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CREATING AN ARTICLE I IMMIGRATION COURT

*Rebecca Baibak**

I. INTRODUCTION

“[O]ur Constitution unambiguously enunciates a fundamental principle – that the ‘judicial Power of the United States’ must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence.”¹ Despite this fundamental principle, today noncitizens are routinely denied independent adjudication because the immigration courts and the Board of Immigration Appeals (“BIA”) are housed in the Department of Justice (“DOJ”), which is directly under the Attorney General’s control.² The Attorney General has exercised this control by selecting only immigration adjudicators who agree with his or her political opinions³ and by terminating judges who do not agree with those political beliefs.⁴ These displays of power lurk in the back of immigration adjudicators’ minds when making decisions. As a result, noncitizens are routinely denied their constitutional right to an independent judiciary.⁵

This comment explores some of the many problems with the current immigration adjudication system and advocates that Congress convert the immigration courts and the BIA into Article I courts to provide noncitizens a truly independent judiciary. Section II, Parts A and B examine the current immigration adjudication system and some of its many problems. Section II, Parts C and D review the line of Supreme Court decisions beginning with *Northern Pipeline*, which assessed the constitutionality of Article I courts, and outlined the structure of a current Article I court: the U.S. bankruptcy court. Next, Section III, Part A argues that Congress should create Article I immigration courts that, like bankruptcy courts, have a trial and appellate division. Last, Section III, Part B applies the *Northern Pipeline* line of decisions and claims, first, that federal courts should have greater ability to review immigration decisions and, second, that the standard of review in federal

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1. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60 (1982).

2. *About the Office*, THE UNITED STATES DEPARTMENT OF JUSTICE (Feb. 9, 2017), <https://www.justice.gov/eoir/about-office>.

3. See Stephen H. Legomsky, *Fortieth Annual Administrative Law Issue: Immigration Law and Adjudication: Restructuring Immigration Adjudication*, 59 DUKE L. J. 1635, 1665-1666 (2010).

4. *Id.* at 1669.

5. Noncitizens are entitled to due process because the Due Process Clause applies to all “person[s]” regardless of their immigration status. *Japanese Immigrant Case*, 189 U.S. 86 (1903).

court should not be deferential to the Article I immigration courts.

II. BACKGROUND

Before discussing possible reforms to the immigration adjudication system, one must understand the structure of the current arrangement, the problems this structure creates, and the constitutionality of legislative courts. Part A discusses the organization of the immigration adjudication system by following the removal process of a noncitizen who asserts asylum as a defense.⁶ Next, Part B explores some of the current immigration court system's problems including the inherent difficulty of immigration cases, disparities in outcomes among immigration judges, the mounting backlog on the immigration docket, and, most importantly, the Attorney General's control over the immigration adjudication system. Part C examines recent Supreme Court decisions that review the constitutionality of legislative courts. Last, Part D provides an overview of the bankruptcy courts' structure, an existing legislative court.

A. The Structure of the Current Immigration Adjudication System

The removal process begins when the Department of Homeland Security ("DHS") serves a noncitizen a notice to appear before an immigration court.⁷ The DHS is a cabinet-level executive agency that enforces immigration laws and provides U.S. immigration benefit services.⁸

After being served, the noncitizen appears before an immigration court. Immigration courts are trial-level courts housed in the DOJ, which sit in fifty-seven locations in twenty-eight states.⁹ Even though jurisdiction of the immigration courts spans a wide array of immigration related matters, the vast majority of their cases are removal

6. The comment follows an asylum case because asylum is one of the few types of cases that can be appealed all the way up to the federal circuit courts. AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION, JUDICIAL REVIEW BY CIRCUIT COURTS: REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 4-9 (2010), http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/full_report_part4.authcheckdam.pdf, [hereinafter JUDICIAL REVIEW BY CIRCUIT COURTS].

7. Legomsky, *supra* note 3, at 1641.

8. AMERICAN BAR ASSOCIATION: COMMISSION ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 19 (Executive Summary, 2010), http://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_executive_summary.authcheckdam.pdf, [hereinafter REFORMING THE IMMIGRATION SYSTEM].

9. *Id.* at 27.

proceedings.¹⁰ Whilst under the jurisdiction of the immigration court, the noncitizen may seek relief in the form of asylum or withholding of removal.¹¹ Alternatively, a noncitizen who is not in a removal proceeding can assert an affirmative asylum claim by filing an asylum application with the U.S. Citizenship and Immigration Services (“USCIS”), which is a component of the DHS.¹² If the application is granted, the applicant is eligible for permanent resident status.¹³ But, if the application is denied, the asylum applicant is referred to an immigration court for removal and the noncitizen can assert asylum as a defense.¹⁴ Then an immigration judge hears the asylum defense and renders a decision.¹⁵ If the immigration judge finds the noncitizen has a valid asylum defense, then the judge grants asylum.¹⁶

Once the final order is issued, the opposing party may appeal the decision to the BIA,¹⁷ a seventeen-member appellate-level body¹⁸ housed in the DOJ.¹⁹ An appeal to the BIA stays removal orders.²⁰ The BIA conducts de novo review of legal issues and reviews facts determined by the immigration court under the highly deferential “clearly erroneous” standard.²¹ The BIA may choose to reject the asylum claim, remand with instructions, or grant asylum.²²

In an increasingly limited set of circumstances, the noncitizen may appeal the BIA decision to a federal court of appeals.²³ The noncitizen’s ability to appeal to federal courts has dramatically changed in recent years.²⁴ Historically, Article III courts could hear immigration cases under their habeas corpus jurisdiction.²⁵ The standard of review for facts in a habeas petition was “substantial evidence,” meaning the decision was only overturned if the facts required a contrary result.²⁶

10. *Id.*

11. Legomsky, *supra* note 3, at 1642.

12. *See, e.g.*, REFORMING THE IMMIGRATION SYSTEM, *supra* note 8, at 19.

13. Leonard Birdsong, *Reforming the Immigration Courts of the United States: Why is There No Will to Make It an Article I Court?*, 19 BARRY L. REV. 17, 23 (2013).

14. Legomsky, *supra* note 3, at 1642.

15. *Id.*

16. *See* Birdsong, *supra* note 13, at 23.

17. Legomsky, *supra* note 3, at 1643.

18. Christine Lockhart Poarch, *Immigration Court Reform: Congress, Heed the Call*, FED. LAW., Oct.-Nov. 2016, at 10.

19. *About the Office*, *supra* note 2.

20. Legomsky, *supra* note 3, at 1643.

21. Lawrence Baum, *Fortieth Annual Administrative Law Issue: Immigration Law and Adjudication: Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L. J. 1501, 1513-14 (2010).

22. Birdsong, *supra* note 13, at 25-26.

23. Legomsky, *supra* note 3, at 1643-44.

24. *See, e.g.*, JUDICIAL REVIEW BY CIRCUIT COURTS, *supra* note 6, at 4-5 – 4-9.

25. *Id.* at 4-5.

26. *Id.* at 4-6.

Discretionary decisions were reviewed under the abuse-of-discretion standard and legal conclusions were reviewed *de novo*.²⁷ However, in 1996, Congress passed two amendments to the Immigration and Nationality Act (“INA”): the Antiterrorism and Effective Death Penalty Act (“AEDPA”) and the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”).²⁸ Together the amendments bar federal review of most discretionary decisions and crime-related removal orders.²⁹ Further, in 2005 the REAL ID Act eliminated habeas corpus review.³⁰ These restrictions are problematic because the vast majority of noncitizens in removal proceedings apply for discretionary relief³¹ and often the distinction between a legal question about a statute (which is reviewable under the amendments) and discretionary use of power granted in accordance with a statute (which is not reviewable) is unclear.³² Today, asylum is the only discretionary issue that is reviewable by the federal courts of appeals.³³ What is more, the amendments created a complex layering of procedural rules and exceptions and, as a result, the federal courts of appeals have developed a “convoluted labyrinth of case law construing the exceptions,” which some argue waste the noncitizen and the court’s time and money.³⁴

If a case is fortunate enough make it to the federal courts, the court of appeal’s ability to review the case is limited. By stripping habeas corpus jurisdiction and restricting remand, Congress has virtually eliminated the court of appeal’s ability to order fact finding.³⁵ Indeed, when reviewing BIA decisions, the federal courts of appeals must decide “only on the administrative record.”³⁶ According to the INA, “[t]he administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.”³⁷ The inability to remand for further fact finding is particularly problematic in asylum and torture cases because country conditions can change rapidly so by the time the case reaches the court of appeals three to four years after the case began the administrative record can be vastly inaccurate.³⁸

27. *Id.*

28. *Id.* at 4-3.

29. Legomsky, *supra* note 3, at 1696.

30. JUDICIAL REVIEW BY CIRCUIT COURTS, *supra* note 6, at 4-8.

31. Legomsky, *supra* note 3, at 1696.

32. JUDICIAL REVIEW BY CIRCUIT COURTS, *supra* note 6, at 4-10.

33. *Id.* at 4-9.

34. *Id.* at 4-3.

35. *Id.* at 4-12. *Lendo v. Gonzales*, 493 F.3d 439, 443 n.3 (4th Cir. 2007), *Gebremaria v. Ashcroft*, 378 F.3d 734, 737 (8th Cir. 2004), and *Wan Ping Lin v. Mukasey*, 303 Fed. Appx. 465, 468 (9th Cir. 2008) are all examples of cases where the court of appeals noted that the outcome would have been different if they could remand for further fact-findings.

36. 8 U.S.C. §1252(b)(4)(A) (2017).

37. 8 U.S.C. §1252(b)(4)(B) (2017).

38. JUDICIAL REVIEW BY CIRCUIT COURTS, *supra* note 6, at 4-15. To deal with this problem

Furthermore, unlike appeal to the BIA, appeal to the courts of appeals does not stay removal orders, so a noncitizen can be removed while appeal is pending.³⁹ After reviewing the BIA decision, the courts of appeals may remand the case to the BIA with instructions or can reject the BIA ruling, which has resulted in a several circuit splits.⁴⁰

B. Problems with the Immigration Courts and the BIA

The first problem with the immigration adjudication system is that the current scheme exacerbates the already inherently difficult nature of immigration cases. Immigration cases are fact intensive⁴¹ and, in asylum cases, courts are often unable to ascertain the facts with certainty and must rely on the asylum seeker's testimony.⁴² However, the noncitizen may not be able to communicate well due to language barriers and inexperience with the law.⁴³ Judges often have to work with translators and must go over the facts several times to make sure the judge understands the noncitizen's testimony.⁴⁴ These inherent difficulties are made worse by immigration law's often-ambiguous legal standards⁴⁵ and the noncitizen's pro se status.⁴⁶ In addition to ascertaining what happened in the past, an asylum decision requires the judge to predict what would happen if the asylum seeker were deported.⁴⁷ Immigration judges must use their speculations about the past and future to make a life-altering dichotomous decision: the judge either orders removal or does not.⁴⁸ In our present system, these are the only two options and the judge does not have an opportunity to reconsider the decision once the noncitizen is deported.⁴⁹

When a judge struggles to determine an accurate legal conclusion, the judges' preferences are more likely to affect the final decision.⁵⁰ Currently, there are sharp disparities in the rate individual immigration

some courts of appeals take judicial notice but this option is restricted by the Rules of Evidence, therefore a legislative solution that restores the authority to remand is preferable. *Id.* at 16.

39. Legomsky, *supra* note 3, at 1643.

40. Birdsong, *supra* note 13, at 26.

41. *E.g.*, Legomsky, *supra* note 3, at 1654; Russell R. Wheeler, *Fortieth Annual Administrative Law Issue: Immigration Law and Adjudication: Practical Impediments to Structural Reform and the Promise of Third Branch Analytic Methods: A Reply to Professors Baum and Legomsky*, 59 DUKE L. J. 1847, 1858 (2010).

42. Baum, *supra* note 21, at 1510.

43. *Id.*

44. Legomsky, *supra* note 3, at 1654.

45. Baum, *supra* note 21, at 1509.

46. *Id.* at 1510.

47. *Id.*

48. *Id.* at 1511.

49. *Id.*

50. Baum, *supra* note 21, at 1511.

judges grant asylum.⁵¹ According to one study, a Colombian asylum applicant who appears before the immigration court in Miami has a five percent chance of being granted asylum under one judge and an eighty-eight percent chance of being granted asylum before another judge in the same court.⁵²

In their *Asylum Study*, Professors Ramji-Nogales, Schoenholtz, and Schrag of Georgetown Law School found three variables that impact the rate at which judges grant asylum.⁵³ First, whether the asylum seeker has legal counsel is the single most important factor affecting the outcome of the asylum seeker's case.⁵⁴ Under the INA, noncitizens may obtain representation "at no expense to the government"⁵⁵ but they do not have a Sixth Amendment right to counsel.⁵⁶ Noncitizens can only get court appointed counsel if they prove assistance is necessary to provide "fundamental fairness."⁵⁷ This high standard has led to the denial of court appointed counsel in all published cases so far.⁵⁸ As a result, the overwhelming majority of noncitizens are not represented.⁵⁹

Second, the immigration judge's gender significantly impacts the rate the judge grants asylum.⁶⁰ Female judges grant asylum 53.8% of the time, while their male colleagues grant asylum at a rate of only 37.3%.⁶¹ This disparity may be because female judges are less apt to have immigration enforcement backgrounds.⁶² Most male immigration judges served as trial attorneys prosecuting immigration cases for the DHS or the former Immigration and Naturalization Service ("INS").⁶³ The more time the judge worked for the DHS or INS the more likely the judge's decisions favor the U.S.⁶⁴ This is because lawyers who work in immigration enforcement are trained to develop a "law enforcement mindset" and deny entrance or order deportation when the lawyer doubts the validity of the noncitizen's claim.⁶⁵

51. REFORMING THE IMMIGRATION SYSTEM, *supra* note 8, at 27.

52. *Id.*

53. Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340-42 (2007) [hereinafter *Asylum Study*].

54. *Id.* at 340.

55. 8 U.S.C. § 1362 (2017).

56. *See* REFORMING THE IMMIGRATION SYSTEM, *supra* note 8, at 40.

57. *Id.*

58. *Id.*

59. *E.g.*, Dana Leigh Marks, *Let Immigration Judges be judges*, THE HILL CONGRESS BLOG (May 9, 2013, 8:03 PM), <http://thehill.com/blogs/congress-blog/judicial/298875-let-immigration-judges-be-judges>.

60. *Asylum Study*, *supra* note 53, at 342.

61. *Id.*

62. Birdsong, *supra* note 13, at 33.

63. *See* Baum, *supra* note 21, at 1529.

64. *Id.*

65. Birdsong, *supra* note 13, at 34.

Last, *Asylum Study* found that asylum applicants with dependents are more likely to be granted asylum.⁶⁶

A further problem with the current immigration adjudication system is its mounting backlog.⁶⁷ From 2013 to 2016, the surge at the U.S.-Mexico border increased the immigration docket by forty-six percent.⁶⁸ In January 2016, the immigration court's docket had 475,000 cases divided among 250 judges.⁶⁹ Cases pending before certain judges in 2016 were scheduled for 2023.⁷⁰ As of October 2016, the BIA's docket has over 34,000 cases.⁷¹

This backlog is a consequence of amplified immigration enforcement. In recent years, the DHS has increased apprehending and removing all criminal noncitizens as well as issuing notices to appear to noncitizens clearly eligible for benefits but who are "out of status."⁷² While Congress allocated additional funds to implement these growing enforcement measures, it did not allocate the resources necessary to adjudicate the resulting cases.⁷³ Only recently, under the Trump administration, has there been an increase in immigration judges.⁷⁴ In addition to inadequate funding, immigration courts have inadequate support staff.⁷⁵ On average, there is one clerk for every four immigration judges and immigration judges do not have bailiffs.⁷⁶ Moreover, the growing number of proceedings pending before the immigration courts has created a massive immigrant detention system that is costly and difficult to manage.⁷⁷

In the face of this backlog, simply processing cases can become many judges' primary goal.⁷⁸ Judges with heavy caseloads often adopt strategies to process decisions, such as a preference to affirm the lower court (which also made its decision under great pressure).⁷⁹ Furthermore, the BIA is incentivized to affirm cases because affirmations do not require written opinions and reversals do.⁸⁰

66. *Asylum Study*, *supra* note 53, at 341.

67. Poarch, *supra* note 18, at 10.

68. *Id.* at 11.

69. *Id.*

70. *Id.*

71. *Id.*

72. REFORMING THE IMMIGRATION SYSTEM, *supra* note 8, at 20.

73. Tara Lundstrom, *Lasting Lessons from the Border Surge: It's Time We Fund an Independent Immigration Court System*, FED. LAW., Jan.-Feb. 2015, at 3.

74. Mica Rosenberg & Kristina Cooke, *Immigration judges exempt from Trump's federal hiring freeze*, REUTERS, March 3, 2017.

75. *E.g.*, Legomsky, *supra* note 3, at 1652.

76. *Id.*

77. REFORMING THE IMMIGRATION SYSTEM, *supra* note 8, at 25.

78. Baum, *supra* note 21, at 1518.

79. *Id.*

80. *Id.* at 1519.

The enormous caseload and the inherent difficulty of immigration cases causes immigration judges to burnout quickly.⁸¹ One practicing attorney, explains:

[O]ur immigration laws are comparable in complexity to our tax laws. Immigration judges . . . are responsible for knowing the political, social, and economic conditions in countries spanning the globe . . . They must do this while hearing cases for 36 hours per week from the bench and with only a fraction of a law clerk's time. And the nature of their work—listening to heart-wrenching stories of persecution and torture every day—takes its toll . . .⁸²

Despite the seriousness of the aforementioned problems, the Attorney General's control over immigration adjudication is by far the most concerning characteristic of the system. Both the immigration judges and the BIA members are directly under the Attorney General's control.⁸³ Before 1983, immigration courts and the BIA were part of the INS.⁸⁴ In 1983, in an effort to remove the immigration courts and the BIA from immigration enforcement, the courts were placed in the newly created Executive Office of Immigration Review ("EOIR").⁸⁵ While this restructuring insulates the adjudicators from the INS, both bodies remain in the DOJ, which answers to the Attorney General.⁸⁶

The Attorney General exerts pervasive power over immigration judges. The Attorney General can directly appoint immigration judges.⁸⁷ Once hired, the judges are considered DOJ staff attorneys with a duty of loyalty to the DOJ.⁸⁸ The immigration judges do not have fixed terms and, since they lack protection against removal without cause, they are subject to discretionary removal by the Attorney General.⁸⁹ As a result, the immigration judges can potentially serve a life term or be removed because the Attorney General does not agree with their decisions.⁹⁰

Similarly, BIA members are appointed by the Attorney General and serve under his or her discretion.⁹¹ BIA decisions may be reviewed *de novo* by the Attorney General, who may vacate or substitute the BIA

81. Legomsky, *supra* note 3, at 1655.

82. Lundstrom, *supra* note 73, at 4.

83. *E.g.*, REFORMING THE IMMIGRATION SYSTEM, *supra* note 8, at 27, 34.

84. Birdsong, *supra* note 13, at 29.

85. Legomsky, *supra* note 3, at 1667.

86. *Id.*

87. Birdsong, *supra* note 13, at 29.

88. REFORMING THE IMMIGRATION SYSTEM, *supra* note 8, at 44.

89. *Id.* at 29.

90. *Id.* at 29-30.

91. *Id.* at 34.

decisions for his or her own.⁹² Due to this oversight, the Attorney General can politicize the BIA by directly firing members or indirectly threatening to reverse their opinions.⁹³ One practicing immigration attorney declared, “[i]f one draws the curtain back on first impressions, the attorney general sits as the great and powerful Oz at the helm of the entire judicial enterprise.”⁹⁴

The Attorney General’s control over the immigration judges and the BIA has resulted in several political scandals in recent years. During an investigation of the hiring process of immigration courts, Monica Goodling, principal deputy director of public affairs under Attorney General Ashcroft, confirmed that the immigration judges hired between 2004-2006 were appointed based on their conservative political views.⁹⁵ In response to the scandal and circuit criticism, the Attorney General issued a twenty-two-point plan to improve the immigration courts.⁹⁶ Fifteen of the twenty-two reforms were enacted including some funding to hire additional judges and support staff, the installation of digital recording in the courts, and training for all immigration judges.⁹⁷

In 1999 and 2002, in response to the BIA’s mounting backlog, the Attorney General implemented a series of BIA reforms.⁹⁸ In 2002, the BIA’s standard of review was changed: the BIA could no longer conduct *de novo* review of the facts but instead had to review facts under the “clearly erroneous” standard.⁹⁹ This standard inhibits the BIA’s ability to correct mistakes made by the immigration judges (which are increasingly difficult to avoid given the judge’s crushing caseload) and obstructs their ability to check against disparities between individual immigration judges.¹⁰⁰

Additionally, prior to 1999, cases before the BIA were heard by a minimum of three members.¹⁰¹ In 1999, a single member of the BIA was empowered to review decisions and issue Affirmances Without Opinions (“AWO”s)¹⁰² in a limited category of cases.¹⁰³ In 2002, this category was greatly expanded.¹⁰⁴ Today, the vast majority of cases

92. *Id.*

93. REFORMING THE IMMIGRATION SYSTEM, *supra* note 8, at 34.

94. Poarch, *supra* note 18, at 11.

95. Legomsky, *supra* note 3, at 1665-66.

96. Birdsong, *supra* note 13, at 37.

97. *Id.* at 37-38.

98. REFORMING THE IMMIGRATION SYSTEM, *supra* note 8, at 31.

99. *Id.*

100. *Id.* at 32.

101. *Id.* at 31.

102. AWOs are final decisions to affirm the immigration judge that are not accompanied by a written opinion.

103. REFORMING THE IMMIGRATION SYSTEM, *supra* note 8, at 31.

104. *See id.* at 31-32.

before the BIA are reviewed by single-members¹⁰⁵ and many final decisions are either AWOs or short, cursory opinions.¹⁰⁶ Single-member review results in less precedent (single-member decisions are not precedential), precludes dissent and the interplay of legal minds, and renders the BIA less likely to catch errors by the immigration courts.¹⁰⁷ Further, the lack of detailed reasoning denies the noncitizen and his or her counsel a sufficient explanation for the BIA decision.¹⁰⁸ As a result, noncitizens have less confidence in the BIA rulings and are more likely to appeal to the federal courts of appeals.¹⁰⁹ In fact, it is widely observed that the number of immigration appeals to the federal courts has dramatically increased since 2002.¹¹⁰ For example, in 2008, thirty percent of the BIA's decisions were appealed and comprise seventeen percent of circuit courts' caseload.¹¹¹ This increase in appeals particularly burdens the Ninth and Second Circuits.¹¹²

Perhaps the most controversial 2002 reform was Attorney General Ashcroft's decision to reduce the BIA from twenty-three to eleven members, even though the stated purpose of the 2002 reforms was to alleviate the BIA's massive backlog.¹¹³ The decision to remove twelve current BIA members was unprecedented; in the BIA's sixty-three-year history, the Attorney General had never removed a BIA member.¹¹⁴ After the Attorney General announced his decision to reduce the number of BIA members, but before declaring which member would be let go, the BIA members, fearing for their job security, rendered more decisions that favored the U.S.¹¹⁵ Their fears were not unfounded; the twelve BIA members who were eventually terminated ruled in favor of noncitizens more frequently.¹¹⁶ The number of BIA members subsequently increased and, currently, the BIA has seventeen members.¹¹⁷ The 2002 change in the BIA membership illustrates the extensive power the Attorney General exerts over the BIA and the effect of that power – pressure to rule according to the Attorney General's political agenda and termination when members do not succumb to this pressure.

105. Legomsky, *supra* note 3, at 1657.

106. REFORMING THE IMMIGRATION SYSTEM, *supra* note 8, at 32.

107. *E.g.*, REFORMING THE IMMIGRATION SYSTEM, *supra* note 8, at 32; Legomsky, *supra* note 3, at 1664.

108. REFORMING THE IMMIGRATION SYSTEM, *supra* note 8, at 32.

109. JUDICIAL REVIEW BY CIRCUIT COURTS, *supra* note 6, at 4-18.

110. *Id.* at 4-17.

111. Legomsky, *supra* note 3, at 1646.

112. *E.g.*, JUDICIAL REVIEW BY CIRCUIT COURTS, *supra* note 6, at 4-18.

113. *E.g.*, Legomsky, *supra* note 3, at 1668.

114. *Id.* at 1669.

115. *Id.*

116. *Id.*

117. Poarch, *supra* note 18, at 10.

In light of the above-mentioned issues, countless judges, attorneys, and academics advocate converting the immigration courts and the BIA into legislative courts.¹¹⁸ To evaluate this proposal, this comment first explores the constitutionality of legislative courts.

C. The Constitutionality of Article I

Article I courts, or legislative courts, are tribunals created by Congress that are not staffed with Article III judges.¹¹⁹ Congress has the power to make legislative courts under Article I, Section 8, Clause 9 of the Constitution.¹²⁰ Unlike Article III judges, legislative judges are not necessarily nominated by the President and approved by the Senate, do not have lifetime tenure, and do not have Article III salary protection.¹²¹ Examples of legislative judges include tax court judges¹²² and bankruptcy court judges.¹²³

Traditionally, there were three permissible Article I courts: territorial courts, military courts, and courts that adjudicate “public rights” disputes.¹²⁴ The “public rights” exception was created in *Murray’s Lessee*¹²⁵ and permits Congress to create legislative courts to adjudicate public rights, which were originally defined as disputes between a party and the government.¹²⁶ When deciding the constitutionality of Article I courts, the Supreme Court oscillates between a formalistic approach, which advocates for bright line rules,¹²⁷ and a functionalistic approach, which focuses on utility and often employs balancing tests.¹²⁸

In *Northern Pipeline*, Justice Brennan’s plurality opinion adopted a formalistic approach and held that, to fall within the public rights exception, the U.S. must be a party in the suit.¹²⁹ Consequently, the

118. *E.g.*, REFORMING THE IMMIGRATION SYSTEM, *supra* note 8, at 9; Marks, *supra* note 59; Lundstrom, *supra* note 73, at 5; Poarch, *supra* note 18, at 10.

119. MOORE’S MANUAL: FEDERAL PRACTICE AND PROCEDURE §1.03 (2016).

120. U.S. CONST. art. I, §8, cl. 9.

121. MOORE’S MANUAL: FEDERAL PRACTICE AND PROCEDURE §1.03 (2016). The Article III salary protections guarantee that Article III judges’ salaries cannot be diminished. *Id.*

122. *Id.*

123. *See, e.g.*, Commodity Futures Trading Com. v. Schor, 478 U.S. 833, 853 (1986).

124. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 585 (1985).

125. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67 (1982).

126. *Id.* at 67-68.

127. *See id.*

128. *See Schor*, 478 U.S. 833 (1986).

129. *N. Pipeline*, 458 U.S. at 67-68. The formalist and functionalist approaches are not necessarily sealed from one another; in *Northern Pipeline* the Court used the two approaches in the same decision. Justice Brennan pointed out functionalistic reasons why the Bankruptcy Courts were unconstitutional including the fact that the Bankruptcy Courts had the power to enter final judgments and, while appeal to a federal district court was possible, the standard of review upon appeal was “clearly erroneous,” a highly deferential standard. *Id.* at 85-86.

bankruptcy judges serving under the Bankruptcy Act of 1978 did not fall under the public rights exception because the U.S. is not a party in bankruptcy disputes.¹³⁰

Justice White dissented in *Northern Pipeline* and upheld that bankruptcy courts employing a functionalist balancing test, which included the following factors: (1) the availability of appellate review to an Article III court;¹³¹ (2) the extent to which the Article I court would undermine the authority of Article III courts;¹³² and (3) Congress' justifications for creating the Article I court.¹³³

Thereafter, Justice O'Connor embraced Justice White's formalistic approach in her majority opinions in *Thomas v. Union Carbide* and *Commodities Futures Trading Commission v. Schor*.¹³⁴ The dispute in *Thomas* involved a data-sharing arrangement between pesticide companies under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), which required all disputes about compensation between pesticide companies be decided in binding arbitration with a legislative judge.¹³⁵ The Court held that the Article I court was constitutional under the balancing approach because it had elements of public and private rights.¹³⁶ While the case did not meet the *Northern Pipeline's* public right exception (for the U.S. was not party in the dispute), it was not purely a private right because it arose under a complex regulatory scheme that did not exist at common law.¹³⁷ O'Connor balanced the three factors found in White's dissent and found that all weighed in favor of upholding the statutory scheme.¹³⁸

O'Connor further developed her functionalist approach by

130. *Id.* at 71.

131. *N. Pipeline*, 458 U.S. 50, 100 (1982).

132. *Id.* at 103.

133. *See id.* at 117. Applying these factors Justice White upheld the bankruptcy Courts because (1) the Bankruptcy Act provided appellate review to an Article III court, *id.* at 100; (2) the bankruptcy judges would not encroach on power of Article III judges since Article III judges would still hear the vast majority of cases, *id.* at 103; and (3) the bankruptcy courts provided more efficient adjudication and were specialty courts, which allowed the judges to adequately specialize in the complex area of law, *id.* at 117.

134. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985); *see also Schor*, 478 U.S. 833 (1986).

135. *Thomas*, 473 U.S. at 571-73.

136. *Id.* at 589.

137. *Id.*

138. (1) FIFRA provided appellate review to an Article III court, *id.* at 592; (2) the dispute involved a complex regulatory scheme that would not exist absent the statute, *id.* at 589; and (3) the complex regulatory scheme was logical and fair, *id.* at 590. The scheme was fair because it set a fee for using the information from another company to compensate that company. *Id.* Disputes between companies were resolved through arbitration, which takes the case out of the public eyes thereby shielding companies that deal with products that could danger public health if dealt with improperly. *See id.* Moreover, the arbitrators were independent federal agents so the decision makers were free from political influence. *Id.*

enumerating a five-part factor test in *Schor*. In that case, Schor and Mortgage Services of America brought a claim for reparations against their broker, ContiCommodity Services, Inc., before a non-Article III judge in accordance with the Commodity Futures Trading Commission (“CFTC”).¹³⁹ ContiCommodity counterclaimed for nonpayment.¹⁴⁰ To determine whether the non-Article III judge could hear the counterclaim, O'Connor laid out a balancing test that considered the following factors: (1) the origins and importance of the right that is being adjudicated; (2) the extent to which the legislative court exercises the range of jurisdiction and powers normally vested in Article III courts; (3) the extent to which the essential attributes of judicial power are reserved for Article III courts; (4) the ability of an Article III court to hear the case; and (5) Congress’s reasons for departing from adjudication in an Article III court.¹⁴¹ Applying this test, the Court determined that the adjudication of the counterclaim did not violate Article III.¹⁴² Even under this balancing approach, the majority did not discount the distinction between public and private rights, but held that it was one among many factors courts should consider.¹⁴³

Most recently, in *Stern v. Marshall*, the Supreme Court adopted a more formulistic approach and distinguished, but did not overrule, *Thomas* and *Schor*. In *Stern*, the Court was asked whether the bankruptcy court could hear a tort counterclaim.¹⁴⁴ The Supreme Court focused on the public and private rights dichotomy and held that the bankruptcy court could not hear the counterclaim because it was a state law action between two private parties.¹⁴⁵ The Court distinguished the counterclaim from the preceding cases.¹⁴⁶ Unlike the claim in *Thomas*, the counterclaim did not flow from a complex statutory scheme.¹⁴⁷ Unlike *Schor*, the counterclaim did not depend on the adjudication of a

139. *Schor*, 478 U.S. at 837.

140. *Id.* at 838.

141. *Id.* at 851.

142. (1) The counterclaim existed at common law, *id.* at 852; (2) CFTC tribunal only reviewed a particular area of law, *id.*; (3) the parties themselves chose to go to the non-Article III court, *id.* at 849; (4) Article III courts can review CFTC decisions under a highly deferential standard of review, *id.* at 853; and (5) the counterclaim jurisdiction was necessary to create a workable framework, *id.* at 855.

143. *See id.* at 853-54.

144. J. Howard did not include Vickie Lynn Marshall (Anna Nichole Smith) in his will even though they married a year before his death. *Stern v. Marshall*, 564 U.S. 462, 470 (2011). Peirce, Howard’s son, filed a complaint in the bankruptcy Court for defamation and Vickie filed a counterclaim for tortious interference with a gift. *Id.* The bankruptcy court awarded Vickie \$400 million in compensatory damages and \$25 million in punitive damages. *Id.* at 470-71. Pierce appealed arguing that Vickie’s counterclaim was outside the bankruptcy court’s jurisdiction. *Id.* at 471.

145. *Id.* at 488.

146. *Id.* at 493.

147. *Id.*

claim created by federal law.¹⁴⁸ The Court stated that even though it was more efficient to hear the counterclaim in the bankruptcy court, efficiency was not the only factor.¹⁴⁹ Despite this formalistic holding, the Supreme Court decision also had functionalistic aspects. For example, the Court acknowledged that the bankruptcy judges had limited power¹⁵⁰ and parties could appeal to an Article III court,¹⁵¹ but, the standard of review was deferential to the bankruptcy court.¹⁵²

Since many demands for immigration court reform call for an Article I court with a trial and appellate division,¹⁵³ it is beneficial to examine the structure of U.S. bankruptcy courts, which includes an optional appellate-level tribunal.

D. U.S. Bankruptcy Court

The U.S. bankruptcy courts were established in 1898.¹⁵⁴ Nearly 100 years later, in 1978, Congress converted the bankruptcy courts into Article I courts and invited each circuit to establish a Bankruptcy Appellate Panel (“BAP”),¹⁵⁵ a panel of three bankruptcy judges that hear appeals from the bankruptcy courts.¹⁵⁶ In addition, the Bankruptcy Reform Act of 1978 expanded bankruptcy court jurisdiction while simultaneously limiting federal court review, which led to *Northern Pipeline*.¹⁵⁷ As discussed above, in *Northern Pipeline* the Supreme Court held that the jurisdiction provision of the 1978 Act unconstitutionally granted non-Article III judges too much judicial authority.¹⁵⁸ In response, the Judicial Conference of the U.S. passed the Emergency Model Rule (“Rule”), which subjected the bankruptcy judges’ factual and legal findings to de novo review in the district courts.¹⁵⁹ The Rule, however, did not mention the legality of BAPs.¹⁶⁰ The First Circuit found that the Rule implicitly withdrew the BAP’s

148. *Id.*

149. *Stern*, 564 U.S. at 501.

150. *Id.* at 475.

151. *Id.* at 502.

152. *Id.*

153. *E.g.*, REFORMING THE IMMIGRATION SYSTEM, *supra* note 8, at 9; Marks, *supra* note 59; Lundstrom, *supra* note 73, at 5; Poarch, *supra* note 18, at 10.

154. Judith A. McKenna & Elizabeth C. Wiggins, *Alternative Structures for Bankruptcy Appeals*, 76 AM. BANKR. L. J. 625, 637-38 (2002).

155. *Id.* at 63.

156. COLLIER ON BANKRUPTCY, ¶ 5.02 (Alan N. Resnick & Henry J. Sommer eds., 16th ed).

157. Tisha Morris, *The Establishment of Bankruptcy Appellate Panels Under the Bankruptcy Reform Act of 1994: Historical Background and Sixth Circuit Analysis*, 26 U. MEM. L. REV. 1501, 1503 (1996).

158. *Id.* at 1504.

159. McKenna & Wiggins, *supra* note 154, at 641.

160. *Id.*

authority to hear appeals,¹⁶¹ while the Ninth Circuit held that the Rule did not affect the BAP.¹⁶²

Two years after *Northern Pipeline*, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984, which increased district court control by specifying that bankruptcy courts were units of the district courts and their judges were judicial officers of the district courts.¹⁶³ The 1984 Amendments allowed circuits to establish BAPs subject to the following changes: once a circuit established a BAP, each district court in the circuit had to authorize appeals to the BAP from that district; all parties had to consent to BAP review; and the BAPs could only hear noncore (or non-bankruptcy) appeals if the parties permitted the bankruptcy judge to enter a final judgment on the noncore claims.¹⁶⁴

In 1994, spawned by the Ninth Circuit's success in reducing the federal courts' workloads, BAPs became mandatory.¹⁶⁵ The Bankruptcy Act of 1994 directed judicial councils of each circuit to establish a BAP unless the council determined that the circuit had insufficient judicial resources or establishing a BAP would cause undue delay.¹⁶⁶ Subsequently, five circuits established a BAP.¹⁶⁷ Today, the First, Sixth, Eighth, Ninth, and Tenth Circuits all have BAPs.¹⁶⁸

BAPs are celebrated for reducing federal court workload and providing a specialized perspective, which produces higher quality decisions that are less likely to be reversed than the district court decision.¹⁶⁹ Further, due to the BAP's specialization, attorneys have greater confidence in their opinions and thus make fewer appeals.¹⁷⁰ But, BAPs come at a price: BAPs require additional administrative costs¹⁷¹ and, since BAP adjudicators are current bankruptcy judges,

161. *Massachusetts Dep't Pub. Welfare v. Dartmouth House Nursing Home, Inc.*, 726 F.2d 26, 30 (1st Cir. 1984).

162. *In re Burley*, 738 F.2d 981, 986 (9th Cir. 1984).

163. *Morris*, *supra* note 157, at 1507.

164. *Id.* at 1507-08. The 1984 amendments distinguished between core and noncore proceedings. In core proceedings the bankruptcy judge could issue a final order subject to traditional appellate review in the district court or the BAP. In noncore proceedings, the bankruptcy judge could only submit proposed findings of fact and conclusions of law subject to de novo review in the district courts (or the parties could appeal noncore proceedings to the BAP if they consented to the bankruptcy judge entering a final order, as stated above). *McKenna & Wiggins*, *supra* note 154, at 641-42.

165. *Morris*, *supra* note 157, at 1508-09.

166. *McKenna & Wiggins*, *supra* note 154, at 644.

167. *Id.*

168. *COLLIER*, *supra* note 156, at ¶ 5.02. The BAPs hear cases from some or all of the districts in the circuit, depending on the circuit. *Id.* In districts that have agreed to BAP review, litigants have three routes to appeal orders from bankruptcy judges, the parties may appeal: to the district courts, 28 U.S.C. § 158(a) (2017); to the BAP (if the parties consent), 28 U.S.C. § 158(b); or directly to the courts of appeals in limited circumstances, 28 U.S.C. § 158(d).

169. *Morris*, *supra* note 157, at 1517-20.

170. *Id.* at 1519.

171. *Id.* at 1520-21.

BAPs increase bankruptcy judges' workloads.¹⁷²

III. ANALYSIS

Numerous judges, attorneys, academics, and legal institutions urge Congress to convert the immigration courts and the BIA into Article I courts.¹⁷³ Congress has the power to do this because immigration cases clearly fall within the public rights exception, as the U.S. is a party in all immigration proceedings.¹⁷⁴ Nonetheless, *Stern* makes clear that the public rights exception, while important, is not the only consideration in assessing the constitutionality of a legislative court. Therefore, the remainder of this comment argues that Congress should look to the line of Supreme Court decisions beginning with *Northern Pipeline* when determining how to structure Article I immigration courts. Part A contends that Congress should create legislative immigration courts that, like bankruptcy courts, have a trial and appellate division. Part B applies the *Northern Pipeline* line of decisions and asserts, first, that the availability of review by federal courts should be expanded and, second, that the standard of review in federal court should be less deferential to the immigration courts.

A. Article I Immigration Courts with Trial and Appellate Divisions

The ABA,¹⁷⁵ the Federal Bar Association,¹⁷⁶ and the National Association of Immigration Judges¹⁷⁷ all advocate that immigration courts and the BIA be converted into legislative courts. This structural change is needed to give immigrant adjudicators the job security they need to make decisions based on law and fact rather than on the outcome that pleases the current Attorney General.¹⁷⁸ Dana Leigh Marks, the president of the National Association of Immigration Judges explained, “[w]hile seemingly technical, this change is essential to achieve the most fundamental expectation we American’s hold about judges: that they are independent and protected from undue influence by any party to their proceedings.”¹⁷⁹

172. *Id.* at 1521-23.

173. *E.g.*, REFORMING THE IMMIGRATION SYSTEM, *supra* note 8, at 9; Marks, *supra* note 59; Lundstrom, *supra* note 73, at 5; Poarch, *supra* note 18, at 10.

174. Immigration was listed in *Crowell v. Benson*, 285 U.S. 22, 51 (1932) as a familiar example of a public right.

175. REFORMING THE IMMIGRATION SYSTEM, *supra* note 8, at 9.

176. Lundstrom, *supra* note 73, at 5.

177. Marks, *supra* note 59.

178. *See Legomsky, supra* note 3, at 1691.

179. Marks, *supra* note 59.

As a preliminary matter, immigration court structural reform is admittedly unlikely in the current political climate. In the late 1990s, Congress considered and rejected three bills to establish Article I immigration courts.¹⁸⁰ Currently, Congress is not likely to create Article I immigration courts for two reasons. First, Congress lacks the political will to create legislative courts because many representatives believe restructuring the immigration courts and the BIA would require additional funding.¹⁸¹ Second, and more importantly, the Attorney General and administrative state does not want to relinquish its power over the immigration adjudication system.¹⁸² Nevertheless, while converting the immigration courts and the BIA into Article I courts is improbable at present, “[i]t is beneficial to churn ideas and be ready should an opportunity arise.”¹⁸³

Some argue that converting the immigration adjudicators into administrative law judges (“ALJs”) is more realistic in our political climate.¹⁸⁴ Advocates of this reform point out that even though, as ALJs, the immigration adjudicators would be housed in the executive branch, they would be further removed from executive control than they are in the present structure.¹⁸⁵ Yet, as discussed above, subjecting immigration adjudicators to executive control, even if diminished, is highly problematic. Even proponents of this reform recognize that ALJs are under the Attorney General’s control and subject to his or her political whims.¹⁸⁶ Thus, to ensure sufficient independence from the executive branch, Congress must establish legislative immigration courts.

The Article I immigration courts should include a trial and appellate division. One may argue that Article I courts traditionally do not have appellate divisions so a two-tiered Article I immigration court would be inappropriate. Yet, as aforementioned, the BAPs are an exception to this general rule. Furthermore, BAPs have proven to be an efficient means of reducing the federal court workload and producing high quality decisions.¹⁸⁷ Moreover, the legislative preference to make a BAP is so strong that, if a circuit council finds that the circuit need not create a BAP because one of the two statutory exceptions are satisfied (insufficient resources or undue delay), the council must submit a report

180. Birdsong, *supra* note 13, at 44.

181. *Id.* at 46.

182. *Id.*

183. Wheeler, *supra* note 41, at 1848.

184. *Id.* at 1868.

185. *See id.* at 1869.

186. *Id.*

187. Morris, *supra* note 157, at 1517-20. In fact, Judge James Browning, the former chief judge of the Ninth Circuit, recounts that the benefits of establishing an appellate-level bankruptcy court were so evident that when the opportunity to create a BAP came along “it seemed to [him] there was no choice.” *Id.* at 1517.

to the Judicial Conference of the U.S. explaining its findings.¹⁸⁸ The Judicial Conference has the power to overrule the circuit council.¹⁸⁹

The legislative immigration courts would benefit from a trial and appellate division because immigration, like bankruptcy, is a high-volume court. In 2016, 1,131,341 cases were pending before the bankruptcy courts¹⁹⁰ and, as stated, in January 2016, the immigration courts had 475,000 cases on their dockets.¹⁹¹ While the immigration courts have smaller dockets, as above-mentioned, immigration cases are inherently difficult both in the complexity of the laws and the intricacies of the facts. Plus, most noncitizens require translators, which doubles the time necessary to process the noncitizens in court. As a result, unlike bankruptcy, Congress should permit appeal to the Article I immigration court(s)¹⁹² in every case.

One may point out that BAP review is optional – circuits do not have to create a BAP and even if a circuit establishes a BAP each district court in the circuit must approve the BAP and the parties must consent to BAP review – and, thus, review by the Article I immigration appellate court should also be optional. However, one must remember that Congress established the above options to ensure the BAP’s constitutionality, which was called into question after *Northern Pipeline*. In *Northern Pipeline*, the Supreme Court made clear that, since the U.S. is not a party in bankruptcy proceedings, bankruptcy does not fall within the traditional public rights exception.¹⁹³ After *Northern Pipeline*, Congress gave federal courts greater control over the bankruptcy proceedings, such as by making BAP review optional, to ensure the bankruptcy courts’ constitutionality.¹⁹⁴ Immigration, on the other hand, clearly falls within this traditional public rights exception because the U.S. is a party in the suit. Therefore, Congress does not have to make review to the appellate-level Article I court optional.

Professor Legomsky contends that having two rounds of appellate review, one by an Article I immigration court and another by a federal court, is duplicative¹⁹⁵ and costly.¹⁹⁶ Yet, this criticism is misguided. First, removing the immigration courts and the BIA from the executive

188. COLLIER, *supra* note 156, at ¶ 5.02.

189. *Id.*

190. UNITED STATES COURTS, U.S. BANKRUPTCY COURTS—BANKRUPTCY CASES COMMENCED, TERMINATED, AND PENDING DURING THE 12-MONTH PERIODS ENDING DECEMBER 31, 2015 AND 2016, Table F, http://www.uscourts.gov/sites/default/files/data_tables/bf_f_1231.2016.pdf.

191. Poarch, *supra* note 18, at 11.

192. Determining the necessary number of immigration trial and appellate courts is beyond the scope of this comment.

193. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982).

194. *See Morris*, *supra* note 157, at 1507.

195. Legomsky, *supra* note 3, at 1680.

196. *Id.* at 1696.

branch would increase their independence, which would lead to greater confidence in their decisions, and, in turn, would lead to fewer appeals to the federal courts.¹⁹⁷ Second, the dual round of appeals would be beneficial for the cases that would nonetheless appeal to the federal courts. Third, immigration appellate judges would provide their specialized understanding of the complexities of immigration law and the federal, generalist judges would serve as an equitable check on abuses of life and liberty.¹⁹⁸

Both specialist and generalist judges offer distinct benefits. Specialized judges familiarize themselves with a complex area of law, allowing them to work more efficiently, both monetarily and temporarily.¹⁹⁹ Further, specialist judges reach more consistent outcomes²⁰⁰ and repeated exposure to the practical consequences of their decisions leads to results that are fair and pragmatic.²⁰¹ Generalist judges, on the other hand, can draw guidance and analogies from other areas of law and are able to approach cases with less-engrained biases.²⁰² This well-rounded perspective is particularly important in immigration cases that deal with the restriction of personal liberty and human rights.²⁰³

One may contend that some issues are inherently challenging, regardless of the adjudicator's level of expertise;²⁰⁴ since immigration cases are innately difficult, two rounds of review by a specialized judge would have limited benefits.²⁰⁵ Yet, this argument is flawed because abolishing the appellate-level immigration court would flood the federal courts with time-consuming immigration cases. What is more, if Congress increased the number of federal judgeships (or created a new Article III court to hear immigration appeals as Professor Legomsky suggests) in response to this influx of immigration cases,²⁰⁶ this would dilute the prestigious status of Article III judges.²⁰⁷

B. Lessons from Northern Pipeline

When converting the immigration courts and the BIA to legislative courts, Congress should be guided by the Supreme Court line of

197. See REFORMING THE IMMIGRATION SYSTEM, *supra* note 8, at 44.

198. See JUDICIAL REVIEW BY CIRCUIT COURTS, *supra* note 6, at 4-20.

199. Legomsky, *supra* note 3, at 1680.

200. *Id.* at 1694.

201. *Id.* at 1693.

202. *Id.* at 1695.

203. JUDICIAL REVIEW BY CIRCUIT COURTS, *supra* note 6, at 4-20.

204. Baum, *supra* note 21, at 1543.

205. See *id.* at 1548.

206. Legomsky, *supra* note 3, at 1640.

207. Wheeler, *supra* note 41, at 1864-65.

decisions beginning with *Northern Pipeline*. As stated, immigration clearly falls within the public rights exception because the U.S. is a party in all immigration proceedings. Still, the Supreme Court made known in *Stern* that the public/private rights dichotomy is not the only factor considered when assessing a legislative court's constitutionality. Consequently, Congress should be mindful of the functional balancing approach the Court applied in *Thomas* and *Schor*. This balancing approach makes clear that, after the public/private rights distinction, one of the most important considerations when assessing an Article I court's constitutionality is the availability of federal appellate review and the standard of review upon appeal. Accordingly, when Congress changes the immigration courts and the BIA into legislative courts, Congress should expand the availability of federal court review and enact a less deferential standard of review.

As demonstrated above, a noncitizens' ability to appeal to an Article III court has been greatly restricted in recent years. From a practical standpoint, this restriction is problematic because it forecloses federal judicial review of all discretionary issues (except decisions to grant asylum) and has resulted in a complex layering of rules that waste the litigants and courts' time and resources. Furthermore, *Northern Pipeline* and its prodigies reveal that the federal court's limited ability to review immigration cases is problematic from a constitutional perspective. In both *Thomas* and *Schor*, the Supreme Court stressed the importance of federal judicial review of the Article I courts' decisions.²⁰⁸ Even *Stern*, with its formalistic focus on the public/private right dichotomy, noted the availability of review to an Article III court.²⁰⁹ While the Supreme Court did not maintain that appellate review to an Article III court alone was sufficient to find a legislative court constitutional, the Court articulated that the availability of federal judicial review is a central factor in assessing the constitutionality of an Article I court. Thus, to ensure that the new Article I immigration courts are constitutional, Congress should permit the federal courts of appeals to review all discretionary decisions and should empower the federal courts to remand immigration cases for further fact finding.²¹⁰

Furthermore, the line of decisions following *Northern Pipeline* made known that it was not enough simply to permit review in an Article III court. Beginning in *Northern Pipeline*, the Court pointed out that highly deferential standards of review in federal court, such as the Bankruptcy

208. See *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 592 (1985); see also *Commodity Futures Trading Com. v. Schor*, 478 U.S. 833, 853 (1986).

209. *Stern v. Marshall*, 564 U.S. 462, 502 (2011).

210. REFORMING THE IMMIGRATION SYSTEM, *supra* note 8, at 12-13.

Act of 1978's abuse of discretion standard, were problematic.²¹¹ The Court clarified this holding in *Schor* when it distinguished *Northern Pipeline* and held that the CFTC's less deferential weight of the evidence standard for orders and de novo review of legal determinations were constitutional.²¹² These decisions reveal that, in addition to restoring review of discretionary decisions, the standard of review in federal court should not be deferential to the legislative courts. Therefore, in creating Article I immigration courts, Congress should restore the standards of review previously available to federal court under their habeas corpus jurisdiction: facts should be reviewed under the substantial evidence standard;²¹³ discretionary decisions should be reviewed under the abuse of discretion standard,²¹⁴ and legal conclusions should be considered de novo.²¹⁵

In addition, as stated, the 1996 Amendments to the INA eliminated the federal court of appeal's ability to remand for further fact finding. Even though the *Northern Pipeline* line of decisions did not speak directly to this issue, the decisions stand for the proposition that Article III courts should be permitted wide discretion when reviewing Article I courts' decisions. Hence, to ensure the constitutionality of legislative immigration courts, Congress should amend the INA to permit the courts of appeals to remand cases to the immigration courts for further fact finding.²¹⁶

One may contend that permitting federal judicial review of all discretionary decisions would flood the federal courts of appeals. But, as demonstrated above, the present high volume of appeals to the federal courts is a result of the perception that the immigration adjudication system is unfair.²¹⁷ Indeed, following the 2002 reforms to the BIA, the number of appeals to the federal courts increased dramatically because noncitizens and their attorneys lacked confidence in the BIA's decisions.²¹⁸ If both the trial and appellate immigration court were removed from the executive branch,²¹⁹ litigants would have greater confidence in the courts' decisions and be less likely to appeal to the federal courts.

Finally, while transforming the immigration trial and appellate courts

211. *See* *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 85 (1982).

212. *Schor*, 478 U.S. at 853.

213. *See e.g.*, *Paredes-Urrestarazu v. INS*, 36 F.3d 801, 807 (9th Cir. 1994).

214. *See e.g.*, *Bazrafshan v. Pomeroy*, 587 F. Supp. 498, 501 (D.N.J. 1984); *see also* *Soroa-Gonzales v. Civiletti*, 515 F. Supp. 1049, 1057 (N.D.Ga. 1981).

215. *See e.g.*, *Paredes-Urrestarazu v. INS*, 36 F.3d at 807.

216. *See* REFORMING THE IMMIGRATION SYSTEM, *supra* note 8, at 13.

217. JUDICIAL REVIEW BY CIRCUIT COURTS, *supra* note 6, at 4-18.

218. *Id.*

219. And the appellate immigration court was not permitted to issue AWOs but instead had to issue reasoned opinions.

into legislative courts would vastly improve the immigration adjudication system, this change alone would not be enough. It is widely recognized that the immigration courts are understaffed.²²⁰ Immigration court reform must account for this gross deficiency and increase the number of judges and support staff accordingly. The ABA's 2010 report, *Reforming the Immigration System*, called for an additional 100 judges and enough clerks to increase the clerk to judge ratio from one to four to one to one.²²¹ Predicting the current judge and staff deficiency is beyond the scope of this comment, but given that the number of immigration cases has only grown since 2010 with the surge of unaccompanied minors,²²² it is safe to say that the new Article I immigration courts would require *at least* an additional 100 judgeships.

IV. CONCLUSION

A fundamental principle in our constitutional system is that “there is no liberty if the power of judging be not separated from the legislative and executive powers.”²²³ Yet, while we condemn judicial comingling with the political branches in other areas of law, we tolerate it in the immigration adjudication system.²²⁴ As a result of this passivity, noncitizens are denied their constitutional right to an independent adjudicator. To correct this wrong, Congress should establish Article I immigration courts with trial and appeal divisions. Further, to comply with the *Northern Pipeline* line of decisions, Congress should empower the federal courts to review the Article I courts' discretionary decisions, to remand cases for further fact finding, and to reinstate the less deferential standards of review formerly available to federal courts under their habeas corpus jurisdiction. While these reforms would not solve all of the aforementioned problems, the changes would ensure noncitizens independent judicial review, thereby restoring faith in our immigration system.

220. *E.g.*, Legomsky, *supra* note 3, at 1652.

221. REFORMING THE IMMIGRATION SYSTEM, *supra* note 8, at 11.

222. *E.g.*, Tom Dart, *Child migrants at Texas border: An immigration crisis that's hardly new*, THE GUARDIAN (July 9, 2014), <https://www.theguardian.com/world/2014/jul/09/us-immigration-undocumented-children-texas>.

223. *Stern v. Marshall*, 564 U.S. 462, 483 (2011) (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).

224. Poarch, *supra* note 18, at 10.