Constitutional and Policy Considerations of an Article I Immigration Court

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

Before examining the wisdom of establishing a specialized im-

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

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

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

THE LIMITED SCOPE OF MR. ROBERTS' PROPOSAL

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

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

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

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

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

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

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

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

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

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

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

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

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

The Merits of a Specialized Immigration Court

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

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

Although rather byzantine and convoluted, immigration and nationality law requires no scientific or highly technical skill on the part of judges and is not extraordinarily complex. Indeed, there exist other areas of law, such as trade regulation, which require considerable knowledge of economics and other non-legal matters, but have not been singled out for specialized court treatment despite respectable proposals to do so. Furthermore, unlike fields for which other specialized courts have been created, such as patent law, there is no reason why the immigration law need be as complex as it is today. It is hoped that proposals to revise the Immigration and Nationality Act will result in a significant simplifi-

9. *See* 1A C. GORDON & H. ROSENFIELD, *supra* note 7, at § 5.10f.

10. Specialized courts currently operating include: the courts of the District of Columbia; the territorial courts of Puerto Rico, the Canal Zone, Guam, and the Virgin Islands; the Court of Claims; the Customs Court; the Court of Customs and Patent Appeals; the Tax Court and the Bankruptcy Court. *See* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 47-49 (2d ed. 1973). In addition, Congress created a number of specialized courts which no longer exist. These included: the territorial courts, the Court of Private Land Claims, the Choctaw and Chickasaw Citizenship Court, the Commerce Court, the consular courts, the United States Court for China, and the Emergency Court of Appeals. *See* 1 MOORE'S FEDERAL PRACTICE ¶ 0.3 (2d ed. 1980).

11. Glidden Co. v. Zdanok, 370 U.S. 530 (1962).

12. *Id.* at 560.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20. *Id.*

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

THE CONSTITUTIONALITY OF THE PROPOSED ARTICLE I COURT

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

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

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

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

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

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

An Overview of Article III, Section 1

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

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

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

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

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

24. U.S. CONST. art. III, § 1.

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

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

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

As set forth below,[29] the Court then indicated that Congress may, in certain circumstances, establish courts under article I of the Constitution[30] without affording judges the protections of arti-

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26. U.S. CONST. art. III, § 2.
27. 411 U.S. 389 (1973).
28. *Id.* at 407.
29. *See* pp. 13-15 *infra*.
30. Article I, § 8 delegates to Congress the powers, *inter alia*:

> To establish an uniform Rule of Naturalization and uniform Laws on the subject of Bankruptcies throughout the United States;
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> . . . .
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> To constitute Tribunals inferior to the supreme Court;
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> . . . .
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> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And
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> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

U.S. CONST. art. I, § 8.

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

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

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

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

The "Particularized Needs" Approach of Palmore

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

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

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

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

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

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

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

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

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

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

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

36. American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828) (Marshall, C.J.).
37. United States v. Coe, 155 U.S. 76 (1894).
38. Stephens v. Cherokee Nation, 174 U.S. 445 (1899).
39. Downes v. Bidwell, 182 U.S. 244 (1901).
40. *In re* Ross, 140 U.S. 453 (1891).
41. 370 U.S. 530, 547 (1962).
42. *See* note 34 *supra*.

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

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

The "Inherently Judicial" Approach of Bakelite

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

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

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

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

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

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

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

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

deem proper.[46]

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

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

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

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

46. *Id.* at 284.
47. *Id.*
48. 279 U.S. 438 (1929).
49. 289 U.S. 553 (1933).
50. 279 U.S. at 451.
51. *Id.* at 453.
52. *See, e.g.*, 289 U.S. at 579.
53. Crowell v. Benson, 285 U.S. 22, 51 (1932).

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

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

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

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

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

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

Id. at n.21 (citations omitted).

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

same extent as legislative courts."[58]

Desirability of an Article III Court

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

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

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

Id. at 580-81.

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

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

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

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

Shortcomings of the Proposed Statute Creating an Immigration Court

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

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

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

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

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

62. *See* note 18 *supra*.

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

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

CONCLUSION

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

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

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

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