JUDICIAL POWER—IMMIGRATION-STYLE

JAYANTH K. KRISHNAN*

Throughout this current global pandemic, but of course, even before, former President Trump advocated enacting restrictive immigration measures. Under his tenure, the Department of Homeland Security (DHS) assumed enhanced judicial authority and issued decisions that often adversely affected noncitizens. However, in June 2020, the U.S. Supreme Court struck down one of the DHS's most well-known initiatives, which sought to end the 'DACA' program. The Court held that the agency could not do so arbitrarily and had to comply with the requirements set forth in the Administrative Procedure Act.

Yet, there have been other areas where the DHS, particularly through its U.S. Citizenship and Immigration Services (USCIS) office, has asserted its judicial power. The result has been a 'turf battle' with the Department of Justice (DOJ), which has historically housed the country's immigration courts and their presiding judges.

One key conflict between the USCIS and DOJ involves whether the latter's immigration judges (IJs) can allow undocumented immigrants to apply for 'U visas.' This visa grants noncitizens the opportunity to remain in the country if they have been (1) victims of abuse and (2) helpful to law enforcement in a criminal investigation. The federal appeals courts are split on this question, with two circuits saying that the DOJ's IJs have this power while two others have held that the USCIS has exclusive jurisdiction.

The thesis here is that, as between the DOJ and USCIS, the DOJ's IJs should and do possess such authority. But focusing on this U visa debate highlights a larger structural problem. Immigration adjudicators within both the USCIS and DOJ are, in theory, supposed to be free from political influence. In reality, though, because they serve at the pleasure of executive branch appointees, they must often act in a partisan fashion rather than in a judicious manner.

---

* Milt and Judi Stewart Professor of Law and Director of the Stewart Center on the Global Legal Profession, Indiana University-Bloomington Maurer School of Law. For their assistance during various stages of this project, the author thanks Melanie Chamberlain, Vitor Dias, Pamela Foohey, Charlie Geyh, Bert Kritzer, Leandra Lederman, Christiana Ochoa, and Deborah Widiss. I am particularly indebted to my close friend and colleague, Tung Yin, whose experience clerking on two separate federal appeals courts, along with his copious reading of the paper and our multiple conversations of this subject matter, benefited me tremendously. I am also grateful for being able to present parts of this paper during a January 2020 retreat/workshop at Indiana, where aspects of that talk focused specifically on the role of the Department of Justice in immigration cases.

What is left, therefore, is a system in need of reform. Building upon previous work, this Study urges the removal of immigration adjudication from the USCIS and DOJ, and creation of special Article I immigration courts to check presidential power and ensure that an especially vulnerable contingent of litigants has their rights safeguarded.

INTRODUCTION

On April 20, 2020, in the midst of the coronavirus pandemic, former President Trump declared that he would be "signing an Executive Order to temporarily suspend immigration into the United States!"[1] Trump argued that this move was necessary to protect American workers from what he saw as unfair competition by those from abroad.[2] In addition, President Trump claimed he was initiating the policy to preserve the country's national security and to protect the public from unknown foreign carriers of this "invisible

1. TRUMP TWITTER ARCHIVE, https://www.thetrumparchive.com (last visited May 17, 2021); Jill Covin & Ben Fox, *Trump Tweets Plan to 'Suspend Immigration' to the United States over Coronavirus—Spokeswoman Connects Order to Economy*, CHI. TRIB. (Apr. 21, 2020, 3:03 PM), https://www.chicagotribune.com/coronavirus/ct-nw-trump-executive-order-suspend-immigration-20200421-4k3givrqrnaz5fuwtzojmicepa-story.html.

2. *See* Michael D. Shear et al., *Trump Halts New Green Cards, but Backs Off Broader Immigration Ban*, N.Y. TIMES, https://www.nytimes.com/2020/04/21/us/politics/coronavirus-trump-immigration-ban.html (Feb. 24, 2021).

[viral] enemy"—during what he called a "wartime" moment.[3]

Critics observed that "the pandemic ha[d] already largely cut off immigration to the United States,"[4] and argued that the President was simply using this rhetoric as a means of distraction. Then-Senator Kamala Harris (D-CA) noted that President Trump "failed to take this crisis seriously from day 1 [and that] [h]is abandonment of his role as president has cost lives."[5] Representative Joaquin Castro (D-TX) denounced it as "an authoritarian-like move to take advantage of a crisis and advance his anti-immigrant agenda."[6] And Representative Hakeem Jeffries (D-NY) was equally blunt, referring to the President as "Xenophobe[-]In[-]Chief."[7]

The April 2020 Presidential Proclamation included nine exceptions.[8] One day later, President Trump expanded that list to allow certain foreign guest workers to enter.[9] But, overall, his plan remained in effect. One group that was

---

3. Remarks at a White House Coronavirus Task Force Press Briefing, 2020 DAILY COMP. PRES. DOC. 2 (Mar. 18, 2020); David Smith, *Trump Talks Himself Up as a 'Wartime President' to Lead America Through a Crisis*, GUARDIAN (Mar. 22, 2020, 2:00 PM), https://www.theguardian.com/us-news/2020/mar/22/trump-coronavirus-election-november-2020.

4. Priscilla Alvarez, *What Trump's New Executive Order on Immigration Covers*, CNN, https://www.cnn.com/2020/04/22/politics/immigration-executive-order-trump/index.html (Apr. 23, 2020, 12:50 AM) (noting that "countries have put border restrictions in place, visa services have been suspended, and refugee admissions are on pause, among other changes").

5. Rebecca Shabad, *'Xenophobe in Chief': Democrats Blast Trump's Plan to Suspend Immigration to U.S.*, NBC NEWS, https://www.nbcnews.com/politics/congress/xenophobe-chief-democrats-blast-trump-s-plan-suspend-immigration-u-n1188551 (Apr. 21, 2020, 8:21 AM).

6. *Id.*

7. *Id. See generally* Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 197 (2019) (providing a detailed critique of President Trump's motivations regarding his previous immigration policies).

8. These exceptions included: current green card holders; medical personnel coming to the United States to fight the virus; noncitizens who were part of the immigrant investor program; noncitizen spouses of American citizens; noncitizen children under the age of 21 of American citizens; noncitizens who could assist in law enforcement; noncitizens who were part of the U.S. military, and their spouses and children; Iraqi noncitizens part of the special immigrant visa program; and any noncitizen deemed to be in the "national interest" of the United States. *See* Proclamation No. 10,014, 85 Fed. Reg. 23,441, 23,442–43 (Apr. 27, 2020).

9. *See* Shear et al., *supra* note 2 (noting pressure from business groups kept President Trump from stopping the issue of green cards for worker programs). In addition, on June 22, 2020, President Trump signed another presidential proclamation. *See* Proclamation 10,052, 85 Fed. Reg. 38,263, 38,264–65 (June 25, 2020) (placing on hold visas for highly skilled noncitizens, those who work in the hospital sector, students in summer programs and nannies from abroad, and foreign workers—and their spouses—at American firms, and exempting those currently present in the United States, certain agricultural laborers, and specialists aiding in the coronavirus programs).

not exempted—for whom Congress has long recognized as needing heightened protection—were those who qualified for U visas. This visa was "created by the Battered Immigrant Women Protection Act of 2000" and then later reaffirmed by the Violence against Women Act of 2013.[10] It allows "noncitizens who have suffered physical or mental abuse as a victim of certain crimes"[11] to stay in the country lawfully, and then after three years to petition for a green card, which would allow them to gain lawful permanent residence.[12]

In order to receive a U visa, applicants must meet two criteria. First, they must have provided assistance to law enforcement about criminal activity; and second, they must have been lawfully admitted into the United States.[13]

---

10. MARIA BALDINI-POTERMIN, IMMIGRATION TRIAL HANDBOOK § 6:73 (2019); *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/victims-human-trafficking-and-other-crimes/victims-criminal-activity-u-nonimmigrant-status (June 12, 2018) (noting that the U visa was part of the larger Victims of Trafficking and Violence Protection Act of 2000); *see also* Jamie Rene Abrams, *Legal Protections for an Invisible Population: An Eligibility and Impact Analysis of U Visa Protections for Immigrant Victims of Domestic Violence*, 4 MOD. AM. 26 (2008) (explaining why advocates for immigrant rights supported the bill); Deanna Kwong, *Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections Under VAWA I & II*, 17 BERKELEY WOMEN'S L.J. 137, 138 (2002) (explaining that the Battered Immigrant Women Protection Act was part of the Violence Against Women Act).

11. BALDINI-POTERMIN, *supra* note 10. Under the Immigration and Nationality Act (INA), the U visa statutory provision lists the following qualifying crimes:

> Rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in section 1351 of title 18); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.

8 U.S.C. § 1101(a)(15)(U)(iii).

12. Suzan M. Pritchett, *Shielding the Deportable Outsider: Exploring the Rape Shield Law as Model Evidentiary Rule for Protecting U Visa Applicants as Witnesses in Criminal Proceedings*, 40 HARV. J.L. & GENDER 365, 383 (2017); *see also* SHANE DIZON & POOJA DADHANIA, 2 IMMIGRATION LAW SERVICE § 9:205 (2d ed. 2020); Fatma E. Marouf, *Regrouping America: Immigration Policies and the Reduction of Prejudice*, 15 HARV. LATINO L. REV. 129, 171 (2012) (describing pathways to permanent residence for victims of domestic abuse, trafficking, and other criminal activities). A huge advantage of gaining a green card, of course, is that it can put a noncitizen on the path to citizenship. For one scholar who has discussed citizenship at great length, see Ediberto Román, *The Citizenship Dialectic*, 20 GEO. IMMIGR. L.J. 557 (2010); EDIBERTO ROMÁN, CITIZENSHIP AND ITS EXCLUSION: A CLASSICAL, CONSTITUTIONAL, AND CRITICAL RACE CRITIQUE (2010).

13. *See* BALDINI-POTERMIN, *supra* note 10; *see also* Memorandum from Peter S. Vincent,

There is, though, a crucial exception to this second prong.[14] As Suzan Pritchett observes, the visa "provides a broad waiver of inadmissibility,"[15] whereby it "carries the potential to forgive almost all previous immigration and criminal violations."[16] The reason for this waiver is because not infrequently U visa applicants have some type of legal transgression associated with their background.[17] For example, such petitioners can be undocumented or have been forced into committing a criminal violation by their abuser.[18] As such, the U visa is considered one of the most "humanitarian" forms of relief for noncitizens.[19]

The question that has come before the federal judiciary, however, is *who* should be granting this waiver.[20] The circuit courts of appeals are presently split.[21] On the one hand, the Ninth Circuit recently held that the power to determine who receives such a waiver rests within an agency of the Department of Homeland Security (DHS) known as the U.S. Citizenship and Immigration Services (USCIS).[22] By contrast, the Seventh Circuit has held that this decision falls under the authority of the Attorney General, who oversees the Department of Justice (DOJ).[23] Two other appellate courts have weighed in on this question as well, with the Third Circuit falling into the Ninth

---

Principal Legal Couns., U.S. Immigr. & Customs Enf't, to OPLA Attorneys, Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal 1 (Sept. 25, 2009), https://www.ice.gov/doclib/foia/dro_policy_memos/vincent_memo.pdf (stating that under the Immigration and Nationality Act, a noncitizen can establish "prima facie eligibility for the benefit.").

14. *See generally* Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207 (2012) (providing a case study of what this exception specifically can look like).

15. Pritchett, *supra* note 12, at 383. For whom is considered inadmissible, see 8 U.S.C. § 1182(a).

16. Pritchett, *supra* note 12, at 383 (noting that there are certain exceptions, however, such as, "participation in Nazi persecution and a few limited foreign policy considerations").

17. For an important history on the U visa, see Rachel Gonzalez Settlage, *Uniquely Unhelpful: The U Visa's Disparate Treatment of Immigration Victims of Domestic Violence*, 68 RUTGERS U. L. REV. 1747, 1762–67 (2016).

18. For a general discussion of undocumented immigrants, see HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW (2014); Stephen Lee, *Growing Up Outside the Law*, 128 HARV. L. REV. 1405 (2015).

19. Pritchett, *supra* note 12, at 383.

20. *See infra* Parts I & II (discussing the circuit split in detail).

21. *Id.*

22. *See* Man v. Barr, 940 F.3d 1354, 1357 (9th Cir. 2019).

23. Baez-Sanchez v. Barr, 947 F.3d 1033, 1037 (7th Cir. 2020).

Circuit's camp and the Eleventh Circuit aligned with the Seventh Circuit.[24]

This debate between the circuits occurs as the Supreme Court has recently handed down a highly publicized immigration ruling.[25] In June 2020, the Court rebuffed the DHS's adjudicatory efforts to end the Deferred Action for Childhood Arrivals (DACA) program, holding that the agency failed to comply with the requirements set forth in the Administrative Procedure Act (APA).[26]

The DACA decision did not deal with U visas. Yet, it is related to this discussion because the Court placed a check on the power of the DHS (and thereby the USCIS)—just as the Seventh and Eleventh Circuits have been willing to do.[27] Indeed, the thesis of this Study is that the DOJ's immigration judges (IJs) should and do possess the authority to issue U visa inadmissibility waivers, more so than the USCIS. In fact, the Seventh and Eleventh Circuits' approach should be adopted by other appellate courts and—depending on if it accepts a petition for certiorari—the Supreme Court as well.

With that said, there is a broader, more sober implication that comes from this discussion. It is important to remember that within DOJ is the Executive Office of Immigration Review (EOIR), which has historically administered the nation's immigration courts.[28] Within EOIR is the Chief Immigration Judge, who oversees some 535 subordinate judges working in sixty-eight immigration courts across the country.[29] In immigration court cases, IJs are the first adjudicators.[30] Cases that are appealed go to the Board of

---

24. Sunday v. Att'y Gen., 832 F.3d 211, 219 n.8 (3rd Cir. 2016); Meridor v. U.S. Att'y Gen., 891 F.3d 1302, 1306 (11th Cir. 2018).

25. *See* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1901 (2020).

26. *Id.*

27. Even Justice Thomas, in his dissent, acknowledged that the "[Department of Homeland Security (DHS's)] initial overreach" was present when the agency enacted its policy of ending the Deferred Action for Childhood Arrivals (DACA) program. *Id.* at 1919 (Thomas, J., dissenting). In the majority opinion, written by Chief Justice Roberts, the Court held that DHS's actions were "arbitrary and capricious." *Id.* at 1912–13. U.S. Citizenship and Immigration Services (USCIS) is mentioned on four separate occasions by the Chief Justice, as the office that was in charge of "accept[ing] applications to determine whether these individuals qualify for work authorization during this period of deferred action . . . ." *Id.* at 1902.

28. *See Executive Officer for Immigration Review Organizational Chart*, U.S. DEP'T OF JUST. (July 26, 2017) [hereinafter *EOIR Organizational Chart*], https://www.justice.gov/eoir/eoir-organization-chart/chart.

29. *Id.*; *see also Office of the Chief Immigration Judge*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios (May 6, 2021).

30. *See generally Evolution of the U.S. Immigration Court System: Pre-1983*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/evolution-pre-1983 (Apr. 30, 2015) (demonstrating the hierarchy of immigration courts).

Immigration Appeals (BIA), which also falls under the EOIR.[31] If a case is appealed from the BIA, it moves to a federal circuit court of appeals that governs the jurisdiction of where that initial IJ sits.[32]

Procedures are in place to promote judicial independence and integrity within the EOIR.[33] Furthermore, IJs are, after all, lawyers by training and are obliged to follow regulations, statutes, and the Constitution. Given this context, it is not surprising that the Seventh and Eleventh Circuits would take the approach that they did. If the choice on granting an inadmissibility waiver is between an IJ or the USCIS, which has been hyper-politicized over the years, the decision, from a due process perspective, would clearly favor the former.[34]

The problem, however, is that immigration courts are far from the ideal venue for U visa applicants—or any noncitizen for that matter.[35] Ideology and politics are an inescapable part of the atmosphere in which IJs hear cases and issue their decisions.[36] IJs serve under the Attorney General, who is a

---

31. *See EOIR Organizational Chart*, *supra* note 28.

32. *See* Jayanth K. Krishnan, *Lawyers for the Undocumented: Addressing a Split Circuit Dilemma for Asylum-Seekers*, 81 OHIO ST. L.J. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3550611.

33. For background on how U.S. immigration courts are situated, see T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 235–69, 252 (8th ed. 2016).

34. For a discussion of the political/partisan nature of USCIS and its adjudication system, see *infra* Conclusion: A Proposal to Consider . . . Cautiously

35. For the difficulties associated with the U visa, see James R. Abrams, *The Dual Purposes of the U Visa Thwarted in a Legislative Dual*, 29 ST. LOUIS PUB. L. REV. 373 (2010).

36. For a discussion of an egregious example of how ideology and politics infect the decisionmaking of immigration judges (IJs), see Karen Musalo, Opinion, *Restore Asylum for Women Fleeing Abuse and Death*, L.A. TIMES (Nov. 22, 2019, 3:00 AM), https://www.latimes.com/opinion/story/2019-11-22/asylum-immigration-women-violence-congress (discussing how then-Attorney General Jeff Sessions pulled *Matter of A-B-*, a case already decided by the Board of Immigration Appeals (BIA) and reversed the judgement because he simply did not like the lower court outcome). *See infra* Conclusion: A Proposal to Consider . . . Cautiously(discussing the external influences on IJs). For a sample of works that have discussed these issues more broadly (primarily in the Article III context), compare Lee Epstein, *Some Thoughts on the Study of Judicial Behavior*, 57 WM. & MARY L. REV. 2017 (2016) (offering a robust discussion of the literature), with JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 3 (2002) (discussing the role of judges as policymakers and presenting three models the Court uses in decisionmaking), CHARLES GARDNER GEYH, COURTING PERIL: THE POLITICAL TRANSFORMATION OF THE AMERICAN JUDICIARY 1 (2016) (arguing that external factors influence judicial discretion and recommending a regulatorily framework to manage such

political appointee.[37] The Attorney General also always has the power to step in and unilaterally overturn an immigration court or BIA ruling.[38] And disturbingly, during the Trump Administration, this intervention was uncommon. Major changes, therefore, are needed.

* * *

This Study will proceed as follows. Part I provides a brief history of how the IJ emerged onto the judicial scene. Over the years, there has been

---

extralegal influences), and Lee Epstein & Jack Knight, *Reconsidering Judicial Preferences*, 16 ANN. REV. POL. SCI. 11, 20 (2013) (examining the relationship between law and judicial decisionmaking).

37. For a scholar who has written extensively and thoughtfully on the issue of immigration prosecution, see Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 294–96 (2010) (recommending measures to clarify and strengthen prosecutorial discretion within DHS); Shoba Sivaprasad Wadhia, *Demystifying Employment Authorization and Prosecutorial Discretion in Immigration Cases*, 6 COLUM. J. RACE & L. 1, 25–26 (2016) (examining how forms of prosecutorial discretion are exercised in the process of work authorization); Shoba Sivaprasad Wadhia, *The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions*, 16 HARV. LATINO L. REV. 39, 77 (2013) (concluding that noncitizens may possess a possible procedural right under the Administrative Procedure Act to challenge agency exercise of prosecutorial discretion); *see generally* Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 AM. U. L. REV. 1285 (2015) (analyzing prosecutorial discretion in immigration law under the Obama Administration); *see generally* SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 4–5 (2015) (describing exercise of immigration prosecutorial discretion at the DHS after 9/11).

38. For other works discussing how it is inherently unfair that the DOJ could establish the rules of the immigration adjudicative process and then select the personnel who would oversee the litigation, see *ABA Signs Joint Letter to Congress on Establishing an Independent Immigration Court System*, AM. BAR. ASS'N (July 9, 2019), https://www.americanbar.org/news/abanews/aba-news-archives/2019/07/aba-signs-joint-letter-to-congress-on-establishing-an-independen/. *E.g.*, Rebecca Baibak, *Creating an Article I Immigration Court*, 86 U. CIN. L. REV. 997, 1018 (2018) (critiquing the lack of separation of powers in the immigration adjudication system). *But see, e.g.*, INNOVATION LAB & S. POVERTY L. CTR., THE ATTORNEY GENERAL'S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL 9 (2019), https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf (noting that "[i]n all cases, immigration judges shall seek to resolve the questions before them in a timely and impartial manner consistent with the [INA] and regulations"); Amit Jain, *Bureaucrats in Robes: Immigration "Judges" and the Trappings of "Courts"*, 33 GEO. IMMIGR. L.J. 261, 314–15 (2019) (explaining that Congress and Attorneys General have "cabined" the discretion of IJs); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 383–87 (2006) (analyzing decisional independence in judicial review of BIA adjudications). *See generally* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635 (2010).

increased scrutiny and suspicion over whether these judges are truly independent. Perhaps reflecting this growing skepticism, Part II discusses how two federal courts of appeals—the Third and Ninth Circuits—have opted to limit the power of IJs in the key area of U visa cases.

Nevertheless, as Part III explains, the opinions of the Seventh and Eleventh Circuits, which side with IJs, are ultimately more persuasive than those offered by their appellate counterparts. But even so, the story cannot end here because there is a need for a fundamental restructuring of the immigration courts themselves. Echoing previous calls, the Conclusion urges Congress to remove immigration adjudication from the executive branch and create special Article I immigration courts in order to check presidential power and ensure that an especially vulnerable contingent of litigants has their rights safeguarded.

I. THE EVOLUTION OF THE IMMIGRATION COURTS AND THE IMMIGRATION JUDGE

The modern immigration judicial system is codified within the Immigration and Nationality Act (INA) that was originally passed in 1952.[39] Today, the INA specifically defines an IJ as "an attorney whom the Attorney General appoints . . . [and who is] subject to such supervision and shall perform such duties as the Attorney General shall prescribe . . . ."[40] While in common parlance, particularly among practitioners, IJs are sometimes referred to as "Article II" adjudicators, it is important to note that they are not considered official administrative law judges under the APA.[41]

Instead, the immigration adjudication process has a history that dates back to President Franklin Roosevelt. In June of 1933, President Roosevelt signed Executive Order 6166, which brought into existence the Immigration and

39. *See generally* Immigration and Nationality Act (INA), Pub. L. 82-414, 66 Stat. 163 (1952) (codified in scattered sections of 8 U.S.C.) (revising legislation relating to immigration and nationality).

40. *See* INA, 8 U.S.C. § 1101(b)(4).

41. *See, e.g.*, *Judicial Oversight v. Judicial Independence*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, https://trac.syr.edu/immigration/reports/194/include/side_4.html (last visited May 17, 2021); *see also infra* Conclusion: A Proposal to Consider . . . Cautiously(noting strong criticism for the way IJs are currently situated within the executive branch); AM. IMMIGR. LAWS. ASS'N, AILA POLICY BRIEF: RESTORING INTEGRITY AND INDEPENDENCE TO AMERICA'S IMMIGRATION COURTS 1–2 (rev. 2020) [hereinafter AILA: RESTORING IMMIGRATION COURTS], https://www.aila.org/infonet/aila-calls-for-independent-immigration-courts (critiquing both the structure and the political nature of immigration courts).

Naturalization Services (INS) agency.[42] Initially, the INS was placed within the Department of Labor, but in 1940 a new executive order was issued that moved the agency into the DOJ.[43] With the passage of the 1952 INA, Congress "established special inquiry officers to review and decide deportation cases."[44] This system continued until 1973, when President Nixon signed an executive order that "authorized [these officers] . . . to use the title 'immigration judge' and to wear judicial robes."[45]

Throughout this period, these adjudicators had been working within the INS.[46] However, "[i]n 1983, the Department of Justice . . . plac[ed] them in a new DOJ unit called the Executive Office for Immigration Review (EOIR) that reported directly to the Associate Attorney General."[47] Following the September 11, 2001 attacks, the Homeland Security Act was passed, which reconfigured the enforcement of immigration. Gone was the INS and, in its place, the newly created Department of Homeland Security was established, which had three main agencies: Customs and Border Patrol (CBP), Immigration and Customs Enforcement (ICE), and USCIS.[48] Yet, the Justice Department retained the EOIR, which continues to oversee the nation's immigration courts to this day .[49]

On the one hand, it may provide some with a sense of reassurance that IJs would remain within the DOJ—as opposed to what has become a highly

---

42. HIST. OFF. & LIBR., U.S. CITIZENSHIP & IMMIGR. SERVS., OVERVIEW OF INS HISTORY 7 (2012), https://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf.

43. *See* 5 Fed. Reg. 2223 (June 14, 1940) (taking action pursuant to the Reorganization Act of 1939); *Evolution of the U.S. Immigration Court System: Pre-1983*, *supra* note 30 (noting the establishment of the BIA); ALEINIKOFF ET AL., *supra* note 33, at 237 (noting the executive order transferring immigration functions to the DOJ was motivated in part by "security concerns as war engulfed Europe").

44. *See Evolution of the U.S. Immigration Court System: Pre-1983*, *supra* note 30.

45. *See id.* (citing 38 Fed. Reg. 8590 (Apr. 4, 1973)).

46. *See* ALEINIKOFF ET AL., *supra* note 33, at 251–52 (describing emerging specialization and qualifications of INS adjudicators).

47. *Id.* at 252. For the regulation making this change, see 48 Fed. Reg. 8038 (Feb. 25, 1983).

48. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002); *see also* ALEINIKOFF ET AL., *supra* note 33, at 236–46 (providing an overview of the adjudicatory and enforcement functions of the component agencies that operate within the DHS).

49. *Office of the Chief Immigration Judge*, *supra* note 29; *see also EOIR Immigration Court Listing*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/eoir-immigration-court-listing (May 11, 2021) (reporting that immigration courts are located in over thirty states and territories, including Arizona, Maryland, and Utah).

politicized DHS.[50] But at the same time, critics see that there is a "fundamental flaw of having a court system that is structured within the Justice Department."[51] The former chairman of the BIA, Judge Paul Schmidt, has noted that American immigration courts are unique: the lead prosecutor (the Attorney General) chooses, supervises, and "provides direction to the judges."[52] Thus, there is not even the appearance of impartiality within the immigration judicial system.

It is true that, on paper, IJs are governed by regulations that mandate they exercise autonomy.[53] However, as many observers have remarked, this aspiration is simply unrealistic and practically impossible, given the institutional structure of where the courts are located.[54] In addition, Judge Schmidt has argued that because of "aimless docket reshuffling"[55]—where every new administration dictates when and which cases judges should hear, thereby displacing those already in the cue—the result is that there is now a backlog of over one million cases within these courts.[56] Add to this that judges are expected to "complete 700 cases each year or risk a less-than-

---

50. For a recent article discussing the tensions between DHS and DOJ, see Kit Johnson, Pereira v. Sessions*: A Jurisdictional Surprise for Immigration Courts*, 50 COLUM. HUM. RTS. L. REV. 1, 1 (2019) (highlighting an 8-1 Supreme Court case that held that when a noncitizen receives a document called a notice to appear, and where that document does not have a time or place listed for the removal proceedings, then it is not a valid notice to appear and, thus, it does not 'stop time' for purposes of establishing the noncitizen's continuous physical presence in the United States).

51. *See* Am. Immigr. Laws. Ass'n, *It's Time for Immigration Reform*, YOUTUBE (Jan. 31, 2020), https://youtu.be/8fkt-g4XG_A (presenting commentary by Judge Ashley Tabaddor).

52. *See id.* (presenting commentary by Judge Paul W. Schmidt).

53. *See* INNOVATION LAB & S. POVERTY L. CTR., *supra* note 38, at 3 (critiquing the structure of the immigration system as set up under the INA).

54. *Compare* Am. Immigr. Laws. Ass'n, *supra* note 51 (presenting speaker Shoba Sivaprasad Wadhia on the increased criticism of the lack of judicial independence in the current structure), *with* Baibak, *supra* note 38, at 1004 (noting the influence of the Attorney General over the immigration system), Dana Leigh Marks, *I'm an Immigration Judge: Here's How We Can Fix Our Courts*, WASH. POST (Apr. 12, 2019 3:31 PM), https://www.washingtonpost.com/opinions/im-an-immigration-judge-heres-how-we-can-fix-our-courts/2019/04/12/76afe914-5d3e-11e9-a00e-050dc7b82693_story.html (explaining how the DOJ micromanages judges' handling immigration of cases), Legomsky, *Restructuring Immigration Adjudication*, *supra* note 38, at 1667–71 (describing how actions of the Justice Department erode BIA independence in practice), Catherine Y. Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1, 5–6 (2018) (analyzing the Trump Administration's political influence on immigration courts), *and* 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, 21 (2013) (discussing how the structure of the immigration system impedes fair judicial review).

55. *See* Am. Immigr. Laws. Ass'n, *supra* note 51 (presenting speaker Paul W. Schmidt).

56. *See id.*; *see also* Marks, *supra* note 54.

satisfactory performance evaluation,"[57] and possible termination.

The pressure points on this system, therefore, are numerous and appear unsustainable. Biases are deeply entrenched, and since there is no right to a government appointed lawyer in immigration proceedings,[58] it is hard to see how noncitizens can receive a fair shake in front of an IJ. While this last observation is not explicitly stated by the Third and Ninth Circuits, it is natural to wonder whether this factor was part of their calculus in arriving at the conclusions that they did.

II. LIMITING THE IMMIGRATION JUDGE'S POWER OVER WAIVERS

A. View from the Third Circuit

In 1995, Sina Sunday entered the United States on a one-year visa.[59] Like others who arrive on a temporary basis, Sunday was classified as a "nonimmigrant."[60] After his visa expired, Sunday opted to remain in the United States for the next eighteen years, until he was discovered by federal authorities who ordered him deported.[61] In addition to his unlawful immigration status, Sunday was convicted of "bail jumping" for a criminal conviction, which also rendered him removable.[62]

In an effort to stave off deportation, "Sunday applied for a U visa from the . . . USCIS."[63] As a result of his criminal conviction and his lack of lawful status, he was declared inadmissible, which thereby made him ineligible for this relief.[64] (Note, under the INA, a noncitizen's presence in the country must correspond to how that individual was admitted; otherwise, the designation will be categorized as inadmissible—"even if . . . [the person] has

57. *See* Marks, *supra* note 54.

58. *See* Matthew S. Mulqueen, *Access to Counsel in Immigration Proceedings*, AM. BAR. ASS'N (Feb. 21, 2019) https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2019/february-2019/access-counsel-immigration-proceedings/; *see also* Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2399 (2012); STEPHEN H. LEGOMSKY & DAVID B. THOMPSON, IMMIGRATION AND REFUGEE LAW AND POLICY 906 (2019); Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 439 (2007).

59. Sunday v. Att'y Gen., 832 F.3d 211, 212 (3rd Cir. 2016).

60. The term "immigrant" is used for people who are arriving in the United States and staying as permanent residents. For a discussion on the distinction between nonimmigrants and immigrants, see WILLIAM A. KANDEL, CONG. RSCH. SERV., R45020, A PRIMER ON U.S. IMMIGRATION POLICY 1 (2018), https://crsreports.congress.gov/product/pdf/R/R45020.

61. *Sunday*, 832 F.3d at 212–213.

62. *Id.*

63. *Id.* at 213.

64. *Id.* (noting that Sunday also "lacked a valid passport").

lived in the United States for many years.")[65]

To contest the government's case, Sunday asked for a U visa inadmissibility waiver from the USCIS, but the agency rejected his petition because of his criminal background.[66] He then sought review of his waiver claim from an IJ who subsequently held "that she lacked jurisdiction to consider Sunday's request . . . ."[67] The BIA let this ruling stand, and then Sunday appealed to the Third Circuit.[68]

The main thrust of Sunday's argument was that under the INA, there were two different cabinet offices that had the authority to issue U visa waivers: the DHS and the DOJ. In support of the former, there was 8 U.S.C. § 1182(d)(14), which states that "[t]he Secretary of Homeland Security [operating through USCIS] may waive the application"[69] altogether, if the Secretary "considers it to be in the public or national interest to do so."[70] Yet as Sunday contended, 8 U.S.C. § 1182(d)(3)(A) offered an alternative approach, because it says that "in the discretion of the Attorney General"[71] "a waiver of inadmissibility [can be granted to those] who are 'seeking admission.'"[72]

The question for the Third Circuit was whether this overlapping jurisdiction between the DHS and the DOJ meant that Sunday could have his waiver petition evaluated by the Attorney General, even after it had been rejected by USCIS.[73] If the answer to that question was yes, then crucially, by extension, IJs could also do the evaluation because of "the powers and duties delegated to them [by the Attorney General] . . . through regulation."[74]

---

65. ALEINIKOFF ET AL., *supra* note 33, at 556.

66. *Sunday*, 832 F.3d at 212–13.

67. *Id.*

68. *Id.* Sunday also argued that his removal amounted to a violation of the Eighth Amendment. This claim was also dismissed by the immigration court and the BIA. *Id.* at 217–18.

69. 8 U.S.C. § 1182(d)(14).

70. *Id.*

71. *Id.* § 1182(d)(3)(A). For general background on (d)(3), see Rachel Gonzalez Settlage, *Status in a State of Emergency, U Visas and the Flint Water Crisis*, 20 HARV. LATINO L. REV. 121, 128 (2017); RACHEL GONZALEZ SETTLAGE ET AL., IMMIGRATION RELIEF: LEGAL ASSISTANCE FOR NONCITIZEN CRIME VICTIMS 40 (2014); Leticia M. Saucedo, *Immigration Enforcement Versus Employment Law Enforcement: The Case for Integrated Protections in the Immigrant Workplace*, 38 FORDHAM URB. L.J. 303, 309 (2010).

72. *Sunday*, 832 F.3d at 214.

73. Stanford Law School's Immigrants' Rights Clinic, led by Professor Jayashri Srikantiah, has been a leading voice for noncitizens seeking U visas. Professor Srikantiah, in fact, participated in a collaborative amicus brief on behalf of Sunday in this Third Circuit case. *See* Amicus Curia Brief in Support of Petition for Rehearing or Rehearing En Banc, Sunday v. Att'y Gen., 832 F.3d 211 (3rd Cir. 2016) (No. 15-1232).

74. *Sunday*, 832 F.3d at 215 (citing 8 C.F.R. § 1003.10).

In its ruling, the Third Circuit rejected this interpretation. According to the court, the precise words, "seeking admission," of § 1182(d)(3)(A)(ii) on its face referred to a noncitizen arriving at the border who was looking to enter.[75] Sunday, in this case, had already been in the United States for nearly two decades, so he did not qualify. Moreover, there were two other DOJ regulations that the court believed supported its decision.[76]

First, 8 C.F.R. § 1212.4(b) describes how a noncitizen pursuing a waiver must submit an application (called an "I-192") to the district director of the USCIS at "the applicant's intended port of entry *prior* to the applicant's arrival into the United States."[77] If that official rules against the noncitizen, then under a second DOJ regulation, 8 C.F.R. § 1235.2(d), there can be an appeal to an IJ.[78] As the court held, these two regulations cemented the conclusion that the IJ could only be involved when the noncitizen was "seeking admission."[79]

Sunday, therefore, saw his petition for a waiver dismissed. Within the last several months, a similar rationale employed by the Third Circuit was adopted by the Ninth Circuit – but with a twist. That decision is examined next.

B. View from the Ninth Circuit

In October of 2019, the Ninth Circuit issued a per curiam opinion in the case of *Man v. Barr*.[80] Before examining the different aspects of this decision, however, it is important to note that in 2016 the BIA decided a case known as *Matter of Khan*,[81] which the Ninth Circuit subsequently drew upon extensively in its 2019 ruling. As background, Safraz Khan was "a native and citizen of Guyana who was admitted to the United States as a lawful permanent resident on May 25,

75. *Id.* at 214 (noting that this phrase "unambiguously indicates" the point made above in the text).

76. *See id.* at 217 (noting that "[t]he Court of Appeals for the Seventh Circuit did not account for the limitations that DOJ immigration regulations 8 C.F.R. § 1212.4(b) and § 1235.2(d) place on IJs' waiver authority").

77. *Id.* at 215–16 (quoting 8 C.F.R.§ 1212.4(b)).

78. *Id.* at 216 (citing 8 C.F.R.§ 1235.2(d), and noting specifically that there could be a "renewal of such application or the authorizing of such admission by the immigration judge without additional fee").

79. *Id.* at 216–17 (citing the BIA's earlier decisions in Fueyo, 20 I. & N. Dec. 84, 86 (B.I.A. 1989) and Kazemi, 19 I. & N. Dec. 49, 52 (B.I.A. 1984), which both held that the IJ could only become involved after being denied entry at the border by the district director). And even if there was ambiguity on the role that the IJ could play, as Sunday so claimed, the Third Circuit cited the *Chevron* doctrine in finding that the BIA's holding (which was in favor of the government) deserved deference. *Id.* at 216 (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S.837 (1984)).

80. 940 F.3d 1354, 1354 (9th Cir. 2019).

81. 26 I. & N. Dec. 797 (B.I.A. 2016).

1992."[82] Sixteen years later, he was convicted of a series of sex-related crimes against children and was ordered deported.[83]

Khan then filed a petition claiming that he qualified for a U visa. In 2014, the USCIS rejected his application, as well as his petition for a waiver.[84] Khan then approached an IJ to review his waiver application, citing § 1182(d)(3)(A)(ii) as the basis for his motion.[85] The IJ held that she indeed could review this file through the "concurrent jurisdiction" that the statute provided to both the DHS and DOJ.[86] However, she found that Khan did not meet the threshold for obtaining the waiver and, therefore, denied his claim.[87]

On appeal, the BIA was asked to decide on whether the IJ had overstepped her authority regarding § 1182(d)(3)(A)(ii),[88] even though the judge had ruled in the government's favor. The BIA approached this statutory provision by saying that it needed to be read together with § 1182(d)(14), which explicitly discussed the DHS and its power over the U visa waivers. According to the court, "legislative intent as to the interplay between the waivers . . . [had been] unclear."[89] Namely, there was no mention of where the noncitizen had to be, location-wise, in order to receive a DHS waiver.

Because of § 1182(d)(3)(A)(ii)'s language referencing how the petitioner must be "seeking admission,"[90] the BIA concluded that the IJ's authority to issue waivers applied in very limited circumstances: to where the noncitizen is looking to enter, but *not* when that person "is [already] physically in the United States."[91] For the latter situation, (d)(14) was held to be the applicable provision, with the DHS being the agency in charge of making such determinations.[92] Since Khan had been in the United States for nearly twenty years, he was ineligible to have an IJ review his waiver petition.

This judgment by the BIA was used by the Ninth Circuit in ruling

---

82. *Id.*

83. *Id.* at 797–98 (referencing 8 U.S.C. § 1227(a)(2)(A)(iii) (2012) as enabling removal of "an alien convicted of sexual abuse of a minor, which is an aggravated felony under . . . 8 U.S.C. § 1101(a)(43)(A) (2012).").

84. *Id.* at 798.

85. *Id.*

86. *Id.* (citing three decisions as the basis for her conclusion: Sanchez Sosa, 25 I. & N. Dec. 807 (B.I.A. 2012); L.D.G. v. Holder, 744 F.3d 1022 (7th Cir. 2014); and Hranka, 16 I. & N. Dec. 491 (B.I.A. 1978)). For a discussion of *L.D.G.*, see *infra* Section III.A,

87. *Id.*

88. *Id.* at 799.

89. *Id.* at 801.

90. 8 U.S.C. § 1182(d)(3)(A)(ii).

91. Khan, 26 I. & N. Dec. at 803.

92. *Id.* at 803–05 (noting that as a result of the *Chevron* doctrine, the DHS had the discretion to resolve an ambiguous conflict in the law in this manner so long as the resolution was reasonable).

against the noncitizen in *Man*.[93] The Ninth Circuit agreed that there was statutory "ambiguity" between the two above-stated provisions of the INA.[94] But it found that the BIA's interpretation in *Khan* was reasonable and deserved to be followed.[95]

Interestingly, the Ninth Circuit then went one step further. It held that *how* noncitizens envision their own status vis-à-vis the statutory framework may well influence the way they will be judged by the law.[96] Here, the noncitizen, Man, "acknowledge[d], he ha[d] been in the United States since 1997, and [was] not seeking a waiver"[97] as part of gaining admission into the country. For the court, this was enough evidence that Man's case belonged under the DHS's (d)(14) waiver purview rather than within IJ's (d)(3)(A)(ii) jurisdiction.[98]

In sum, the approach taken by the BIA and Third and Ninth Circuits is one that views IJs as having a limited portfolio. Yet, there is a counter-perspective that envisions a more robust role for these adjudicators. Two federal appellate courts have embraced this position, and they have done so in a careful and deliberate manner.

III. A MORE EXPANSIVE VIEW OF THE IMMIGRATION JUDGE'S POWERS

A. The Seventh Circuit's Judgment in L.D.G. v. Holder

1. Underlying Facts

In each of their decisions, the BIA and Third and Ninth Circuits were reacting, in particular, to a 2014 case from the Seventh Circuit, *L.D.G v. Holder*.[99] The decision in *L.D.G.* was pivotal because it directly addressed whether the USCIS had exclusive jurisdiction over the U visa waiver. The opinion, authored by Judge Diane Wood, was a detailed ruling that spent time on the facts of the case, the competing provisions within the INA, and the public policy implications of this ruling.[100]

---

93. Man v. Barr, 940 F.3d 1354, 1356 (9th Cir. 2019).

94. *See id.* at 1356.

95. *Id.* at 1357.

96. *See id.* at 1358.

97. *Id.* at 1358.

98. *See id.* at 1357–58.

99. 744 F.3d 1022 (7th Cir. 2014).

100. *See id.* Also joining Judge Wood (appointed by President Clinton) was Judge David Hamilton (appointed by President Obama) and Judge Michael S. Kanne (appointed by President Reagan). *See Biographical Directory of Federal Judges*, FED. JUD. CTR., https://www.fjc.gov/history/judges/search/glossary-search (last visited May 18, 2021) (providing information regarding appointment and confirmation of federal judges).

L.D.G. and her husband were Mexican citizens who were informally designated as "EWIs"—or those who have entered without inspection.[101] They came to California in 1987 and then moved to Illinois in 2005, "in order to support L.D.G.'s brother-in-law, who was struggling with a drug problem."[102] The couple had four children, each of whom were American citizens, and even though the parents were undocumented, they were able to run a successful restaurant shortly after moving to Illinois.[103]

Problems arose, however, for L.D.G. and her family because of her brother-in-law's continued affiliation with drug associates. In August 2006, a gang that had been searching for the brother-in-law assaulted and kidnapped L.D.G. and her family.[104] The family was rescued by police officers, who later went on to arrest the captors.[105] The perpetrators were eventually prosecuted and convicted for their crimes with the help of L.D.G. and her relatives.[106]

Sadly, this experience changed the lives of L.D.G. and her family for the worse. Her husband soon became involved in the illegal narcotics underworld.[107] In 2007, he and L.D.G. were arrested on various drug-related offenses.[108] The husband was sentenced to five years in prison, and L.D.G. pleaded guilty to a lesser crime, which allowed her to receive "a sentence of probation and time served in order to return to her children."[109]

In late 2007, the government moved to deport L.D.G. for failing to have entered the United States lawfully, as well as for her drug conviction.[110] She sought to apply for a U visa because she had assisted prosecutors in the case against her kidnappers.[111] But before she could make this petition, she

---

101. *L.D.G.*, 744 F.3d at 1026.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. One of the specific statutes under which the DHS acted was 8 U.S.C. § 1182(a)(6)(A)(i), which makes removable a noncitizen present in the United States "without [having] be[en] admitted or paroled . . . ." *See L.D.G.*, 744 F.3d at 1026–27. Additionally, for her conviction of a crime involving moral turpitude, the DHS worked under 8 U.S.C. § 1182(a)(2)(A)(i)(I); for her conviction of a controlled substance crime, § 1182(a)(2)(A)(i)(II); and for her status as a person who "the Attorney General knows or has reason to believe . . . is or has been an illicit trafficker in any controlled substance," § 1182(a)(2)(C). *L.D.G.*, 744 F.3d at 1026–27.

111. Another benefit to this was that she would be able to obtain a work permit as well. *L.D.G.*, 744 F.3d at 1026–27. For a general discussion on this point, see Diane Mickelson,

needed to obtain a waiver of inadmissibility, which the USCIS refused to grant.[112] It was at this point that she asked the DOJ's immigration court "to consider anew her application."[113] However, the court also refused, as did the BIA on appeal.[114] Thus, she approached the Seventh Circuit for a review of her request.[115]

2. The Appellate Court's Legal Analysis

a. Statutory Rationale

For the original IJ, there were two reasons he cited for why he lacked the authority to intervene. First, a DHS regulation (8 C.F.R. § 214.14(c)(1)) specified that the DHS had "sole jurisdiction over all petitions for U nonimmigrant status."[116] Second, a separate DHS regulation (8 C.F.R. § 212.17) said that it was the USCIS's prerogative whether or not to issue the waiver.[117] Based on these two rules, as well as the language within the 1996 Illegal Immigration Reform and Immigrant Responsibility Act, the judge held that he could have no role.[118] On appeal, the BIA embraced these arguments and went further by declaring that a 2008 precedent from the Seventh Circuit itself, which precluded noncitizens for obtaining waivers for unlawful entry in the past, applied directly to L.D.G's case here.[119]

When the Seventh Circuit reviewed the case, the panel approached the matter by immediately stating that it did not have jurisdiction to evaluate the substantive or "discretionary decisions of the Attorney General or the Secretary of Homeland Security."[120] Yet, the court firmly asserted that it could intervene on issues pertaining to the IJ's conclusion that he lacked jurisdiction to grant the inadmissibility waiver.[121] On review, the Seventh Circuit began by correcting "the Board's impression that L.D.G. was pursuing a retroactive waiver under § 1182(d)(3)" and thus the precedent the BIA relied upon was

---

When the Problem Is the Solution: Evaluating the Intersection Between the U Visa "Helpfulness" Requirement and the No-Drop Prosecution Policies, 53 U. RICH. L. REV. 1455 (2019).

112. *See L.D.G.*, 744 F.3d at 1027.

113. *Id.*

114. *Id.*

115. *Id.*

116. *See id.* (citing the language of the regulation itself).

117. *Id.*

118. *See id.*

119. *See id.* (citing Borrego v. Mukasey, 539 F.3d 689, 693 (7th Cir. 2008) (noting "that a waiver under section 1182(d)(3) cannot be granted retroactively in immigration proceedings.")).

120. *Id.* at 1027 (citing 8 U.S.C. § 1252(a)(2)(B)(ii)).

121. *See id.* at 1027–28.

incorrect.[122] It then addressed and rejected the government's arguments: first, that the BIA decision was entitled to *Auer* deference and, second, that § 1182(d)(3)(A), the section giving the Attorney General authority to grant a waivers of inadmissibility, had been replaced by § 1182(d)(14), the section giving the Secretary of Homeland Security authority over waivers of inadmissibility for U visa applicants.[123] Procedurally, it also corrected the BIA's interpretation of the 2008 precedent that it cited.[124] Specifically, it was not as though L.D.G. had already obtained a visa (unlawfully) and then was petitioning retroactively for a waiver in order to keep it—which was the situation in that 2008 case. Rather, here L.D.G. was requesting a waiver *prospectively* so she could "gain eligibility for a U Visa in the future."[125]

From there, the court assessed whether USCIS had sole control over the granting of these waivers. The government cited the Supreme Court's 1997 ruling in *Auer v. Robbins*,[126] which held that an agency's interpretation of a regulation is owed deference except for where such a reading is egregiously incorrect.[127] The court rejected the government's argument that the BIA's interpretation was deserving of *Auer* deference for two reasons.[128] First, it was unwilling to extend deference to one agency's interpretation of another agency's regulation.[129] Second, it noted that even if deference was owed, the regulations the BIA relied on did not address the issue of whether an IJ had authority to issue waivers of inadmissibility to U visa applicants. Instead, this issue was governed by statute and, therefore, *Auer* deference was inappropriate.[130] In this case, the two regulations in question (8 C.F.R. §§ 212.17, 214.14) were put forth by the DHS—not the DOJ.[131] Only an

---

122. *Id.* at 1028.

123. *See id.* at 1028–30.

124. *Id.* at 1028.

125. *Id.* The court further clarified:

> A waiver is retroactive [only] when it works to salvage relief previously granted for which the applicant was not qualified, and thus was void from the outset. L.D.G., by contrast, has not obtained any relief at all. She is seeking a waiver of inadmissibility in order to qualify for a new U Visa.

Id. The case that the court distinguished was Borrego v. Mukasey, 539 F.3d 689 (7th Cir. 2008), which the Third Circuit cited for support in its decision that the IJ could only become involved where a noncitizen is seeking admission.

126. 519 U.S. 452 (1997).

127. *See L.D.G.*, 744 F.3d at 1028–29 (discussing *Auer*, which also cited for this point in the text, Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (2012)).

128. *Id.*

129. *Id.*

130. *Id.* at 1029–30.

131. *Id.* at 1028–29.

attenuated reading of *Auer* would suggest that one entirely different executive branch office would have to bow to the regulations promulgated by another—and the Seventh Circuit was unwilling to break new ground on this front.[132]

As the court explained, 8 C.F.R. § 214.14 lists the criteria for acquiring the U visa and provides the USCIS with the exclusive power of issuance.[133] 8 C.F.R. § 212.17, meanwhile, lays out the process for submission of the necessary documentation to obtain the visa.[134] Unfortunately, the BIA and the IJ improperly assumed that what flowed next was the notion that the USCIS also had sole authority to grant waivers.[135]

However, as the Seventh Circuit pointed out, both rules "are silent on" this issue.[136] By contrast, an existing statutory provision—8 U.S.C. § 1182(d)(3)(A)(ii)—expressly vests the Attorney General with the power "to waive the inadmissibility of 'an alien' applying for a temporary nonimmigrant visa."[137] The Seventh Circuit critiqued the BIA and IJ by saying that "it is not enough to identify a regulation that addresses an associated matter and tack on requirements that are conjured from thin air."[138]

In explaining this point, Judge Wood engaged in a lesson on statutory interpretation. She noted that, except for cases involving certain national "[s]ecurity and related grounds,"[139] § 1182(d)(3)(A)(ii) gives the Attorney General broad discretion in determining who may or may not qualify for a waiver of inadmissibility—even beyond U visa applicants.[140] Otherwise put, § 1182(d)(3)(A)(ii) could be seen as a "catch-all provision,"[141] giving the Attorney General great leeway in issuing waivers on a range of applications by noncitizens.

Section 1182(d)(14) focuses solely on the U visa, but interestingly offers the DHS Secretary flexibility.[142] There is no prohibition on granting a waiver to someone who may be a security risk. Hence, if a U visa applicant with a suspicious background petitions for a waiver, the DHS Secretary could theoretically grant the waiver, even though under (d)(3)(A)(ii) the waiver could not be granted.[143] Thus, in reality—as Judge Wood noted—there was

132. *Id.*
133. 8 C.F.R. § 214.14 (2020).
134. *Id.* § 212.17.
135. *L.D.G.*, 744 F.3d at 1027.
136. *Id.* at 1029.
137. *Id.* at 1030 (quoting 8 U.S.C. § 1182(d)(3)(A)).
138. *Id.* at 1029.
139. This statutory exception is found in 8 U.S.C. § 1182(a)(3).
140. *L.D.G.*, 744 F.3d at 1030–31.
141. *Id.* at 1031.
142. *See* 8 U.S.C. § 1182(d)(14).
143. The language of 8 U.S.C. § 1182(d)(14) only restricts the DHS Secretary's ability to

never any duplication between these two provisions from the start.[144]

This statutory analysis then allowed Judge Wood to make her final point. During the course of the litigation, government lawyers contended that (d)(14) effectively repealed the Attorney General's power on U visa waivers and vested it with the DHS Secretary.[145] The government's argument was straightforward: since the Secretary, under (d)(14), controlled inadmissibility waivers of noncitizens in the interest of the country,[146] that necessarily meant that the Attorney General could not do so under (d)(3)(A)(ii).[147]

Judge Wood's reply was direct. The later-passed (d)(14) had no language in it that could be seen as repealing (d)(3)(A)(ii).[148] Relatedly, given the powers explicitly granted to the DOJ under (d)(3)(A)(ii), from a statutory interpretation perspective, it made little sense to conclude that (d)(14) could have the effect of limiting the former's scope.[149] Upon holding that the two provisions could be "capable of coexistence if they are understood to provide dual tracks for a waiver determination," Judge Wood found the government's argument unpersuasive.[150]

b. Public Policy Supporting the Immigration Judge

Beyond the statutory analysis, the end of the *L.D.G.* opinion discusses *why* it is important for the IJ to remain involved in the waiver process.[151] For Judge Wood, a key reason for a judge's active involvement was due to congressional intent.[152] Recall, (d)(3)(A)(ii) applies more broadly than simply U visa cases. The provision applies to other nonimmigrant visa applicants,

---

grant waivers "other than paragraph (3)(E)," which pertains to those who are "[p]articipants in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing." *See* 8 U.S.C. § 1182 (a)(3)(E). When it first came onto the statutory books in 2000, it was the Attorney General—not the DHS Secretary—who had the power to waive inadmissibility under (d)(14). Indeed, having both (d)(3)(A) and (d)(14) resulted in some "awkwardness," because it appeared that the latter was "redundant." *L.D.G.*, 744 F.3d at 1030. Then in 2008, when (d)(14) was amended to give the DHS Secretary the power to issue waivers, it might have been seen as Congress's way of curing this problem by suggesting that the Attorney General no longer could exercise this authority under (d)(3)(a). But there was no real disconnect between the two provisions, even from the beginning. *See id.* at 1031.

144. *L.D.G.*, 744 F.3d at 1030–31.

145. *Id.* at 1027–28, 1030.

146. *See* 8 U.S.C. § 1182(d)(14).

147. For background on this point, see *supra* text accompanying note 143.

148. *See L.D.G.*, 744 F.3d at 1030–31.

149. *Id.*

150. *Id.* at 1031.

151. *Id.* at 1031–32.

152. *Id.* at 1031.

such as fiancés of U.S. citizens.[153] And in these instances, IJs have been at the center of the adjudication process.[154] Similarly, inadmissible noncitizens requesting temporary protected status or protection under the Convention against Torture can and have used (d)(3)(A)(ii).[155]

The promotion of judicial efficiency appears to be behind Congress's desire for this provision of the INA to be comprehensive. Having the IJ serve as the point person on all waiver petitions provides uniformity and streamlines the process, reducing the likelihood of different agencies doing this work in an uncoordinated, piecemeal fashion.[156] Where wait times for acquiring visas are only becoming longer, a system with an experienced judge in place, who is able to deliver decisions in a timely fashion, is a win–win for all concerned.[157] With respect to statutory purpose, legislative intent, and policy objectives, the Seventh Circuit ultimately ruled that the IJ retains control over inadmissibility waivers.[158]

B. The Eleventh Circuit's Decision in Meridor v. U.S. Attorney General

In the mid-1990s, Finest Meridor entered the United States from Haiti as an undocumented noncitizen and remained in the country for over two decades.[159] In 2013, the government ordered him deported after he was convicted of a drug-related offense, "a crime of moral turpitude,"[160] and for

153. *Id.*

154. *Id.*

155. *See* 8 U.S.C. § 1254a (codifying temporary protected status law); *id.* § 1254a(c)(2) (codifying waiver provision for temporary protected status law). Regarding withholding of removal under the Convention against Torture, see 8 C.F.R. § 208.16(c) (2020).

156. *See L.D.G.*, 744 F.3d at 1031–32. In addition to DHS, the Department of State and the Department of Labor also play a role in immigration policy.

157. *Id.* at 1032 ("Concurrent jurisdiction over U Visa waivers, shared by DOJ and DHS, thus has its advantages for the administration of the immigration system when compared to the possibility of exclusive USCIS jurisdiction."). Judge Wood also provided statistics showing that, during the time period in which this case was going through the litigation process, "the average waiting period has increased 37% over the last five years, from 657 days in fiscal year 2009." *Id.* (citing *Wait for Immigration Relief Longest in Nebraska, Oregon, Illinois Courts*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Nov. 12, 2013), http://trac.syr.edu/whatsnew/email.131112.html).

158. *Id.* at 1031–32.

159. Meridor v. U.S. Att'y Gen., 891 F.3d 1302, 1304 (11th Cir. 2018). Note, there is not a specific year provided in the case file. Rather, it says that Meridor "arrived in the United States about 25 years ago as a political refugee from Haiti." *Id.* Separate from his asylum claim, which, if successful, would have led to a green card and then citizenship, Meridor also applied for withholding of deportation. *Id.*

160. *Id.* Within the INA, a crime of moral turpitude is found within 8 U.S.C.

not having a valid visa and current passport.[161] Initially, Meridor applied for asylum and withholding of deportation, but these claims were denied by the sitting IJ.[162] He then presented a new argument: that he ought to be eligible for a U visa given his personal suffering, as well as the fact that he could assist law enforcement in a criminal investigation.[163] Before he could apply, however, he needed to receive a waiver of inadmissibility. He, therefore, submitted his waiver petition to both the USCIS, as well as to the IJ..[164]

Judge Wood's view that, absent a streamlined process, inefficiency would occur, was prescient and manifested in Meridor's case. Having two different agencies considering the same application was duplicative, time-consuming, and—perhaps not surprisingly—resulted in a disjointed outcome. The presiding IJ orally ruled that she would be issuing the waiver, but prior to her written publication, the USCIS summarily dismissed both Meridor's waiver and substantive U visa request.[165]

The facts then became even more convoluted. After the USCIS acted, the IJ confirmed her order in writing, stating that she found Meridor's presence within the country posed a minimal threat and that his family would face dire circumstances if he were deported.[166] Yet, she distinguished between granting the waiver and granting the U visa itself, with the latter only being issuable by the USCIS. Given that the agency had found that he did not qualify for the visa, she ordered him deported.[167]

From there, Meridor appealed to the BIA, which ruled that the IJ did not even have the power to provide waivers in the first place.[168] It also said that "Meridor did not merit such a waiver."[169]

Having no attorney to represent him any further, Meridor launched a pro

---

§ 1182(a)(2)(A)(i)(I). Note, "[t]he INA does not define 'crime involving moral turpitude'—a key concept for both inadmissibility and deportability." ALEINIKOFF ET AL, *supra* note 33, at 558. For a discussion on how the term has been defined over the years, see *id.* at 679—80.

161. *Meridor*, 891 F.3d at 1304.

162. *Id.*

163. *Id.* at n.1.

164. *Id.* at 1304.

165. *Id.*

166. *Id.* at 1305.

167. *Id.* at 1304–05.

168. *Id.* at 1305 (noting that "Meridor's reasons for wanting to remain in the United States did not outweigh his criminal history," which is what the IJ held).

169. *Id.* This was a rather odd finding given that even the USCIS said that, "if he [Meridor] were [admissible], he appeared to meet all of the other U visa eligibility criteria." *Id.* at 1304. Meridor then resubmitted his application for both the waiver and visa itself to the USCIS, which affirmed its earlier decision on both grounds. *Id.* at 1305.

se appeal to the Eleventh Circuit.[170] The court heard the case and, in its decision, reiterated the long-standing position that the IJ effectively functions as a "delegate" of the Attorney General for the purposes of (d)(3)(A)(ii).[171] The court then held that the BIA had overstepped when it found that Meridor had no substantive claim to a U visa.[172] From there, the court made two significant statements.

First, it ruled that the IJ certainly had the power to grant inadmissibility waivers to U visa applicants. It opted to follow the decision in *L.D.G.* and expressly rejected the rationale offered by the BIA in *Khan* and the Third Circuit in *Sunday*.[173] Second, the court stated that on remand, the BIA would need to consider and accept the IJ's "factual findings," unless there was evidence that a "clear error" had been made.[174] Conspicuously missing was any mention of how the USCIS's findings should enter into the calculus.[175]

By its explicit language, the Eleventh Circuit privileged the role of the IJ in this situation. In *Man*, the Ninth Circuit dismissively remarked that the Eleventh Circuit acted "[w]ithout independent analysis" in rendering its judgment.[176] Bluntly put, the Ninth Circuit was wrong. *Meridor*, in fact, thoughtfully illustrates how the Eleventh Circuit saw the IJ as a valuable official whose findings deserved deference in both the waiver and U visa process.

C. Returning to the Seventh Circuit—Baez-Sanchez v. Barr

In January 2020, the Seventh Circuit reentered the debate over who could issue inadmissibility waivers. This time, Judge Frank Easterbrook penned the opinion for a unanimous three-judge panel.[177] In a blistering judgment deriding the BIA, Judge Easterbrook chastised the Board for what he saw as overt insubordination.[178] The harsh, admonishing language from the judge

---

170. *Id.*

171. *Id.* at 1307 (citing 8 C.F.R. § 1003.10(a)).

172. *Id.* (finding that it could "therefore decide the IJ's jurisdiction over waivers of inadmissibility").

173. *Id.* at n.8 (opining that both were "unpersuasive").

174. *Id.* at 1304, 1308.

175. *See generally id.* (making no mention of the role of the USCIS).

176. *See* Man v. Barr, 940 F.3d 1354, 1358 (9th Cir. 2019).

177. The other two judges were Judge David Hamilton—who was part of the *L.D.G.* judgment—and Judge William Bauer. *See* Baez-Sanchez v. Barr, 947 F.3d 1033, 1034 (7th Cir. 2020).

178. *See* Jonathan H. Adler, *The BIA Is Behaving Badly (and Judge Easterbrook Is Not Amused)*, REASON: THE VOLOKH CONSPIRACY (Jan. 24, 2020, 3:32 PM), https://reason.com/volokh/2020/01/24/the-bia-is-behaving-badly-and-judge-easterbrook-is-not-amused/.

was noteworthy, to say the least.

The history of the case involved Jorge Baez-Sanchez, an undocumented teenager from Mexico, who assisted law enforcement in an armed robbery case, resulting in the arrest and conviction of two individuals.[179] Sometime later, however, Baez-Sanchez himself was convicted "for aggravated battery of a police officer [which] render[ed] him inadmissible."[180] He was ordered deported, but Baez-Sanchez argued that he qualified for a U visa; though, he also recognized that his own criminal background required him to gain a waiver to apply, which he sought from an IJ in 2015.[181]

The judge granted Baez-Sanchez's request.[182] Her decision was appealed to the BIA by the DHS, which argued that there were no "extraordinary circumstances" to award the waiver, nor did the judge exercise her judicial authority in a proper manner.[183] The BIA declined to issue a ruling on either of these grounds, holding instead that, under (d)(3)(A)(ii), only the Attorney General, and not any DOJ-subordinate, could issue such a waiver. Otherwise put, delegation to an IJ was not permissible.[184]

In 2017, the Seventh Circuit, led by Judge Easterbrook, reversed the BIA's judgment and asked it to do a more thorough analysis of the issues raised by the DHS.[185] The story, thereafter, took a bizarre turn, as the case returned to the Seventh Circuit two years later.[186] In fact, as Judge Easterbrook stated, the entire episode "beggars belief."[187] In short, on that 2017 remand, the BIA opted to simply reiterate its previous ruling.[188] Perhaps most surprisingly, it then had the boldness to say that the appellate court was wrong in even sending the case back.[189]

To say that Judge Easterbrook was outraged would be an understatement. Consider his anger reflected in his January 2020 opinion:

> We have never before encountered defiance of a remand order, and we hope never to

179. For background on this case, see Chuck Roth, *The Human Story Behind the Board of Immigration Appeals Action that Beggars Belief*, NAT'L IMMIGRANT JUST. CTR. (Jan. 24, 2020), https://immigrantjustice.org/staff/blog/human-story-behind-board-immigration-appeals-action-beggars-belief.

180. *See Baez-Sanchez*, 947 F.3d at 1034.

181. *Id.* at 1034–35.

182. *Id.* at 1035.

183. *Id.* at 1034–35.

184. *Id.* (citing Khan, 26 I. & N. Dec. 797 (B.I.A. 2016)).

185. *See* Baez-Sanchez v. Sessions, 872 F.3d 854, 857 (7th Cir. 2017).

186. *See generally Baez-Sanchez*, 947 F.3d at 1033.

187. *Id.* at 1035.

188. *Id.*

189. *Id.* (noting that "[t]he Board of Immigration Appeals wrote, on the basis of a footnote in a letter the Attorney General issued after our opinion, that our decision is incorrect.").

> see it again. Members of the Board must count themselves lucky that Baez-Sanchez has not asked us to hold them in contempt, with all the consequences that possibility entails.
>
> The Board seemed to think that we had issued an advisory opinion, and that faced with a conflict between our views and those of the Attorney General it should follow the latter. Yet it should not be necessary to remind the Board, all of whose members are lawyers, that the "judicial Power" under Article III of the Constitution is one to make conclusive decisions, not subject to disapproval or revision by another branch of government.[190]

The Attorney General was also not spared from the court's frustration. The second time that the Seventh Circuit heard the matter, the DOJ entered the fray and asked the court once again to remand to the BIA to determine whether an IJ could serve as the Attorney General's delegate.[191] But to Judge Easterbrook, this plea was simply "bizarre . . . [because he had] already held that immigration judges *do* possess this power . . . ."[192] That the BIA resisted implementing this order left the court with little choice, and the Seventh Circuit was not going to remand again.[193] Accordingly, it ruled that Baez-Sanchez was entitled to the waiver originally granted by IJ because, as a matter of fundamental fairness, he "ha[d] waited long enough."[194]

D. Summarizing and Evaluating the Split Circuit Situation

When examining the debate between the Third and Ninth Circuits on the one hand, and the Seventh and Eleventh Circuits on the other, the legal analysis points in favor of the latter two courts as having the superior position. The foundational case, recognized by all four of these courts, was *L.D.G.* But as has been discussed, no deference was given to this decision by the appellate courts in the Third and Ninth Circuits. Indeed, even the BIA refused to show respect for this precedent, including in a case occurring within the very Seventh Circuit where *L.D.G.* governed.[195] Perhaps for this reason, then, it is understandable why Judge Easterbrook's opinion was as particularly sharp as it was.

At the heart of this dispute is who should have control over one of the most important aspects of the U visa waiver process. The Third Circuit in *Sunday* directly challenged Judge Wood's opinion in *L.D.G.* by noting that, while Judge Wood highlighted how the DHS's regulations could not apply to the Attorney General, she failed to "account for the limitations [the] DOJ

190. *Id.* at 1035–36.
191. *Id.* at 1036.
192. *Id.*
193. *Id.* at 1036–37.
194. *Id.* at 1037.
195. *See supra* Section III.C.

immigration regulations [themselves] . . . place on IJs' waiver authority."[196]

For instance, the DOJ's 8 C.F.R. § 1212.4(b) discusses how noncitizens who are seeking waivers for inadmissibility must first deal with an official within the DHS known as the "district director."[197] There is no mention at all of the IJ at this stage. Moreover, it is this DHS official who is in charge of evaluating the waiver petition, and as protocol dictates, this review occurs "prior to the applicant's arrival in the United States."[198] Only if there is a rejection of the application by the district director can the noncitizen ask an immigration court for review under 8 C.F.R. § 1235.2(d).[199] Noted by the Third Circuit, however, is that the involvement of the IJ is only triggered once there is a denial by the district director at the "port of entry."[200] Those who have already been in the United States unlawfully cannot avail themselves of a waiver review by an IJ, per the DOJ's own rules.[201]

On its face, it would seem that this rationale is hard to rebut, and it is perhaps understandable why the Ninth Circuit in *Man* pursued this same path. However, as Judge Easterbrook made clear in the 2017 *Baez-Sanchez* case, there were several points that both the Third and Ninth Circuits omitted from their analyses. First, taking the argument head-on that the Attorney General could only issue waivers for those at the border, Judge Easterbrook rightly noted that "[i]mmigration law has historically applied at least some rules about 'admissibility' to aliens already in the United States."[202] Further, the Third and Ninth Circuits found a sharp distinction between being "outside" or "inside" of the country, resulting in the creation of a false framework that determined when the Attorney General could and could not act.[203]

---

196. Sunday v. Att'y Gen., 832 F.3d 211, 217 (3d Cir. 2016).

197. *See* 8 C.F.R. § 1212.4(b).

198. *Id.*

199. *See id*, § 1235.2(d).

200. *See Sunday*, 832 F.3d at 215–216.

201. *Inadmissibility Due to Prior Removals and/or Unlawful Presence*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/sites/default/files/document/foia/Inadmissibillity_and_Waivers.pdf(last visited May 17, 2021).

202. Baez-Sanchez v. Sessions, 872 F.3d 854, 856 (7th Cir. 2017) (citing Menendez, 12 I. & N. Dec. 291, 292 (B.I.A. 1967); Sanchez Sosa, 25 I. & N. Dec. 807 (B.I.A. 2012)).

203. Additionally, Judge Easterbrook rejected the government's assertion, as lacking any foundation, that the INA somehow transferred the waiver powers held by the Attorney General (and thereby IJs) to the DHS. The government, specifically (and ironically) the Attorney General himself, filed a brief saying that the Attorney General could not issue inadmissibility-waivers. The brief cited 6 U.S.C. §§ 271(b) and 557, which Judge Easterbrook said were inapplicable for these arguments. *Id.* Section 271(b) does not state that there is a transferring of the inadmissibility waiver to the DHS from the DOJ, and "557 does not

Second and relatedly, the DHS had established its own regulation (8 C.F.R. § 212.17) suggesting that its agency, the USCIS, could issue inadmissibility waivers for those already in the United States.[204] For Judge Easterbrook, this led to a logical and fair question: "If the [DHS] Secretary can do this, why not the Attorney General?"[205]

And third, Judge Easterbrook pointed to a more relevant DOJ provision, 8 C.F.R. § 1003.10(a).[206] It not only explicitly listed IJs as being the representatives of the Attorney General, but also enabled them to "exercise all of the Attorney General's powers."[207]

What can be inferred from both *L.D.G.* and *Baez-Sanchez*, is that there can be definite sentiment for retaining the IJ's authority. Also, recall that in *L.D.G.*, Judge Wood provided an efficiency rationale justifying her position. Judge Easterbrook's embracing of *L.D.G.* would seem to endorse this policy point as well.

But there also could be another reason for why both Judge Wood and Judge Easterbrook believed that IJs should not be removed from the equation. Recall that a change was made in the early 1970s to employ the word 'judge' instead of 'officer,' for those adjudicators working within the INS.[208] Immigration *judges* wanted to be seen as impartial and as upholders of the rule of law. That image is what the DOJ seeks to present to the world, in terms of how immigration courts operate, to this day.

It is only natural then to assume that Judge Easterbrook's anger, as seen by his later January 2020 opinion,[209] stemmed in part from the fact that the DOJ's BIA judges were forgetting this virtue. They appeared to be affirmatively placing their loyalty to their political bosses rather than to the ideal of judicial independence. Even though DOJ adjudicators are not Article III judges, they are still supposed to act like judges and know their role within the judicial setting.

For Judge Easterbrook, the bottom line was that this appellate bench needed to do better. After all, consider the alternative adjudication process within the DHS, which has been made especially partisan during the last four

---

independently transfer any powers; instead it depends for its effect on other statutes, regulations, and reorganization plans." *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 855.

207. *See id.*

208. *See Evolution of the U.S. Immigration Court System: Pre-1983*, *supra* note 30; 38 Fed. Reg. 8590 (Apr. 4, 1973).

209. *See generally Baez-Sanchez v. Barr*, 947 F.3d 1033 (7th Cir. 2020).

years.[210] The forum of first resort within the USCIS has no real judicial process to it. The official in charge does not have to be a lawyer and can make a unilateral decision without having to conduct a hearing.[211]

Above this office is a review body known as the Administrative Appeals Office (AAO). It "exercise[s] appellate jurisdiction over approximately 50 different immigration case types filed with USCIS offices [including the U visa], as well as certain ICE determinations."[212] Yet, the head of this office also does not have to be a lawyer.[213] Furthermore, while the noncitizen "may request an oral argument . . . [t]he AAO has sole discretion to grant or deny the request."[214] And AAO proceedings are among the most nontransparent in government. Set aside that they "generally issue . . . non-precedent decisions,"[215] but everything else about them—"all of the names of the petitioners, the aliens, the presiding judge or judges, and the lawyers involved[—]are kept secret."[216]

---

210. *See generally* Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control over Immigration Adjudication*, 108 GEO. L.J. 579, 625, 627 (2020) (finding that removal of IJs was higher during the Trump era than during the Obama and Bush eras, and that the actual effect of the politicization of the Trump era may be artificially underinflated).

211. The process involves the noncitizen filing what is called an I-192 form. USCIS provides instructions for the requirements that are needed here. Briefly, the process involves the noncitizen providing in writing: biometric, biodata information, along with employment history, why the individual is inadmissible (whether it be on national security, health-related, or criminal grounds), and a filing fee. From there, the application is reviewed by the USCIS official, who may (or may not) request an interview. Subsequently, a written decision is sent to the noncitizen.

212. *See The Administrative Appeals Office*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao (Jan. 5, 2021) (listing the other areas as well).

213. The current head is Susan Dibbins, who according to the Administrative Appeals Office (AAO) website, started her career as an asylum officer and is a graduate of Tufts University (which does not have a law school). *See Susan Dibbins, Chief, Office of Administrative Appeals*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/about-us/leadership/susan-dibbins-acting-chief-office-administrative-appeals (Dec. 21, 2020).

214. *See* U.S. CITIZENSHIP & IMMIGR. SERVS, USCIS FORM I-290B, INSTRUCTIONS FOR NOTICE OF APPEAL OR MOTION 6 (rev. 2019), https://www.uscis.gov/sites/default/files/document/forms/i-290binstr.pdf.

215. *See AAO Decisions*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/administrative-appeals/aao-decisions (Jan. 27, 2021).

216. *See* David North, *New Leader for USCIS Appeals Office Could Mean More Transparency*, CTR. FOR IMMIGR. STUD. (Feb. 26, 2018), https://cis.org/North/New-Leader-USCIS-Appeals-Office-Could-Mean-More-Transparency ("Before an AAO decision can be published, AAO's clerks take a heavy black pencil to any element in the document that might indicate anyone's name, including the geographical location. Some passages in some

Comparatively, then, the DOJ's system looks much more like a standard judicial institution, which is why the decision at the BIA level in *Baez-Sanchez* was so disappointing. The saving grace for Judge Easterbrook was that, even though the BIA did not do its job, there was one official who did: the initial lower court IJ herself. This fact did not escape the Seventh Circuit, which was why her judgment was reinstated and then summarily affirmed.

* * *

While immigrant-rights advocates may prefer immigration courts to the USCIS or the AAO, the reality is that none of these forums are truly adequate. For the reasons mentioned at the outset of this Study, even IJs are ultimately beholden to their executive branch bosses. Consequently, noncitizens simply cannot be guaranteed that the principle of judicial independence will guide how their cases are handled.

Is there another way, therefore, to structure an immigration judiciary that adheres to a strict rule of law regimen, as well as offers the *perception* to all parties involved that the process is fair? One proposal gaining momentum involves removing the immigration judiciary entirely from the executive branch. The specifics of this plan are examined in the final Part.

CONCLUSION: A PROPOSAL TO CONSIDER . . . CAUTIOUSLY

In January 2020, the American Immigration Lawyers Association (AILA) produced a position paper that called upon Congress to create independent, Article I immigration courts.[217] Citing the system as "inherently flawed,"[218] AILA critiqued the bifurcated manner in which the DHS has been responsible for "trial level immigration prosecut[ions],"[219] while the DOJ "manages the Immigration Court and the Board of Immigration Appeals (BIA) . . . [together with] the Office of Immigration Litigation (OIL), which defends immigration cases on behalf of the government in the circuit courts of appeals."[220]

The above discussion of the U visa conflict highlights just how problematic the overlapping jurisdiction is between the two cabinet offices. Then there

---

decisions are redacted to the point of incomprehensibility."). There is also one other aspect of this citation that is worth mentioning. The Center for Immigration Studies has historically been seen as a more conservative organization on this issue of immigration. That it even views as problematic how the AAO operates underlines the skepticism that many across the political spectrum have towards it. *See Center for Immigration Studies*, S. POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/group/center-immigration-studies (last visited May 17, 2021) (designating the Center for Immigration Studies as a hate group).

217. *See* AILA: RESTORING IMMIGRATION COURTS, *supra* note 41, at 1.

218. *Id.* at 2.

219. *Id.*

220. *Id.*

is the issue of independence. Given that both the DHS and the DOJ are seen as especially political at this moment, it is difficult to expect adjudicators within either institution to feel secure operating in an autonomous way.

AILA's criticism is particularly focused on a pattern of troubling actions inside the DOJ. For example, since 2018, IJs have been subject to intense performance reviews based on how quickly they dispose of cases.[221] Additionally, President Trump's past Attorneys General were involved in highly charged interventions, with both appointees reversing several decisions made by IJs and the BIA.[222] The unionization of IJs has been prohibited as well, in spite of their desire to do so.[223] And, the DOJ has engaged in a defamatory campaign against lawyers representing noncitizens in immigration cases.[224]

AILA and its allies are right. The system needs to change. Congress ought to become involved, and Article I courts should be established in order to end the overt unfairness that presently exists. [225]

---

221. *Id.* at 3. The brief notes that the "unprecedented policy requires judges to adjudicate a certain number of cases or face discipline which may result in termination of employment." *Id.* In addition, a number of procedural moves have been made in the last three years to accelerate judgments delivered by IJs, including: reorganizing the Executive Office for Immigration Review (EOIR) so that the Attorney General has more say on which cases will and will not qualify as precedent; following "a 'no dark court room' policy, which directs immigration judges to reschedule and advance hearings to any period in which there is no case scheduled in their court room[,]"; limiting adjournments; inventing hearing dates to comply with "the Supreme Court's decision in *Pereira v. Sessions*, [138 S. Ct. 2105 (2018),] which said that all [notices to appear] in immigration court must include a date, time, and location[,]"; and holding makeshift court hearings at the border, as a means of expediting claims of removal against arriving noncitizens. *See id.* at 7–10.

222. *Id.* at 3–4; *see also* Krishnan, *supra* note 32.

223. *See* AILA: RESTORING IMMIGRATION COURTS, *supra* note 41, at 5 (noting that because IJs act in a managerial capacity, they are not permitted to unionize under the Federal Service Labor-Management Review Statute).

224. *Id.* at 10 (noting that there have even been threats to charge these lawyers with fraud). For an important study highlighting the differences in outcomes when a noncitizen has a lawyer versus not, see Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 47–75 (2015). On a related point, in terms of asylum cases, see Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 339–41 (2007). Indeed, for an important article on how lawyers help strategize for clients seeking U Visas, see Sarah Morando Lakhani, *Producing Immigration Victims' "Right" to Legal Status and the Management of Legal Uncertainty*, 38 L. & SOC. INQUIRY 442, 468–70 (2013).

225. *See* Kim, *supra* note 54, at 48 (finding that "[t]he Trump Administration's recent reforms to immigration courts," notwithstanding conventional wisdom that "presidential control over agencies . . . does not extend to administrative adjudication," proves that

With that said, the calls vary for how Article I courts might be created. Rebecca Baibak has argued that a court of first instance and an appellate body for immigration should be created by Congress, with a further possibility of review to an Article III court thereafter.[226] Modeling her proposal on how Article I bankruptcy courts function, Baibak suggests that this approach would allow for efficiency, expertise, and, if needed, "generalist judges" from the Judicial Branch to conduct a next tier, external assessment.[227]

At the same time, Lawrence Baum has suggested that so much of what an Article I immigration court looks like will depend upon the legislation that accompanies this new institution.[228] Stephen Legomsky has urged caution in moving forward on such an Article I court.[229] It is not that Legomsky is

---

administrative adjudication is indeed influenced directly by presidential power). For a separate study by Kim and Amy Semet, involving an examination of over 830,000 removal cases over the past two decades, offering further support, see Kim & Semet, *supra* note 210, at 640 (noting that IJs serving in the Trump Administration have been "more likely to order removal . . . than during previous presidential eras").

226. *See* Baibak, *supra* note 38, at 1012–15.

227. *Id.* at 1014–15. Baibak finds that:

> First, removing the immigration courts and the BIA from the executive 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. 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.

Id.

228. *See* Lawrence Baum, *Immigration Law and Adjudication: Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501, 1553 & n.237 (2010) (discussing also that although the momentum for revamping the immigration judiciary has gained steam in the last two years, in reality, going back to "the early 1980s, scholars and public policymakers . . . offered proposals for changes in the structure of [immigration] adjudication"); SELECT COMM'N ON IMMIGR. & REFUGEE POL'Y, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 248–50 (1981) (suggesting the creation of an Article I immigration court); Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 NOTRE DAME L. REV. 644, 651–54 (1981) (advocating a specialized judicial model for immigration courts); Maurice A. Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 SAN DIEGO L. REV. 1, 18–20 (1980) (recommending the formation of a new Article I immigration court); *see also Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 12–13 (2006) (testimony of John M. Roll, J., U.S. District Court for the District of Arizona) (advocating for a consolidated immigration court); COMM'N ON IMMIGR., AM. BAR ASS'N, REFORMING THE IMMIGRATION SYSTEM: EXECUTIVE SUMMARY 43–48 (2010) (outlining the options and goals for restructuring the immigration adjudication system).

229. *See* Legomsky, *Restructuring Immigration Adjudication*, *supra* note 38, at 1678–80.

unsupportive—indeed, he believes this "idea is commendable and . . . would be an improvement over the status quo."[230] But a review of the other existing legislative courts does give one pause.[231]

Take, for example, the bankruptcy court-model that Baibak favors. She notes that these courts have survived constitutional challenges and have adapted to the changes made by Congress over the years, thus showing they are a resilient institution that can be imitated.[232] Yet, she does not effectively rebut two of Legomsky's legitimate worries. First, should judges on Article I immigration courts have fixed or renewable terms? If the former is opted for, then attracting "accomplished people [might be difficult] unless they were already immigration adjudicators or were nearing retirement."[233] And if these judges were given renewable terms, lasting in these jobs would likely depend on pleasing whomever was doing the reviewing, which raises, once again, the question of judicial independence.[234]

---

230. *See id.* at 1678.

231. In looking at the other Article I courts that currently exist, the driving force behind each of their respective creations was a normative, 'Weberian' belief that specialization would result in better, more just outcomes. At present, there are six such specialized tribunals: the United States Tax Court; the United States Court of Appeals for the Armed Forces; the Court of Military Commission Review; the United States Court of Appeals for Veterans Claims; the United States Court of Federal Claims; and the United States Bankruptcy Courts. For a brief summary of each of these forums, see *Article I Tribunal*, BALLOTPEDIA, https://ballotpedia.org/Article_I_tribunal (last visited May 17, 2021). Also, for a commentary on the difference between Article I and Article III courts, see Steve Vladeck, *The Difference Between Article I and Article III Questions in* Al Bahul, LAWFARE (July 20, 2016, 8:43 AM), https://www.lawfareblog.com/difference-between-article-i-and-article-iii-questions-al-bahlul; JAMES E. PFANDER, ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND JUDICIAL POWER OF THE UNITED STATES 45–57 (2009).

232. In her article, Baibak discusses key Supreme Court cases on the constitutionality of bankruptcy courts, including: N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Commodity Futures Trading Comm'n. v. Schor, 478 U.S. 833 (1986); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985); Stern v. Marshall, 564 U.S 462 (2011). *See* Baibak, *supra* note 38, at 1007–10. For Baibak's discussion highlighting the evolution of the Bankruptcy Appeals Panel, see *id.* at 1010–12.

233. *See* Legomsky, *Restructuring Immigration Adjudication*, *supra* note 38, at 1678 (noting that "their midcareer options would be limited when their terms expire").

234. I am grateful to my colleague, Pamela Foohey, for her helpful comments on the tensions that exist regarding adjudication on, and personnel staffing of, the bankruptcy courts. For further discussion of adjoining issues on this matter, see Ralph Brubaker, *Non-Article III Adjudication: Bankruptcy and Non-Bankruptcy with and Without Litigation Consent*, 33 EMORY BANKR. DEVS. J. 11 (2016); Ralph Brubaker, *The Constitutionality of Non-Article III Bankruptcy Adjudications, with and Without Litigant Consent (Part I)*, 35 BANKR. L. LETTER No. 9, Sept. 2015, at 1–17; Ralph Brubaker, *The Constitutionality of Non-Article III Bankruptcy Adjudications, with and Without Litigant*

Furthermore, if Article I courts are meant to serve as a check on the executive branch, what is the check on these legislative courts themselves? On the one hand, the premise of these specialized courts is that they are supposed to dispose of cases quickly and in an expert-like fashion—where the intervention of Article III courts is thought to be less needed. At the same time, supporters also seem to say Article III courts should possess a "greater ability to review immigration decisions and . . . that the standard of review . . . should not be deferential . . . ."[235] So which is it?

In other words, there are cross-cutting tensions here that involve a desire to ensure efficient disposal of cases, recruitment of independent adjudicators, protection of due process rights of noncitizens, a check on both the President and Congress's authority, and, relatedly, a proper balance between the three branches of government. Add to this two other relevant aspects that need consideration: transparency and accountability. Leandra Lederman's important research shows how the Article I U.S. Tax Court has been hindered by judges not always understanding where they fit within the federal system.[236] The Tax Court, as a result, has had to create its own set of processes, determine if and when it can issue equitable remedies, and figure out under what conditions it can expand its jurisdiction.[237] There is even debate as to whether it should be treated as an administrative agency or not.[238] Because there are no clear demarcated lines for how to operationalize the Tax Court, gaining transparency and holding it publicly accountable has been difficult, with the consequence, perhaps not surprisingly, being various scandals that have emerged over the years.[239]

All of these concerns need to be part of the decision calculus as immigration reformers think about establishing Article I courts of their own.

Consent (Part II), 35 BANKR. L. LETTER No. 12, Dec. 2015, at 1–14; Ralph Brubaker, *The Constitutionality of Non-Article III Bankruptcy Adjudications, with and Without Litigant Consent (Part III)*, 36 BANKR. L. LETTER No. 1, Jan. 2016, at 1–16.

235. *See* Baibak, *supra* note 38, at 997–98.

236. *See infra* note 237.

237. For a list of scholarship on these points, see Leandra Lederman, *Tax Appeal: A Proposal to Make the U.S. Tax Court More Judicial*, 85 WASH. U. L. REV. 1195 (2008); Leandra Lederman, *When the Bough Breaks: The U.S. Tax Court's Branch Difficulties*, 34 AM. BAR. ASS'N TAX SECTION NEWS Q., Winter 2015, at 10–11; Leandra Lederman, *Increasing Transparency in the U.S. Tax Court*, LAW360: TAX AUTH. (Dec. 4, 2018, 6:57 PM), https://www.law360.com/tax-authority/articles/1108041/increasing-transparency-in-the-us-tax-court; Leandra Lederman, *Equity and the Article I Court: Is the Tax Court's Exercise of Equitable Powers Constitutional?*, 5 FLA. TAX REV. 357 (2001); Leandra Lederman, *(Un)Appealing Deference to the Tax Court*, 63 DUKE L.J. 1835 (2014).

238. *See* Lederman, *(Un)Appealing Deference to the Tax Court*, *supra* note 237, at 1894–95.

239. *See* case cited *supra* note 237; *see also* HAROLD DUBROFF & BRANT J. HELLWIG, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS (2nd ed. 2014).

This task will undoubtedly be difficult, both from an institution-building and political standpoint. Legomsky recognized the challenges years back. He proposed pursuing a different route: making IJs administrative Article II adjudicators.[240] They would fall under the Administrative Procedure Act and be accompanied by a new Article III, immigration-only appellate body.[241] Legomsky would do away with the BIA in its entirety.[242]

Yet, the Trump Administration was one where the President and his appointees repeatedly injected themselves into the immigration adjudication process. They were not hesitant to try and unduly influence administrative agencies for overt political purposes. Even if IJs are converted into administrative law judges, they would still work within institutions over which the President presides. It is thus necessary to have a check in place that has teeth. Going the Article I route—where Congress is that check—on balance is the best way forward.

Therefore, Congress should adopt a legislative court system for immigration matters. So long as the issues that have been raised here are taken into account and addressed, there is no reason why an overhaul of this current system cannot occur. There just must be the political will and moral courage to do so.

240. *See* Legomsky, *Deportation and the War*, *supra* note 38, at 404–05.

241. *See* Legomsky, *Restructuring Immigration Adjudication*, *supra* note 38, at 1678–81.

242. *Id.* at 1686.