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A Specialized Court for Immigration Hearings and Appeals

Peter J. Levinson*

I. Introduction

The United States immigration adjudication system is beset with crippling problems. Immigration judges occupy positions of unhealthy dependence within the Immigration and Naturalization Service (the Service),¹ lack adequate support services, and frequently face debilitating conflicts with agency personnel. Board of Immigration Appeals members perform appellate functions without job security or statutory recognition. Long delays pervade the quasi-judicial hearing and appellate process. The availability of further review in federal courts postpones finality, encourages litigation, and undermines the authority of initial appellate determinations.² This article examines the process by which persons are excluded or expelled from the United States, describes the present system's problems, and suggests structural alternatives.

II. The Present System

The Service employs forty immigration judges handling an annual caseload of approximately 4,000 exclusion and 58,000 deportation cases.³ Exclusion proceedings involve hearings on the admissibility⁴ of aliens denied "entry"⁵ to the United States by immigration officers at land borders or ports.⁶ Aliens within

* Consultant, Select Commission on Immigration and Refugee Policy. A.B., Brandeis University, 1965; J.D., Harvard University, 1968. This article is based in part on *Immigration Hearings and Appeals: A Structural Study* (June 1980) (unpublished paper prepared for the Select Commission by the author). The views expressed in this article are the author's own opinions and do not necessarily reflect the opinions of the Select Commission.

1 The Immigration and Naturalization Service is the agency within the Department of Justice that performs enforcement, service, and adjudicatory functions relating to the immigration and naturalization laws. The Attorney General possesses statutory authority, with certain exceptions, to administer and enforce these laws. 8 U.S.C. § 1103(a) (1976). He generally has delegated concurrent authority to the Commissioner of the Service, who in turn has made various subdelegations. 8 C.F.R. §§ 2.1, 103.1 (1980).

2 Judicial review is an important safeguard under present circumstances. The layering of review, however, may be eliminated by providing an initial judicial (rather than quasi-judicial) hearing and appeal. See text accompanying note 14 *infra*.

3 These figures are based on cases received in fiscal year 1980. Dispositions did not keep pace with new cases. In fiscal year ("FY") 1980 completed exclusion cases totalled 3,100; completed deportation cases equaled 45,034, a decline from the 55,886 figure for FY 1979. 1,596 exclusion cases and 29,267 deportation cases were pending at the end of FY 1980. IMMIGRATION & NATURALIZATION SERVICE, REPORT OF FIELD OPERATIONS (FY 1979, 1980).

4 8 U.S.C. § 1182(a) specifies 33 separately numbered classes of aliens that are inadmissible to the United States. Some of these classes include numerous subclasses. See 8 U.S.C.A. § 1182(a) (West 1970 & Supp. 1981).

5 Entry is broadly defined by statute to include the return of a lawful permanent resident from a temporary visit abroad. Thus, reentering lawful permanent residents are subjected anew to all the grounds of exclusion except the literacy requirement. 8 U.S.C. §§ 1101(a)(13), 1182(a)(25) (1976). In *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), the Supreme Court ameliorated the rigidity of the reentry doctrine for persons whose visits abroad are "innocent, casual and brief," *id.* at 462, but lower federal courts have divided in interpreting the scope of the *Fleuti* decision.

6 To qualify for an exclusion hearing a person must physically reach the United States. An alien

the United States may be expelled for a variety of causes⁷ through deportation. Immigration judges are based at eighteen cities around the country and frequently travel to other locations to hold hearings.

The Board of Immigration Appeals (the Board), an administrative appellate entity, reviews the exclusion and deportation decisions of immigration judges at the request of either the alien or the Service.⁸ The five member Board exists by authority of regulation (rather than statute) as part of the Department of Justice and is "subject to the general supervision of the Deputy Attorney General."⁹ The Board disposes of approximately 2,800 cases per year.¹⁰ On rare occasions the Commissioner exercises a regulatory right¹¹ to seek the Attorney General's review of Board decisions. By statute, final Board deportation orders are reviewable solely upon the alien's petition directly to a United States court of appeals.¹² Board exclusion decisions are not subject to direct appellate judicial scrutiny but may be reviewed by habeas corpus in the United States district courts.¹³

A number of objectives are significant in considering the range of options for handling the present case-load of immigration judges and the Board: (1) Officials performing hearing and appellate adjudicatory functions should possess security, compensation and stature commensurate with the nature of their responsibilities. These requisites are essential to attracting highly qualified attorneys to these positions. (2) The independence of immigration judges should be safeguarded by their insulation from direct or indirect pressure from enforcement officials. Such pressure can compromise the integrity of decisionmaking, create intolerable working conditions, and undermine the essential appearance of fairness that should characterize hearings. (3) Immigration judges should receive support services adequate to enable them to decide cases expeditiously. (4) National uniformity in immigration decisional law should be promoted to ensure fairness and discourage litigation. (5) Unnecessary layering of review should be eliminated.

III. The Immigration Judge's Predicament

Presently, immigration judges in the United States operate in an atmosphere of crisis. These quasi-judicial officials generally consider themselves to be working under untenable conditions: they are subject to inappropriate interference from law enforcement personnel, lack the necessary control over the admin-

denied an immigrant or nonimmigrant visa by a consular officer abroad has no access to a formal review. Moreover, the grant of a visa by a consular officer abroad does not bind the immigration officer at the place of entry. In effect, the immigration officer takes a second look at the individual's admissibility.

7 The grounds for deportation are delineated in 8 U.S.C. § 1251 (1976 & Supp. 1978).

8 The jurisdiction of the Board also includes review of immigration judge bond determinations and decisions of district directors on certain types of applications and petitions. 8 C.F.R. § 3.1(b) (1980). Decisions of district directors on most categories of applications and petitions, however, are reviewable by the four regional commissioners within the Service and never reach the Board. 8 C.F.R. § 103.1(m) (1980) delineates the appellate jurisdiction of regional commissioners.

9 8 C.F.R. § 3.1(a)(1) (1980).

10 The exact figures for FY 1980 are "2,762 cases involving 3,189 aliens." Board of Immigration Appeals' Annual Report for FY 1980. Deportation cases represent the majority of the Board's caseload. 8 C.F.R. § 3.1(b) (1980) lists other types of cases included in the 2,762 figure.

11 8 C.F.R. § 3.1(h) (1980). Board decisions also can be referred to the Attorney General either by direction of the Attorney General or by request of "[t]he Chairman or a majority of the Board." *Id.*

12 8 U.S.C. § 1105a (1976).

13 *Id.* § 1105a(b) (1976).

istration of their own hearings, and lack the resources needed to carry out their essential functions. In an effort to understand these pressing concerns, the Select Commission on Immigration and Refugee Policy (the Select Commission)¹⁴ solicited the views of numerous people involved in immigration matters. The written and oral responses revealed strong sentiment for major structural change designed to provide immigration judges greater independence.

Although vested with authority to make independent decisions in cases involving the deportation or exclusion of aliens, immigration judges work under the administrative supervision of Service enforcement personnel. Presently "Regional Commissioners exercise administrative supervision . . ."¹⁵ David Dixon, Special Assistant to the Commissioner, is "temporarily . . . coordinat[ing]" "[p]rofessional supervision and legal matters affecting the judges, which would normally be within the scope of the Chief Immigration Judge's duties . . ."¹⁶ Immigration judges are dependent on district directors and regional commissioners for office space, hearing facilities, equipment, supplies, clerical and transcription support, translating personnel, travel authorization and reimbursement, and maintenance of case files.

Tension pervades relations between many enforcement personnel and immigration judges. A number of district directors perceive the immigration judges as working at cross-purposes to those of the district directors, view the immigration judges' goals as antithetical to the Service's mission, and express their contempt for the immigration judges.¹⁷ Testimony delivered before the Select Commission in April 1980, on behalf of the Association of Immigration Directors, confirms that many district directors view the present role of immigration judges negatively:

The need for economy and efficiency in the delivery of public service dictates a review of the statutory basis, if any, for the costly and inefficient system of so-called "Immigration Courts" and "Immigration Judges" that seems to have been dictated by the cry for due process. . . . [T]he system as it has developed over the past decade particularly, has gone from a relatively simple but complete "lay" hearing to a most complex legal bureaucracy serving only to confuse and make it costly to the aliens and the government in the process.¹⁸

14 The Select Commission is a presidential-congressional commission with a mandate to "study and evaluate . . . existing laws, policies, and procedures governing the admission of immigrants and refugees to the United States and to make such administrative and legislative recommendations to the President and to the Congress as are appropriate." Immigration and Nationality Act—Refugee Policy, Pub. L. No. 95-412 § 4(c), 92 Stat. 907 (1978).

15 Letter from Acting Commissioner David Crosland to Immigration Judge Joseph W. Monsanto (Mar. 20, 1980) (copy in Select Commission files).

16 *Id.* The position of chief immigration judge has been vacant since August 1979, awaiting a decision from the Department of Justice on the possible removal of immigration judges from the Service.

17 *See, e.g.*, Memorandum re Association of Immigration Directors' Conference with Commissioner Castillo (Dec. 14, 1977) (copy in Select Commission files).

It was pointed out that no individual change adding to SIO [special inquiry officer or immigration judge] authority to veto decisional authority historically exercised [sic] by DIDIR's [district directors] was, in itself, of major significance; but that in the aggregate the many changes had resulted in creation of a complex legal bureaucracy that hindered Service mission accomplishment, increased costs and was of more benefit to the legal trade than to the aliens.

Id. The memorandum refers to the robes of immigration judges as "the black nightgowns they frequently wear when conducting hearings." *Id.*

18 Submission on behalf of Association of Immigration Directors, Select Commission Chicago Regional Hearing, Apr. 21, 1980 (copy in Select Commission files).

Although the merits of the trend toward increased recognition of aliens' procedural rights can be debated at length, having district directors determine the support needs of immigration judges is fraught with problems.¹⁹

David Dixon, Special Assistant to the Commissioner, recently acknowledged that "the advantages of separating the immigration judges from [the Immigration and Naturalization Service] are large"²⁰ and that "something must be done" about the potential for abuse in a situation where immigration judges are "staffed and supported administratively by the district directors."²¹ Board Chairman David Milhollan observed that it "seemed to be the consensus, it always has been our view, that the Judges should be separate from [the] Immigration Service."²² Chairman Milhollan referred to "the fact that the work of Immigration Judges doesn't always receive from District Directors the highest priorities,"²³ and concluded that immigration judges should have the "opportunity to take care of their own work themselves."²⁴

Service enforcement personnel's frequently antagonistic attitude toward immigration judges perhaps results from both (1) immigration judges' ambiguous semi-autonomous status and (2) district directors' awkward position as enforcement personnel having some responsibility for quasi-judicial officials. "It is now clear," one immigration judge wrote to the Select Commission, "that these Directors and their subordinates view our role as renegade Immigration Officers who are usurpers of authority and frauds in our role as Judges."²⁵ Letters to the Select Commission from immigration judges document a variety of irritating intrusions by enforcement personnel into immigration judges' operations. "Fair and impartial hearings are not possible," another immigration judge advised the Select Commission, "when one of the parties in each case controls the court system."²⁶ The immigration judge found that "[t]he strong desire to influence the judges directly or indirectly is repugnantly clear."²⁷ The independence of immigration judges should be clarified and the conflicting roles of enforcement officials should be eliminated. In short, a compelling case exists for removing immigration judges from the Service entirely.

IV. Immigration Judges and Administrative Law Judges: A Comparison

Thirty federal agencies employ over 1,000 administrative law judges to per-

19 Support needs are not in fact being met. Many immigration judges point to a chronic lack of adequate clerical assistance. Letters from immigration judges (in Select Commission files). Also, appeals to the Board often face inordinate transcription delays.

20 Executive Summary, Consultation on "*Quasi-Judicial Quandaries: Over Due Process*," SELECT COMMISSION ON IMMIGRATION & REFUGEE POLICY, 2D SEMIANNUAL REPORT TO CONGRESS, 96th Cong., 2d Sess., 196, 197-98 (Joint Print of House and Senate Committees on Judiciary (Oct. 1980)[hereinafter cited as Consultation, 2D SEMIANNUAL REPORT]. This consultation or miniseminar, organized by Select Commission Director of Legal Research Mary Jo Grotenrath, focused on issues relating to immigration judges and the Board.

21 Transcript of Consultation (described at note 20, *supra*) 38 (unpublished transcript in Select Commission files).

22 Consultation, 2D SEMIANNUAL REPORT, *supra* note 20, at 203.

23 *Id.*

24 *Id.*

25 Immigration judge correspondence with Select Commission (in Select Commission files).

26 *Id.*

27 *Id.*

form a variety of quasi-judicial tasks.²⁸ Candidates for administrative law judge positions must meet threshold experience requirements, receive adequate scores rating various qualities, prepare an acceptable written opinion, and satisfactorily participate in an interview. The Office of Administrative Law Judges, in the Office of Personnel Management, prepares a register of applicants who have successfully completed the screening process. An agency wanting to fill a position must pick from among the three top candidates unless it has been authorized to impose specialized experience requirements (selective certification) in the substantive area of the agency's work. Selective certification permits an agency to bypass top names on the general register and choose from among the leading candidates with specialized experience. An agency may also bypass candidates on the register by selecting an administrative law judge already employed by another agency.²⁹

By contrast, the selection process for immigration judges parallels that used for filling other civil service management and supervisory positions within the Service. First, by referring to the civil service qualifications handbook, a Service staffing specialist in the central office determines whether a candidate meets the requirements. Next, the specialist separates those who hold or have held competitive appointments (status candidates) from non-status candidates. If the number of status candidates does not exceed seven,³⁰ the candidates' names are submitted in alphabetical order to the Commissioner. Non-status candidates are evaluated and ranked by the Office of Personnel Management. The Commissioner is allowed unlimited discretion in selecting a new immigration judge from among applicants on either the status or non-status list.

Unlike administrative law judges, immigration judges do not enjoy special protection within the civil service system. Unless they possess career status at the time of their appointment, immigration judges cannot attain such status without serving a one year probationary period and accumulating three years of continuous service. Regardless of prior government career experience, administrative law judges can be removed "only for good cause established and determined by the Merit System Protection Board on the record after opportunity for hearing."³¹ Immigration judges are evaluated periodically by the Service for pay increases, a responsibility that usually devolves on the chief immigration judge.³² By contrast, administrative law judges are "entitled to pay prescribed by the Office of Personnel Management independently of agency recommendations or ratings"³³ The Supreme Court has stated that "Congress intended to make [administrative law judges] 'a special class of semi-independent subordinate hearing officers' by vesting control of their compensation, promotion

28 For detailed descriptive and statistical information on the caseloads of administrative law judges in various agencies, see ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL ADMINISTRATIVE LAW JUDGE HEARINGS—STATISTICAL REPORT FOR 1976-1978, 21 (July 1980) [hereinafter cited as ADMINISTRATIVE CONFERENCE, STATISTICAL REPORT].

29 For an analysis of the selection process, see Mans, *Selecting the "Hidden Judiciary"* (pts. 1-2), 63 JUD. 60, 130 (1979).

30 A panel of three immigration judges is convened to rank in order the top seven status candidates in the unlikely event more than seven status applicants are available. This contingency has not arisen in at least the last five years.

31 5 U.S.C. § 7521 (1976 & Supp. 1978).

32 The chief immigration judge position has been vacant for over 16 months. See note 16, *supra*.

33 5 U.S.C. § 5372 (1976 & Supp. 1978).

and tenure in the Civil Service Commission to a much greater extent than in the case of other federal employees."³⁴

Changing the position of immigration judge to that of administrative law judge would offer several advantages over the present system. First, the Office of Administrative Law Judges, an entity specifically concerned with merit selection of quasi-judicial officials, would play a major role in the appointment process. This involvement could result in the elimination of some unqualified or marginally qualified candidates and lead to greater efforts to recruit qualified members of the private bar. Second, as quasi-judicial officials, persons given positions would receive job security upon appointment regardless of their prior competitive government appointments. Job security would promote independence of action and might induce potential candidates to give up other secure positions. Third, placing control over compensation in the Office of Administrative Law Judges rather than in the appointing agency would augment quasi-judicial independence. Finally, administrative law judges concerned with immigration matters probably would receive GS (General Schedule) 16 appointments rather than the GS 15 position of immigration judges.³⁵ GS 16 is the grade of administrative law judges in most federal agencies. The nature of the responsibilities presently exercised by immigration judges justifies appointments at this level.³⁶

The Service's employment of administrative law judges rather than immigration judges would not, however, solve the most serious problem facing quasi-judicial personnel. The most serious problem³⁷ stems from the immigration judges' dependence on an agency primarily concerned with enforcement. Administrative law judges' dependence on the agencies that employ them for facilities and support services seems to pose fewer problems because the major missions of these agencies, unlike those of the Service, do not conflict, or are not widely perceived to conflict, with the roles of persons responsible for hearing functions. Administrative law judges assigned immigration judge functions could be removed from the Service and assigned either to an independent entity within the Department of Justice comparable to the United States Parole Commission³⁸ or to a new independent agency modeled on an existing independent adjudicatory agency.³⁹

V. The Vulnerability of the Board of Immigration Appeals

An appellate body such as the Board of Immigration Appeals is needed to harmonize decisions of immigration judges around the country and provide na-

³⁴ *Ramspect v. Federal Trial Examiners Conference*, 345 U.S. 128, 132 (1953) (footnote omitted). The role of the Civil Service Commission has been assumed by the Office of Personnel Management and the Merit Systems Protection Board.

³⁵ The present \$50,112.50 ceiling on the amount actually payable under the general schedule results in a compression of wages. As a result, some persons at GS 15 (those at step 5 and above) and all persons at GS 16 reach the ceiling. See Exec. Order No. 12,248, 45 Fed. Reg. 69,199 (1980). Congress, of course, may act to raise the ceiling and ease the compression.

³⁶ The Office of Personnel Management classifies administrative law judges, although Congress occasionally specifies a minimum classification.

³⁷ See text accompanying notes 15-16 *supra*.

³⁸ See text accompanying note 47 *infra*.

³⁹ The Occupational Safety and Health Review Commission and the Federal Mine Safety and Health Review Commission provide good models for establishing an immigration adjudicatory agency without a link to a government department.

tionwide authority in immigration law. The elimination of an appellate body would likely produce more disparate treatment of aliens in the different parts of the United States. Moreover, by subjecting decisions of individual immigration judges to a process of collective scrutiny, an appellate body provides an important error correcting function. Abolishing the Board without establishing another institution capable of performing its functions would exacerbate federal court caseload problems.

Unlike the immigration judge structure, the Board is insulated from the Service. This advantage, however, must be balanced against the precariousness of the Board's existence. While immigration judges perform statutory functions,⁴⁰ Board members derive their authority solely from regulation. An Attorney General dissatisfied with the Board's operations could abolish the Board. Its lack of statutory standing, a subject of strong criticism,⁴¹ undermines the Board's stature, renders service on the Board less secure and thus less attractive, and threatens the Board's independence. In any event the Board's fate should not rest in the hands of an agency that appears before the Board as an advocate.

The Attorney General's ability to review Board decisions inappropriately injects a law enforcement official into a quasi-judicial appellate process, creates an unnecessary layer of review, compromises the appearance of independent Board decisionmaking, and undermines the Board's stature generally. The Attorney General assumes a posture of inevitable conflict when he is required to evaluate the merits of advocacy positions assumed by his own Department. Moreover, the subordination of the Board's collective judgment to a single individual's opinion reverses a sound principle of appellate scrutiny: that the decision of one judge is best reviewed by a collegial body. Although authorized to act independently in its decisionmaking role, the Board hardly can avoid taking into account its perception of the Attorney General's likely view.

Speaking at the Select Commission Consultation on Quasi-Judicial Quandaries,⁴² Board Chairman David Milhollan referred to a number of prior studies of the Board and noted that "[c]ommon to all of the reports . . . has been the recommendation that the Board be elevated in stature."⁴³ Chairman Milhollan expressed his personal wholehearted support for upgrading the position of Board member, concurred "in the recommendation that the Board be established by statute,"⁴⁴ and favored eliminating Attorney General review of Board decisions.⁴⁵ Comparing the Board of Immigration Appeals with the United States Parole Commission underscores some of the points raised by Chairman Milhollan.

The United States Parole Commission exemplifies a statutory "independent agency in the Department of Justice"⁴⁶ functioning without supervision from the

40 See 8 U.S.C. § 1252(b) (1976), which provides that deportation proceedings shall be conducted by a special inquiry officer. The statute should be read in conjunction with 8 C.F.R. § 1.1(l) (1980), which specifies that "[t]he term 'immigration judge' means special inquiry officer"

41 See, e.g., PRESIDENT'S COMMISSION ON IMMIGRATION & NATURALIZATION, WHOM WE SHALL WELCOME 160 (1953).

42 See note 20, *supra*, for a description of this consultation.

43 Consultation, 2D SEMIANNUAL REPORT, *supra* note 20, at 203.

44 *Id.* See also Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29 (1977) (advocating an upgraded statutory Board).

45 Consultation, 2D SEMIANNUAL REPORT, *supra* note 20, at 204.

46 18 U.S.C. § 4202 (1976).

Attorney General or his subordinates. Parole Commission members are appointed by the President, and confirmed by the Senate, to positions at the GS 18 level⁴⁷ for terms of six years. By contrast, Board of Immigration Appeals members receive appointments from the Attorney General at the GS 15 level (except for a GS 16 Chairman) and serve at the discretion of the Attorney General. Although the Board of Immigration Appeals fulfills responsibilities of importance comparable to those of the Parole Commission,⁴⁸ Board members do not enjoy comparable security, stature, or statutorily recognized independence. A very modest proposal for upgrading and safeguarding the Board of Immigration Appeals might involve enacting legislation comparable to the 1976 act⁴⁹ that established the United States Parole Commission as the successor to the United States Board of Parole. Immigration judges or administrative law judges responsible for hearing and deciding deportation and exclusion cases could be attached to the new body.

Independent adjudicatory agencies⁵⁰ also provide models for an administrative entity which might accommodate the Board of Immigration Appeals and the immigration judges. Persons performing appellate immigration adjudicatory functions might occupy positions analogous to those of commission members, enjoying presidential appointments subject to Senate confirmation, fixed terms of office, and compensation at level IV of the executive schedule.⁵¹ Immigration hearing and appellate officers arguably should not maintain even a loose affiliation with a law enforcement entity; the independent agency model offers the advantage of a structure without any link to the Department of Justice. Immigration judges or administrative law judges could be assigned to the new agency.

VI. A New Specialized Court

The specialized judicial model provides the best solution to the dilemma of establishing an appropriate institutional framework for immigration judge and Board of Immigration Appeals functions.⁵² Although quasi-judicial models—such as the United States Parole Commission and independent adjudicatory agencies—promise a substantial improvement over the present immigration system, they do not provide the advantages inherent in leaving critical liberty-related questions to courts. Judicial forums are available for resolving many controversies of less importance to individuals than whether they should be expelled or excluded from the United States. Courts are accustomed to making

47 The \$50,112.50 ceiling applies to all persons at GS 18. *See* note 35 *supra*.

48 The Parole Commission passes on parole applications, imposes parole conditions, and modifies or revokes parole orders.

49 Pub. L. No. 94-233 (1976).

50 *See* note 39 *supra*.

51 The present ceiling on the amount payable to a person with a level IV appointment is \$52,750.00. Pub. L. No. 96-369, 94 Stat. 1351 (1980), Exec. Order No. 12,248, 45 Fed. Reg. 69,199 (1980). The ceiling for a level III appointment (the appropriate level for the chairman of the adjudicatory entity) is \$55,387.50. *Id.*

52 On various occasions Congress has recognized that a judicial forum provides a more appropriate structure for resolving controversies that had been left to executive decisionmaking in the past. This recognition is exemplified in the creation of the United States Customs Court (now known as the United States Court of International Trade) to replace the Board of General Appraisers. The Board of Tax Appeals evolved into the Tax Court of the United States and then into the United States Tax Court. For a history of the evolution of tax adjudications, see H. DUBROFF, *THE UNITED STATES TAX COURT—AN HISTORICAL ANALYSIS* (1979).

judgments affecting the rights of disenfranchised persons or unpopular minorities without bowing to political expediency. The judicial tradition of strict independence and adherence to the rule of law makes courts ideal bodies for resolving questions where the sanction, although not denominated criminal, may involve a severe deprivation of liberty. Moreover, courts can best provide a process that appears fair to a person who may never again be exposed to American justice.

Creating a specialized court system can be justified by the fact that immigration judges already perform essentially judicial functions. Immigration judges decide cases involving alleged law violations on the evidence presented. Immigration judges' discretionary authority to provide various forms of relief requires their weighing equitable considerations—a task judges of trial courts frequently confront. Expulsion from the United States, a sanction which may be more onerous than imprisonment, differs qualitatively from any penalties that administrative law judges impose.⁵³ To a great extent, placing immigration judge functions within a specialized court structure may simply recognize the practical result of the increased judicialization of the hearing officer's position. This judicialization has included: (1) authorizing hearing officers to decide cases (rather than limiting them—as they were once limited and as some administrative law judges remain limited—to making recommendations); (2) filling the position of special inquiry officer exclusively with attorneys; (3) relieving special inquiry officers of non-adjudicatory functions (by the assignment of trial attorneys with prosecutorial functions in contested cases); and (4) designating special inquiry officers as immigration judges.⁵⁴

The position of United States magistrate provides a possible model for a new immigration magistrate charged with the responsibilities currently discharged by immigration judges. The Federal Magistrates Act of 1968 “created the new office of United States magistrate to emphasize the judicial nature of the position and to denote a break with the commissioner system.”⁵⁵ More recent legislation has resolved jurisdictional ambiguities and given explicit sanction to a broad range of potential responsibilities for United States magistrates.⁵⁶

53 Penalties vary among agencies. They may include the imposition of monetary fines or damages, the issuance of cease and desist orders, the recall of products, the publication of adverse findings, and the suspension or revocation of licenses, permits and registrations. For an agency by agency description of penalties imposed by administrative law judges, see ADMINISTRATIVE CONFERENCE, STATISTICAL REPORT, *supra* note 28. Administrative law judge penalties sometimes have considerable business and financial implications but do not deprive individuals of basic freedoms.

54 See generally 1A C. GORDON & H. ROSENFELD, IMMIGRATION LAW & PRACTICE § 5.7 (rev. ed. 1980).

55 McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 343, 348 (1979) (footnote omitted) (citing *Hearings on the Federal Magistrate Act Before the Subcomm. on Improvements in the Judicial Machinery of the Sen. Comm. on the Judiciary*, 89th Cong., 2d Sess. 34 (1966) (staff memorandum)).

56 See McCabe, *supra* note 55, for a detailed analysis of 1976 and 1979 enactments. United States district courts today can designate magistrates to (1) try persons charged with misdemeanors (with the consent of the accused), 18 U.S.C. § 3401 (1976); (2) “hear and determine,” subject to possible district court reconsideration, “any pretrial matter [with certain exceptions, generally dispositive motions] pending before the court . . .” in either civil or criminal cases, 28 U.S.C. § 636(b)(1) (1976); (3) submit proposed findings and dispositional recommendations (subject to possible district court de novo review) on dispositive motions in civil or criminal matters, *id.*; and (4) conduct (with the consent of the parties) “any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case . . .” with a right of appeal directly to the United States court of appeals unless “at the time of reference to a magistrate, the parties . . . further consent to appeal on the record to a judge of the district court . . .” Pub. L. No. 96-82, § 2(2), 93 Stat. 643 (to be codified at 28 U.S.C. § 636(c)(1), (3), (4)).

Although magistrates, as adjuncts of United States district courts,⁵⁷ perform a significant role in the disposition of federal litigation, they do not offer the best institutional model for hearing officers in deportation and exclusion cases. The United States already has a functioning group of immigration judges; a change in title to magistrate might frustrate efforts to recruit highly qualified lawyers to accept appointments. The positions of various judicial and quasi-judicial officials—including magistrates, bankruptcy judges, and administrative law judges—have been upgraded in recent years; redesignating persons performing immigration judge functions as magistrates would be antithetical to that trend. Unlike magistrates, immigration judges do not depend on delegations from other officials in order to exercise their most significant jurisdiction and do not require the consent of the parties. The magistrate closely resembles an arbitrator. By contrast, immigration judges function like judges. The jurisdiction of immigration judges, moreover, is distinct from that of any existing federal court. Thus, exclusion and deportation cases most appropriately can be heard by “judges” housed in a new immigration court.

An immigration court could eliminate the layering of review that characterizes present jurisdictional arrangements. Today a person subject to a final Board deportation or exclusion order has statutory remedies in article III courts⁵⁸—by direct appeal to a United States court of appeals in a deportation case and by petition for habeas corpus to a United States district court in an exclusion case. Litigation may even go further. A court of appeals decision in a deportation matter may be reviewed by the Supreme Court on petition for certiorari,⁵⁹ and a district court habeas corpus ruling in an exclusion matter may be appealed to a court of appeals with subsequent Supreme Court scrutiny on petition for certiorari a possibility.⁶⁰ Also, the final Board order triggering these potential remedies in article III courts is itself a quasi-judicial appellate remedy.

Congress could provide a single right of review in an appellate division of the new immigration court. Such a structure would generally eliminate the present statutory involvement of courts of appeals in deportation cases and both district courts and courts of appeals in exclusion cases. Discretionary Supreme Court review may be retained to preserve the Court’s supremacy in matters of national law.

A new immigration court would introduce uniformity in immigration decisional law. Initial appellate decisions would no longer be subject to potentially disparate rulings by courts of appeals in different circuits. Greater cohesion and less confusion could be expected to characterize immigration law in the future. Moreover, eliminating layers of appellate review may encourage litigants to accord greater deference to prior appellate opinions when deciding whether to appeal.⁶¹

The availability of review in the appellate division of the new immigration

57 See McCabe, *supra* note 55 at 369-74.

58 See text accompanying note 12 *supra*.

59 28 U.S.C. § 2350 (1976).

60 Because of the exigencies of the Supreme Court’s heavy caseload, however, petitions for certiorari are granted in only a small percentage of cases.

61 The Board essentially functions as a tribunal of intermediate appellate jurisdiction. Today unfavorable precedent may not discourage attorneys from relitigating old issues because of an expectation that a federal court ultimately may agree with an argument repeatedly rejected by the Board.

court would provide litigants an adequate remedy to safeguard individual rights. Even persons convicted of serious federal crimes generally qualify for only one appeal. Repeated review does not necessarily lead to better decisions. Moreover, the societal cost of postponing finality can be enormous. The greatest protections for persons involved in deportation and exclusion proceedings would derive from the capacity of the new court's trial and appellate divisions to upgrade the quality of adjudications.

To date Congress has created six federal courts combining specialized jurisdiction and specialized judges.⁶² Ample historical precedent can be found for creating a specialized immigration court. In recent years considerable controversy has centered on the advisability of expanding the list of specialized courts to include additional substantive areas. The debate over whether to route specialized cases to judges with generalized experience (who arguably can offer a broad legal perspective) or to route them to specialized judges (who arguably possess the expertise to resolve complex cases thoughtfully and expeditiously) need not deter Congress from creating a new article I United States Immigration Court,⁶³ with a trial and appellate division, to decide cases that already are being decided by specialists. The controversy over the appropriate role of specialized courts must be faced, however, if Congress is to provide generally for final review in the new court's appellate division.

A specialized appellate division, staffed with outstanding lawyers, need not succumb to arcane interpretations of immigration law or identify with the Service. First, recruitment efforts could emphasize broad legal experience. The new positions would provide an attractive professional opportunity to members of both the private and the public bar. An immigration court nominating commission could perform an important recruiting and screening role for the new court.⁶⁴ Second, the continued involvement of federal district courts and courts of appeals in some immigration-related matters⁶⁵ would ensure a healthy exchange of ideas between the specialized judges of the new immigration court and the generalized judges of article III courts. Third, Supreme Court review by petition for certiorari would permit occasional scrutiny of appellate division cases. The very existence of Supreme Court review would serve as a reminder to the Immigration Court that its rulings must fit within the more general fabric of the law.

62 These six courts are the United States Court of Claims, the United States Court of International Trade (discussed in note 52, *supra*), the United States Court of Customs and Patent Appeals, the United States Tax Court (discussed in note 52, *supra*), the United States Court of Military Appeals, and the United States Bankruptcy Court. In addition, two specialized federal courts, the Rail Reorganization Court and the Temporary Emergency Court of Appeals, are staffed on a rotational basis by federal judges who do not generally specialize in the substantive work of the court on which they temporarily serve.

63 The United States Tax Court and the United States Court of Military Appeals are the two presently existing federal courts of limited subject matter jurisdiction explicitly established under article I (the legislative powers provision) of the Constitution. See 10 U.S.C. § 867 and 26 U.S.C. § 7441 (1976). Article I courts (legislative courts) are to be distinguished from constitutional courts established under article III (the judicial powers provision) of the Constitution. Judge Joseph Monsanto, President of the National Association of Immigration Judges, has vigorously advocated an article I court for immigration hearing functions. See, e.g., J. Monsanto, Immigration Court Under Article I of the Constitution (unpublished proposed statute and rules for an immigration court) (copy in Select Commission files).

64 Cf. Exec. Order No. 12,064, 43 Fed. Reg. 24,661 (1978) (United States Tax Court Nominating Commission).

65 Constitutional habeas corpus remedies, for example.

VII. Conclusion

An article I court offers distinct advantages over an independent, upgraded quasi-judicial structure. A federal court is more likely than a Board or Commission to attract the highest qualified adjudicators because of the status, security, independence, and challenge associated with judicial service. Unlike some administrative agencies, federal courts can command adequate support services. A new court could resolve immigration cases definitively without the layering of review and duplication of effort inherent in having both quasi-judicial and judicial structures. Finally, a new court could introduce certainty in immigration decisional law. Such certainty could not be achieved with a new administrative structure.

Article I of the Constitution permits innovation. The creation of an immigration court need not encumber the deportation and exclusion process with procedural rigidity. Immigration court rules, for example, could provide for flexibility in the reception of evidence and the participation of non-attorneys.⁶⁶ Many institutional and jurisdictional questions need to be addressed as further consideration is given to establishing a new immigration court. The nation's prior experience with specialized courts should provide guidance in this effort.

⁶⁶ *Cf.* R. OF PRAC. & PROC. OF THE U.S. TAX CT., R. 177(b) (providing for admissibility in “[t]rials of small tax cases” of “any evidence deemed by the Court to have probative value”) and R. 200(a)(3) (establishing a procedure for admission of non-attorneys to practice).