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Proposed: A Specialized Statutory Immigration Court

MAURICE A. ROBERTS*

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

INTRODUCTION

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

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

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

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

THE EXISTING SYSTEM

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

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

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

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


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

The Immigration and Nationality Act abounds with provisions
for exclusion, deportation, and the imposition of penalties, both
civil\footnote{7} and criminal.\footnote{8} These, plus the responsibility for policing the
borders, involve the Service in functions which are essentially of
an enforcement and prosecutorial nature. The bulk of the Ser-
vice's personnel are engaged in enforcement activities of this na-
ture.

In juxtaposition stand the many statutory provisions authoriz-
ing various benefits and forms of relief for citizens and aliens,
which bring into play the public service functions of the INS.
Typical are the provisions for the grant of exemptions and prefer-
ences in the issuance of immigrant visas, based on family reunifi-
cation,\footnote{9} business needs,\footnote{10} and humanitarian concerns for refugees
and those seeking asylum here.\footnote{11} Finally, there are the numerous
provisions for waivers of inadmissibility and relief from deporta-
tion which frequently confront the INS with the need for making
decisions in cases involving a combination of both its enforce-
ment and its service functions.\footnote{12}

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


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

\footnote{9} Immigration and Nationality Act §§ 201(b), 202(b), 203, 204, 8 U.S.C.

\footnote{10} Immigration and Nationality Act §§ 101(a) (15) (E), (H), 203(a)(3), (6), 204,

\footnote{11} Immigration and Nationality Act §§ 207, 208, 209, 243(h), 8 U.S.C. §§ 1157,
No. 96-212, 94 Stat. 102.

\footnote{12} Immigration and Nationality Act §§ 211(b), 212(b), (c), (d), (e), (g), (h),
(i), (j), 213, 244, 245, 246, 248, 249, 8 U.S.C. §§ 1181(b) (1976), 1182(b), (c), (d), (e), (g),
(h), (i), (j) (1976 & Supp. III 1979), 1193 (1976), 1254 (1976 & Supp. III 1979), 1255,
1258, 1259 (1976).
undeniable fact that Congress has provided the Service with little real support in carrying out its conflicting and sometimes irreconcilable duties. For example, in the Act, as enacted in 1952, and in the patchwork of amendments which followed, Congress has reflected no clear immigration policy. This failure has made it necessary for the Service (and the BIA on appeal) to improvise and make ad hoc determinations, shifting positions from time to time as best seemed to suit the needs of the moment. The most dramatic evidence of the congressional failure to provide a clear immigration policy is the fact that in recent years the INS has not been given resources adequate to cope with the proliferating


14. Illustrative is the administrative position with respect to out-of-wedlock children as stepchildren. The precise question is whether and under what circumstances an alien's illegitimate child can be considered the stepchild of his spouse. The problem arose because under Immigration and Nationality Act § 101(b)(1)(D), 8 U.S.C. § 1101(b)(1)(D) (1976), an illegitimate child can claim or confer immigration benefits only in relation to its natural mother and not in relation to its natural father. This discrimination has been sustained by the Supreme Court. Fallo v. Bell, 430 U.S. 787 (1977). A remedy was fashioned years ago in Nation v. Esperdy, 239 F. Supp. 531 (S.D.N.Y. 1965), where the court recognized the spouse of the natural father as the child's stepmother within the meaning of Immigration and Nationality Act § 101(b)(1)(B), 8 U.S.C. § 1101(b)(1)(B) (1976), when the three had lived together in a close family unit. The Service did not appeal that decision and the BIA accepted it as a rule of general applicability, over Service objection. In re The, 11 I & N. Dec. 449 (1965). However, when the same court in Andrade v. Esperdy, 270 F. Supp. 516 (S.D.N.Y. 1967), extended the Nation rule to a situation where there had never been a close family unit, the Board balked and refused to apply that holding in cases outside the jurisdiction of the court that rendered it. In re Harris, I.D. No. 2308 (1974); In re Amado and Monteiro, 13 I & N. Dec. 179 (1969); In re Soares, 12 I & N. Dec. 633 (1968).

After a number of years had passed with no further court ruling on the issue, the INS changed its position. In a memorandum dated December 11, 1978, in In re Moreira, File No. A 22 211 458 (Dec. 11, 1978), the Board recommended to the BIA that the Andrade rule should be applied nationwide. Without committing itself, the Board in an unreported order dated January 5, 1979, remanded the case to the INS for reconsideration in light of the new Service position. 56 Interpreter Releases 12 (1979). Both the Service and counsel sought reconsideration, urging the Board to overrule its prior precedents to the contrary (which are binding on the Service) and come out with a new precedent decision accepting the Andrade formulation. In the interim, another court in an unpublished opinion had endorsed Andrade. Hyppolite v. Sweeney, Civ. No. 77-1855 (S.D. Fla. Jan. 6, 1979), reported in 56 Interpreter Releases 62 (1979). The Board's response was its published precedent decisions in In re Moreira [Moreira I], I.D. No. 2792 (1979), and In re Moreira [Moreira II], I.D. No. 2792 (1980), in which, far from accepting the INS position, it placed a new gloss on Andrade. The Service codified the new Moreira standards in an amendment to its regulations, 8 C.F.R. § 204.2(c)(3), (5), 45 Fed. Reg. 41392 (1980). Since then, however, the first court of appeals to consider the issue has rejected the Board's new gloss on the meaning of "stepchild" in Moreira I and has endorsed the holdings in Andrade and Hyppolite. See Palmer v. Reddy, 622 F.2d 463 (9th Cir. 1980). The Board at first applied that ruling only in cases arising in the Ninth Circuit, In re Bonnette, I.D. No. 2840 (1980), but has now accepted it nationwide, In re McMillan, I.D. No. 2844 (1981).
problems engendered in both its enforcement and service functions. The study now in process by the Select Commission should yield some meaningful policy guidelines for congressional consideration. But unless Congress provides sufficient funding to carry out the policies seemingly manifest in its legislation, it is a fair inference that Congress does not really intend those policies to be carried out. Effective administration of the laws, whether by way of enforcement or the delivery of services, cannot thrive under such conditions.

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

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

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

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

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

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

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

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

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

\textsuperscript{19} See 8 C.F.R. § 103.1(m) (1980).

\textsuperscript{20} See 8 C.F.R. § 3.1(b) (1980).

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

\textsuperscript{22} See, e.g., 8 C.F.R. § 244.2 (1980).

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

\textsuperscript{24} U.S. COMMISSION ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR 41 (1980) (Bruce D. Beaudin, consultant).
The Immigration Judges

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

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

It was not until the enactment of the Administrative Procedure Act in 194630 and the Supreme Court's 1950 decision in Wong Yang Sung v. McGrath,31 however, that the need for truly independent hearing officers was brought squarely home to the Service. In Wong Yang Sung, the Court held that the Administra-
ative Procedure Act's hearing provisions applied to deportation proceedings and that the Service was not exempt from the requirement that such hearings be conducted by Administrative Procedure Act hearing examiners. The Service succeeded in stampeding Congress into exempting exclusion and deportation proceedings from the Administrative Procedure Act's hearings requirements by insisting that effective immigration law enforcement would otherwise break down. However, the lesson of *Wong Yang Sung*, that the Constitution requires a hearing before a tribunal "which meets at least currently prevailing standards of impartiality," had been learned. When the Immigration and Nationality Act was enacted in 1952, its deportation hearing provisions contained sufficient built-in protections to be ultimately sustained as providing the functional equivalent of the Administrative Procedure Act safeguards.

The immigration judges are now all lawyers selected through civil service procedures from among candidates who either have or acquire civil service status. They are now, and have been for years, classified for pay purposes in grade GS-15, with a theoretical salary range of $44,547 to $57,912. They have endeavored, with some success, to achieve the added stature and trappings of their role models in the judicial branch of government. They wear robes, refer to their tribunal as the "immigration court," and are in theory relatively free from undue influence by the District Directors and other enforcement officials in their decision-making.

When it comes to the realities, however, the immigration judges are far from free. Despite their semi-autonomous status, they are directly dependent on the District Directors, and indirectly on the Regional Commissioners, for office space, hearing facilities, equipment, supplies, clerical and transcription support, interpreter service, travel authorization and reimbursement, library and research facilities, calendars, maintenance of case files, and other services. In determining what portion of their limited resources they can afford to allocate to the needs of the immigration judges, the District Directors are subject to a number of influences which tend to depreciate the importance of those needs.

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

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32. *Id.* at 50.
34. The range is theoretical because Congress has imposed a flat limit of $50,112.50.
ers whose demands in the name of due process only obstruct the Service mission. Thus, a memorandum by the Association of Immigration Directors of its December 14, 1977 conference with then INS Commissioner Castillo contemptuously refers to the robes of the immigration judges as the “black nightgowns they frequently wear when conducting hearings,” and states:

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

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

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

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

36. Id. at 2-3.
37. Id. at 3-4.
“when one of the parties in each case controls the court system.” He further asserted that “[t]he strong desire to influence the judges directly or indirectly is repugnantly clear.”

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

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

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

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

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

38. Id. at 4.


40. Summary decisions on printed form orders are authorized in some instances by 8 C.F.R. § 242.18(b) (1980).
the appeal, delay in transcribing the hearing necessarily causes delay in the ultimate consideration and disposition of the appeal. As far back as 1972, the BIA noted the acute clerical shortage in some INS districts and the opportunities available to obtain substantial delay in frivolous cases by the simple expedient of filing an ingeniously contrived notice of appeal. The Board suggested administrative shortcuts, including the possibility of dispensing with the transcript in appropriate cases. When there is a dispute between the immigration judge and the District Director as to whether a record on appeal should be transcribed, the District Director's control of the clerical resources determines the result, at least until the Board intervenes. But even in the absence of an appeal, clerical help is needed to transcribe an immigration judge's oral opinion or to type his written decision.

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

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

41. 8 C.F.R. § 3.6 (1980).
43. See, e.g., In re Holani, L.D. No. 2804 (1980), in which an appeal from an immigration judge's exclusion order was frustrated for over a year by the District Director's refusal to accede to the immigration judge's request for transcription of the hearing and his oral decision. The BIA remanded for completion of the record without deciding the merits.
44. 8 C.F.R. 103.1(f) (1980).
The Board of Immigration Appeals

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

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


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

48. In Accardi v. Shaughnessy, 347 U.S. 260 (1954), the Court held that under the regulations the Attorney General cannot dictate the actions of the BIA. Following that decision, the Attorney General, in Order 45-34 of April 26, 1954, directed the Board and all other subordinates of the Attorney General to exercise their own independent judgment in deciding cases, and to exercise discretion "on the basis of their own understanding and conscience directed by the facts of each individual case, uninfluenced by any extraneous statements by persons official or unofficial." 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE 1-79
Apart from its lack of statutory recognition, a number of additional disadvantages inherent in the Board's present posture have recently come to the fore. These must be seriously addressed in any critical appraisal of the Board. For instance, no longer do the majority of Board cases originate on the eastern seaboard. The center of gravity has shifted sharply. Immigration cases now spring up in profusion all over the country, and immigration practitioners may now be found not only in the large centers of population on both coasts but also in the Midwest. The opportunity for ready access to the Board for oral argument on the part of practitioners outside the Washington, D.C. area is becoming a real need which the Board, as now constituted, cannot fill.

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

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

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

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

has consistently held\(^5\) that it is bound to apply the rule of law laid down by the court in future cases arising within the territorial jurisdiction of that court. As issues of this nature proliferate, we are being increasingly confronted with situations in which the Board applies one rule in one geographical area and another rule in the rest of the country.\(^2\)

**Judicial Review**

In recent years, the availability, form, and scope of judicial review have played an increasingly important role in the direction of immigration law enforcement. Not only do the courts' developing concepts of due process affect immigration procedures,\(^3\) their construction of the substantive provisions of the statutes themselves has had a marked effect on the direction the law has taken.\(^4\)

Because judicial review provides a ready avenue of additional delay, the Immigration and Nationality Act was amended in 1961 to add section 106(a) providing a statutory form for review of final deportation orders. This provision was designed to streamline the mechanics of review by eliminating access to the district courts altogether. Petitions for review are now filed directly in the courts of appeals. But not all BIA decisions are thus reviewable. In deportation cases, habeas corpus in the district court is still preserved for the alien under official restraint,\(^5\) and for aliens ordered excluded it is the sole remedy.\(^6\) Moreover, Board deci-

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


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

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

\(^{54}\) E.g., Francis v. INS, 532 F.2d 268 (2d Cir. 1976).

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

\(^{56}\) Immigration and Nationality Act § 106(b), 8 U.S.C. § 1105a(b) (1976).
sions on visa petitions, not being final orders of deportation, are still reviewable in the district courts in actions for declaratory judgments. So also are determinations affecting deportability made outside the deportation proceedings before the immigration judge.

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

Need for a Change

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

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

**Some Alternatives**

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

**The Administrative Procedure Act**

One suggested solution would be to amend the Immigration

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\(^{61}\) As one commentator aptly put it:

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

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

A New Independent Statutory Agency

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

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

A New Statutory Immigration Court

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

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

The appellate division of the new court could perform all the appellate functions now committed to the BIA and would have many additional advantages. For example, it could determine
constitutional issues, which the BIA may not do.\textsuperscript{62} With adequate staffing, it could permit oral argument in all parts of the country before roving panels of the court. Having nationwide jurisdiction, it could apply its decisions uniformly all over the country. If its decisions were made subject to further review only by the United States Supreme Court on certiorari, this would not only eliminate an additional layer of review but would close the door to different rules being applied in different parts of the country as a result of conflicting holdings in the courts of appeals.

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

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

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


\textsuperscript{63} The bill is modeled after, and elaborates upon, one drafted by Peter Levinson and submitted to the Select Commission staff in an unpublished memorandum dated August 18, 1980. A much more detailed and intricate draft bill had been submitted on behalf of the organization of immigration judges.
tions not renewable in trial-type proceedings before the trial judges of the new court, could be made directly appealable to the court's appellate division. The naturalization function, now reposed in the United States district courts and selected state courts, could be transferred to the trial division.

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

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

UNITED STATES IMMIGRATION COURT

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

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

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

Section 4. Rules of court. The appellate division shall promulgate rules of court governing practice and procedure in the appellate division and in the trial division. The rules shall be designed to accord all parties to proceedings in the trial division and in the appellate division a fair and prompt hearing and determination. To this end, neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure shall apply to proceedings in the United States Immigration Court. However, selected provisions of those Rules may be adapted and incorporated, as deemed appropriate, in the rules of the United States Immigration Court.
The rules shall contain provisions for the representation of non-government parties in proceedings before the court by counsel of their own choice without expense to the government, as well as by qualified nonattorneys who appear without fee or as accredited representatives of nonprofit voluntary agencies of a religious, charitable, social service or similar nature recognized by the court as having at its disposal adequate knowledge, information and experience.

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

Section 6. Appellate division jurisdiction. The appellate division shall have jurisdiction to hear and determine appeals from final decisions of judges of the trial division. The appellate division shall also have jurisdiction to hear and determine appeals from final decisions of the Immigration and Naturalization Service in the following types of proceedings: (1) administrative fines and penalties under sections 231, 233, 237, 239, 243, 251, 254, 255, 256, 271, 272, and 273 of the Immigration and Nationality Act; (2) applications for the exercise of the discretionary authority contained in section 212(c) and section 212(d)(3) of the Immigration and Nationality Act; and (3) applications for classification as immediate relatives under section 201(b) of the Immigration and Nationality Act and for preference classification under section 203(a) of the Immigration and Nationality Act. The appellate division shall also have power to direct that any determination of a judge of the trial division or of the Immigration and Naturaliza-
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Section 7. Trial division administration. The chief judge of the trial division shall have administrative responsibility for the proper functioning of the trial division and shall have power to appoint such administrative assistants, attorneys, clerks and other personnel as may be needed for that purpose. In accordance with the rules of the court, the chief judge of the trial division may designate any trial division judge to hear and decide any case falling within the jurisdiction of the trial division.

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

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

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