup>132</sup> Those suspicions appear to have been fulfilled, as Peter Levinson's article demonstrates: following the voluntary retirement of several of the most liberal members of the Board, the five members selected for "reassignment" by the Attorney General were those with essentially the most immigrant-friendly and anti-agency decision record on precedent cases.<sup>133</sup>

These changes, and the analysis now available of the method in which they were implemented, reveal the vulnerability of an appellate procedure for immigration adjudications that is a creature of regulation. While the Board's lack of statutory authority provides the administrative flexibility so often coveted by agency heads, it also provides the opportunity for agency choices which directly affect substantive outcomes.

During the same period, Attorney General Ashcroft also used his statutory authority to vacate precedent decisions of the Board and issue new and binding decisions himself. In particular, the Attorney General reopened the case of Rodi Alvarado, a Guatemalan woman who had been found eligible for asylum on the basis of severe domes-

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129 Board of Immigration Appeals: Procedural Reforms To Improve Case Management, 67 Fed. Reg. 54,878, 54,903 (Aug. 26, 2002) (codified at 8 C.F.R. § 1003 (2005)).

130 *Id.*

131 *Id.* at 54,893.

132 See, e.g., Diedre Davis, *Into the Line of Fire*, LEGAL TIMES, Sept. 2, 2002, at 1, 9 (quoting Georgetown University Law Center Professor and former INS general counsel, T. Alexander Aleinikoff, regarding the effect on the Board's legitimacy of anticipated moves by the Attorney General to "pack and stack" the Board with judges who typically side with the government).

133 See Levinson, *supra* note 15, at 1155-61 (evaluating the decisions of individual members in precedent decisions both before and after the rule was proposed, and determining that the reassignments were predictable on the basis of individual records both on precedent cases and those in which the Attorney General demonstrated a special interest).

tic violence.<sup>134</sup> The decision in *Matter of R-A*<sup>135</sup> had reinterpreted existing asylum law to recognize certain permutations of severe domestic violence as persecution, a change that allowed battered spouses previously unable to find safe haven in the United States to obtain immigration relief.<sup>136</sup> The Attorney General subsequently remanded the case to the BIA two years after certifying the case to himself and calling Ms. Alvarado's fate back into question.<sup>137</sup> *Matter of R-A* is an example of the substantive power to interpret immigration law that the Attorney General retains in the absence of congressional action to limit it.

### III. PERSISTENT AND EMERGING PROBLEMS, AND MODEST RECOMMENDATIONS FOR A LASTING SOLUTION

The current state of affairs for immigration presents both ongoing problems inherited from the foregoing troubled history and new problems emerging from recent, but apparently unsuccessful, attempts to remedy them. As noted at the outset, perhaps the gravest and most immediately identifiable problem facing the agency is the current burden that review of immigration decisions is placing on the federal courts. That in the world of the federal government and all of its hundreds of agencies decisions from a single agency can consume half of the resources of some federal appellate courts is shocking. But it is also, and perhaps more importantly, an indication of how intrinsically tied to national values individual immigration cases can be. They

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134 *In re R-A*, 22 I. & N. Dec. 906, 908–09 (B.I.A. 1999), *vacated*, 22 I. & N. Dec. 906 (Att'y Gen. 2001), *remanded for reconsideration*, 23 I. & N. Dec. 694 (Att'y Gen. 2005). The BIA has yet to rule.

135 22 I. & N. Dec. 906.

136 *Id.* at 922–23.

137 23 I. & N. Dec. 694 (ordering briefing following certification). In the intervening two years, concerns ran deep, and numerous advocacy groups publicly urged the Attorney General to maintain the rule of *Matter of R-A*. See, e.g., Center for Gender and Refugee Studies, *The Case of Rodi Alvarado*, <http://w3.uchastings.edu/cgrs/campaigns/alvarado.php> (last visited Sept. 18, 2005). Members of Congress have spoken as well. See, e.g., Letter from Patrick Leahy, Senator, to John Ashcroft, Attorney Gen. (Mar. 3, 2003), available at [www.lchr.org/asylum/leahy\\_letter.pdf](http://www.lchr.org/asylum/leahy_letter.pdf) (urging the Attorney General to retain protection for victims of domestic violence abroad).

Interestingly, protests against the Attorney General's broad power to certify are a bit ironic in the context of *Matter of R-A*, where certification by then Attorney General Janet Reno reversed the unpopular decision of the Board denying relief to Ms. Alvarado on the basis of existing interpretations of asylum law. The Attorney General's certification power can, of course, cut both ways. That is why the soundest course is to attempt to determine objectively the best procedure—the best structural solution—before any particular controversial case colors the judgment of interested parties.

can unite or divide families, save victims of violence and persecution, and banish hated criminals to be some other nation's problem. And somehow, without the strongest procedural protections, for the person facing such immense consequences, any decision will be suspect and will be fought until all avenues are closed.

Simultaneously, the problem of agency deference is emerging. In the fall of 2004, the Ninth Circuit issued its decision in *Lagandaon v. Ashcroft*.<sup>138</sup> The decision itself is of little consequence to this discussion; instead, a troublesome footnote about what the court need not decide is sparking new concern. *Lagandaon* was procedurally typical, being heard on petition for review of a removal order of an immigration judge, which had been affirmed by the BIA. Ordinarily, when a BIA decision "intend[s] to issue an interpretation" of an immigration statute, the interpretation is reviewed deferentially in accordance with *Chevron*.<sup>139</sup>

When the agency charged with adjudicating controversies (here, EOIR, specifically the BIA, housed within the Department of Justice) is distinct from the agency given authority to enforce the law (here, the Department of Homeland Security), then full *Chevron* deference may not necessarily be owed.<sup>140</sup> While the intricacies of the distinctions between *Chevron* deference and perhaps lesser deference due under *Skidmore*<sup>141</sup> are well beyond the scope of this discussion, the

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138 383 F.3d 983 (9th Cir. 2004).

139 *Id.* at 987 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

140 *Id.* at 987 n.3 ("The Supreme Court has indicated that courts may not owe full *Chevron* deference to an agency charged with adjudicating issues under a statute when a different agency is charged with enforcement of the statute."); *see also, e.g.*, *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 152 (1991) (holding that Secretary of Labor, not the independent adjudicative agency OSHRC, receives deference in interpretations of the Occupational Health and Safety Act); *Dir., Office of Workers' Comp. Programs v. Gen. Dynamics Corp.*, 982 F.2d 790, 795 (2d Cir. 1992) ("When the responsibility for administering an act has been split, the Supreme Court has directed us to defer to the office that has the policy-making authority.").

141 *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Skidmore* deference involves a more complicated analysis than the simplistic formulation (though difficult application) of *Chevron* deference. Essentially, agency actions are given deference to the extent that they have the "power to persuade, if lacking power to control." *Id.* at 140. *United States v. Mead Corp.*, 533 U.S. 218 (2001), reiterates that *Skidmore* survives *Chevron*, and holds that it may have a role to play once a determination has been made that *Chevron* deference should not apply to a particular agency interpretation. *Mead* made clear that the existing doctrine under *Skidmore*, which could allow *some* deference due to the agency's "specialized experience and broader investigations and information" and to the "value of uniformity in its administrative and judicial understandings of what a national law requires," was still in play. *Id.* at 234 (quoting

practical difficulties in vesting power to interpret the meaning of immigration law in two bodies, under two different Secretaries, are of great import to this discussion. The U.S. Commission on Immigration Reform recognized this difficulty in its recommendations, and specifically rejected a situation similar to the current arrangement, because of the difficulties inherent in one department reviewing another department's actions.<sup>142</sup>

Add to this already complex picture of deciding to which agency deference is due the actual language of the Homeland Security Act:

STATUTORY CONSTRUCTION. Nothing in this Act, any amendment made by this Act, or in section 103 of the Immigration and Nationality Act, as amended by section 1102, shall be construed to limit judicial deference to regulations, adjudications, interpretations, orders, decisions, judgments, or any other actions of the Secretary of Homeland Security or the Attorney General.<sup>143</sup>

The result is, of course, nothing but utter confusion. The Act purports to retain deference to the Secretary of Homeland Security *and* to the Attorney General, but neglects to provide any guidance as to how that deference is to be applied in cases of conflict.

Finally, in addition to the clear desire for greater procedural protections evidenced by the flood of appeals to the federal courts and the decisions those courts will soon have to face about how to review adjudicative decisions, other problems are certain to persist under the new structure. The immigration courts, though now stepping out of the shadow of the immigration enforcement agency, still remain in an enforcement-minded agency.<sup>144</sup> As the Commission on Immigration Reform said in 1997, the Department of Justice is "ultimately and predominantly a law enforcement agency."<sup>145</sup> While this is not particularly troubling in most administrative adjudication under the prevailing and modern view of administrative law, it returns us to the

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*Skidmore*, 323 U.S. at 140). The scope of *Skidmore* deference, and its fuzziness around the edges, stands in stark contrast to the absolutism of *Chevron's* deference formulation.

142 U.S. COMM'N ON IMMIGRATION REFORM, *supra* note 98, at 178.

143 Homeland Security Act of 2002, Pub. L. No. 107-296, § 1103, 116 Stat. 2135, 2274 (codified at 6 U.S.C. § 522 (Supp. II 2002)).

144 As was noted in Part IIA, *supra*, the value of separating investigatory and prosecutorial functions was embraced even in internal structuring of the Department of Homeland Security. The act of separating the benefits-granting functions (by placing them with U.S. Citizenship and Immigration Services) from the investigation and prosecution of immigration violations (housed within Immigration and Customs Enforcement) demonstrates an across-the-board commitment to the separation of functions as a central tenet of immigration reform.

145 U.S. COMM'N ON IMMIGRATION REFORM, *supra* note 98, at 178.

persistent problem that immigration law and the penalties it is capable of imposing on an individual human being somehow impel the rest of the justice system to treat it differently. Separation from the actual immigration prosecutors was clearly an important step, but it neglects this latter point—when the rights at stake are so fundamental and so human, being part of an enforcement culture seems inappropriate.

For the solutions to these developing and continuing problems for adjudications, a proper analysis requires a return to the history. Here, the history of the immigration adjudicator is a history of continued growth toward greater decisional and institutional independence and of demand for increased procedural protections.

Congress has for long periods of time left the management of that growth to administrative decisions within the agency. When it has intervened, however, it has acted to, at minimum, solidify the adjudicator's responsibilities and distinguish those from the prosecutorial functions performed by others in the executive branch with respect to immigration. Though the statutory recognition of EOIR came late in this history, it came at a time in which substantive immigration law was called into question, and rights, procedural or otherwise, were hardly the battle cry of the day. When actions have been left to the Administrator's discretion, they too have, until recently, all reflected a move toward more solid separation of prosecutorial and adjudicative roles. It was those administrative decisions that made the adjudicators administrative judges, gave them access to only record evidence, and eventually created the first structural barriers between the prosecutor and the judge by creating the Executive Office and the BIA.

This brief review of the history of the immigration adjudicator reveals much about relative values and their development as well. The preference of Congress to allow much to proceed at the discretion of the agency, as well as the recommendations of the Commission on Immigration Reform, demonstrate the high value assigned to efficiency and flexibility in decisionmaking at the macro level. At the micro level, the Attorney General's recent decisions with regard to the Board have demonstrated the consequences of failing to meet internal expectations of efficiency.

By contrast, the basic trajectory of reforms in the adjudicator's role demonstrates that the value of efficiency will be tempered by concerns for justice and fairness. The Supreme Court's decision in *Wong Yang Sung v. McGrath*<sup>146</sup> and the administrative and congressional at-

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146 339 U.S. 33 (1950).

tention to setting up progressively stronger barriers between the prosecutorial and decisional functions are evidence of that tempering.

The solution to these problems, read in their context, is not an easy one, though the timing is ripe for continued development of the adjudicator's role. The nation remains at a juncture where substantive immigration laws are of immense importance to many in Congress and are therefore likely to continue to evolve. Moreover, the nature of the current crisis in some federal appellate courts is likely to produce cries for procedural reforms as well.

There continue to be three variations of practical proposed reforms that could target the flood of immigration cases on appeal in the federal courts: (1) changes to substantive immigration law eliminating reviewability of decisions; (2) transfer of the functions of EOIR to a separate and independent Executive Branch agency; and (3) creation of specialized Article I courts for immigration matters. Each should be viewed in the context of the historical demands placed on immigration adjudication and the values they embody, as well as the effect that they would have on the current system.

Congress has already made a preliminary choice among the potential reforms in enacting the REAL ID Act in 2005 as a rider to an emergency supplemental appropriations bill.<sup>147</sup> REAL ID at least in part changed the existing avenues for review in the federal courts by limiting review of final orders of removal to those filed on petition for review in the courts of appeals only, no longer allowing habeas review.<sup>148</sup> The limitation on habeas, however, is accompanied by language actually expanding the jurisdiction of the federal courts of appeals to examine previously unreviewable cases and issues in the habeas context by petitions for review.<sup>149</sup> While proposals to limit the availability of review have the potential to offer the most immediate and significant impact on the current crisis in the federal courts, they ignore the immigration adjudicators themselves and their evolving roles in the immigration system. Such proposals prize efficiency at the end of the process without ensuring neutral, considered decisionmaking with adequate procedural safeguards at the administrative stages. While REAL ID's limitations and more systematic versions of the same are popular, they do not comprehensively address the current prob-

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147 Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, § 106(a)(1)(A)(iii), 119 Stat. 231, 310 (to be codified at 8 U.S.C. § 1252).

148 *Id.*

149 *Id.*

lem, nor do they sufficiently acknowledge the history of immigration adjudication in determining its future.

Second, the legislature could choose to implement the plans of the U.S. Commission on Immigration Reform with respect to the creation of an independent Executive Branch agency. As the Commission had explained, doing so would prevent the appearance that judges had been captured by the prerogatives of an enforcement-minded agency. Furthermore, the Attorney General would not have control over the individual decisions of the Board by vacating its orders. Finally, perhaps, whatever was left open procedurally by statute, the Board itself would be free to regulate in terms of its own procedures.

The combination of these three changes might restore confidence in the integrity of the decisionmaking body, though the impact it is likely to have on the current crisis for federal appellate courts is likely to take time. It is also not clear how this change would resolve or change the current deference dynamic presented by *Lagandaon v. Ashcroft*.<sup>150</sup> Nonetheless, this approach would respect the direction that history has all too gradually taken in resolving the matter, by strengthening the authority and independence of the adjudicator.

Finally, the legislature could choose to create, as the Select Commission on Immigration and Refugee Policy suggested,<sup>151</sup> an independent, specialized Article I court for immigration. This is the least likely of all options, since Congress not only often chooses the path of least resistance, but at least in the area of immigration adjudication as we have discussed, attempts to solve a particular problem by the least drastic change possible as outlined above. As an Article I court, an immigration adjudications structure would certainly not have problems establishing its stature or independence. It would be wholly and completely removed from the control of the executive, created by congressional charter. It could remove totally the burden of the federal appellate courts, if Congress chose to structure it according to the Select Commission's proposal by removing jurisdiction to the courts of appeals but reserving certiorari for the Supreme Court. That is, the likely structure of an Article I immigration court would be that the role of the immigration judge would be played by a specialized federal trial-level judge and that of the BIA by a specialist federal appellate judge. The decision of the BIA would be final in the absence of a Supreme Court intervention.<sup>152</sup>

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150 383 F.3d 983 (9th Cir. 2004).

151 See *infra* notes 89–93 and accompanying text.

152 SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 248–49 (1981).

During the era of its proposal, Professor Stephen Legomsky openly criticized the above approach for ignoring the value of a generalist approach to immigration, and avoiding the issue of whether a non-Article III court with tenure and salary protection, would be preferable.<sup>153</sup> The U.S. Commission on Immigration Reform likewise rejected the approach, though on the ground that it removed too much administrative flexibility.<sup>154</sup>

From the perspective of history and of values, this approach has some advantages. It pushes the immigration courts in the direction they have moved since their inception—toward greater and greater independence. It also could remove a layer of review, improving efficiency. But Legomsky and the Commission also pose serious questions about whether it is workable and desirable, and it would drastically change the relationship the executive branch has always had to immigration.<sup>155</sup> Perhaps more importantly for the purposes of a discussion of the likely possible courses of action, this proposal seems the furthest from those the legislature is currently considering.

In the final analysis, it is likely that limitations on the reviewability of decisions, while certainly frequently employed and currently under consideration by Congress, are not the best solution. When viewed in the context of history, this approach is likely to yield only more discontent, and only a greater drive for change, which as a force in this area of law has rarely been denied. For practical reasons, the creation of an Article I court seems to be beyond the scope of power Congress is willing to give to immigration judges. Again, the lens of history confirms that Congress is often willing to make reforms, but rarely at the broadest level demanded. Congress has also never seen fit to challenge executive primacy over these adjudications, and is not likely to do so now, in the post-September 11th climate.

The mid-ground solution, that of an independent executive agency court, though not flawless, seems plausible as a long-term solution to some of the current problems. Greater confidence in front-end process lessens the burden on back-end process. Moreover, a movement towards greater autonomy, while maintaining the courts within the executive branch, is consistent with historical developments and with fairly recent recommendations of a bipartisan Commission. Most importantly, it balances values, finding justice in total separation, and efficiency and flexibility as a part of the executive.

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153 Legomsky, *supra* note 15, at 1386–400.

154 U.S. COMM'N ON IMMIGRATION REFORM, *supra* note 98, at 178.

155 The Supreme Court has been very clear in its statements of executive branch primacy in immigration. See *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001).

### CONCLUSION

Immigration adjudication in the United States has undergone massive changes since its first permutations at the turn of the century. It has evolved from a system in which there were virtually no procedural guarantees, often with an alien pleading his case before an investigating officer, to one which in many respects mirrors a formal judicial proceeding. Recent changes to the structure of the immigration functions of the federal government as a whole, including to the adjudications structure, pose serious questions as to whether this historic trajectory will be sustained or reversed.

Perhaps more importantly, however, the change of direction in the evolution of the adjudications structures has produced a telling response—overwhelming demands for judicial review. These demands demonstrate that the parties to these proceedings and their advocates will continue to demand, as they have throughout history, that their cases be heard by an independent adjudicator, whether internal or external to the agency. This demand, as in the past, may very well impel changes giving greater procedural protections to aliens and greater quasi-judicial independence to adjudicators. Should potential changes to immigration adjudications structures be considered, legislators should be wary of overly simplistic approaches that attempt to cut off judicial review and leave the current adjudications structure otherwise as is. As the current situation demonstrates, such a measure will eventually force aliens to seek protection elsewhere. Instead, Congress should select a model that responds to and balances the evolution of the adjudication structure and the values it embodies. Properly undertaken, this approach would cause a wise Congress to establish a wholly independent executive agency for immigration adjudications. If created with the intent of fostering independent decisionmaking, such a change would eventually begin to ease the current burden on federal courts.

Until then, however, the current burdens will stand. The interests involved implicate too many values for the parties before the courts to demand anything less.

