Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process

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INTRODUCTION

Today, important agency adjudication is generally subject to some form of review at the instance of the aggrieved party. The modern literature is replete with thoughtful commentary on the review process. The writings have traditionally focused on the questions of which actions should be reviewable and how searching the review should be.

Surprisingly, however, one question has been largely neglected:[1] to whom should the review function be entrusted? The options are many.

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1. Two impressive exceptions to this pattern are Cass, *Agency Review of Administrative Law Judges' Decisions*, in ADMIN. CONF. OF THE U.S., RECOMMENDATIONS & REPORTS 115

At the administrative level, review might be by a single individual or by a collegial body, by policymakers or by personnel who enjoy varying degrees of independence from the political machinery, by lawyers or by nonlawyers. At the judicial level, review might be in the courts of general jurisdiction or in specialized courts. If courts of general jurisdiction are preferred, review might be assigned to the district courts or to the courts of appeals. If specialized review is preferred, review might be by a centralized forum or by a network of tribunals geographically dispersed, and it might be by an article I court or by an article III court.

Congress faces these choices every time it creates a program that requires administrative decisionmaking in individual cases. Ideally, the options should also be weighed periodically to evaluate those adjudicatory processes already in place. Both tasks require a general framework for selecting the forums in which particular classes of administrative decisions can best be reviewed. Constructing such a framework is the principal aim of this Article.

Studies of agency adjudication have been marked by another tradition as well—the demarcation of administrative review and judicial review into discrete subject areas. Distinctions between the two systems are certainly supportable. To many, courts symbolize independence and impartiality, at least to a greater degree than do tribunals located within the executive branch. Moreover, contrasts between specialist administrative bodies and generalist courts give rise to corresponding differences in the functions of review. All these differences are real and widely accepted. It is not my intent to disavow them.

At the same time, I believe that the line separating administrative review from judicial review is not nearly as crisp as is customarily assumed. As will be seen, courts and many of the administrative appellate bodies share a number of attributes. Indeed, in several respects, some administrative appellate bodies have much more in common with courts than they do with other administrative agencies.

For that and other reasons outlined in this Article, administrative review and judicial review should be seen as parts of a single, continuous, adjudication process. Studying them in tandem yields tangible benefits. First, to select a review forum for a given class of cases, it is necessary to match the attributes of those cases with the attributes of the possible reviewing bodies in a way that optimizes the fit. Most of the differences between district courts and courts of appeals will be shown to parallel roughly the differences between the tribunals often available for administrative review. Consequently, once the pertinent characteristics of a class

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(1983) (leading to ACUS Recommendation No. 83-3, 1 C.F.R. § 305.83-3 (1985)), and Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1 (1975) (based on report leading to ACUS Recommendation No. 75-3, 1 C.F.R. § 305.75-3 (1985)).

of cases are isolated, the results can be used to select both a forum for administrative review and a forum for judicial review.

Second, decisions about administrative review will themselves affect decisions about judicial review, and vice versa. A decision to provide no administrative review might force an aggrieved party to pursue remedies in court. Further, for several reasons explored below, a decision to place administrative review in a particular forum might influence the choice of forum for judicial review, and vice versa. Finally, even after an administrative reviewer has been selected, the question whether to authorize further review by the agency head is inseparable from the question whether to allow the agency to initiate judicial review.

Third, courts and certain appellate administrative bodies perform a number of common functions. Evaluating proposals to substitute a single specialized court for the current combination of specialist administrative review and generalist judicial review requires an assessment of the extent, if any, to which the commonality of functions results in duplication of effort.

The immigration process affords a superb illustration of how the general framework offered in this Article can be applied. The governing statute[2] and accompanying regulations[3] authorize a bewildering array of administrative decisions in individual cases. Initial decisionmaking is by various officials in various agencies after various procedures. Most of the major immigration decisions are subject to administrative review, but by different bodies. Most decisions are also subject to judicial review, some in the district courts and some in the courts of appeals.

Timing also favors immigration as a target area for a study of forum selection. Recent congressional bills have taken aim at both administrative and judicial review structures in the field of immigration.[4] Within the Department of Justice, there is talk of curtailing administrative review of certain controversial categories of decisions.[5] The immigration bar has voiced its deep-seated dissatisfaction with at least one crucial component of the administrative appellate apparatus.[6] And the subject of judicial review has become a perennial battlefield in this corner of the law.[7] Pressures are building, and something is certain to give soon.

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2. Immigration & Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1557 (1982)) [hereinafter cited as I. & N. Act].

3. *See* 8 C.F.R. (1985) (Department of Justice); 20 C.F.R. §§ 655-656 (1985) (Department of Labor); 22 C.F.R. §§ 41-42, 46 (1985) (Department of State).

4. *See infra* notes 289-90, 448, 464, 481, 483, 517, 541, 573 and accompanying text.

5. *See infra* note 89.

6. Interview with Warren Leiden, Executive Director of the American Immigration Lawyers Association (June 14, 1985) (immigration lawyers have been criticizing quality of decisions by Administrative Appeals Unit). *See generally infra* notes 85-87, 156-68 and accompanying text.

7. *See generally infra* notes 238-53, 290, 517, 541, 573 and accompanying text.

Part I of this Article briefly summarizes the present adjudication structure in immigration law.[8] The summary proceeds from initial decisions,[9] to administrative appeals,[10] to judicial review. The second Part is the heart of the study. It develops general criteria for selecting both the proper administrative forum and the proper judicial forum in which to review agency adjudication.[11] Part III then applies those general criteria to several illustrative classes of immigration cases, and concludes that the existing structure of administrative appeals requires radical surgery.[12] Reasons for the current allocation of cases among the major administrative reviewing bodies are difficult, if not impossible, to discover. In contrast, the current scheme of judicial review is generally both understandable historically and defensible today, but even that scheme would benefit from certain adjustments. The final Part comments on recent proposals for a specialized immigration court.[13]

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8. *See infra* text accompanying notes 14-125. For more detailed descriptions of substantive immigration law, the reader is referred to general sources in that area. The most comprehensive treatise is C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE (rev. ed. 1985). For other general works, see T. ALEINIKOFF & D. MARTIN, IMMIGRATION: PROCESS AND POLICY (1985); A. FRAGOMEN, A. DEL REY & S. BELL, IMMIGRATION PROCEDURES HANDBOOK (1985); A. FRAGOMEN, A. DEL REY & S. BERNSEN, IMMIGRATION LAW AND BUSINESS (1985); E. HARPER, IMMIGRATION LAWS OF THE UNITED STATES (1975); B. HING, HANDLING IMMIGRATION CASES (1985); IMMIGRATION LAW SERVICE (1985); A. LEIBOWITZ, IMMIGRATION LAW AND REFUGEE POLICY (1983); NATIONAL LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE (2d ed. 1985); R. STEEL, STEEL ON IMMIGRATION LAW (1985); J. WASSERMAN, IMMIGRATION LAW AND PRACTICE (3d ed. 1979); D. WEISSBRODT, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL (1984).

9. Paul Verkuil has recently completed a preliminary study of immigration procedure. *See* Verkuil, *A Study of Immigration Procedures*, 31 UCLA L. REV. 1141 (1984) (based on previous study for Administrative Conference). Applying flexible due process and Mathews v. Eldridge, 424 U.S. 319 (1976), Verkuil suggested a framework for determining which procedural ingredients are constitutionally required when various types of adjudicative immigration decisions are made. He emphasized the initial hearings, although he briefly noted administrative and judicial review. *See* Verkuil, *supra*, at 1179-84. The present study accepts the initial decisionmaking process as given.

The President's Management Improvement Council has conducted another recent study of immigration procedure. *See* PRESIDENT'S MANAGEMENT IMPROVEMENT COUNCIL, MANAGEMENT IMPROVEMENTS IN THE IMMIGRATION AND NATURALIZATION SERVICE, FINAL REPORT (1981). Its report focused entirely on the initial adjudication process and, as to that, addressed only matters of administrative efficiency. *See id.* at 1-2.

10. For another view of the administrative appeals process, see Frank Goodman's excellent unpublished study of caseload management problems at the Board of Immigration Appeals, F. Goodman, Report Concerning Improvements in Administrative Organization and Procedures of United States Board of Immigration Appeals (Report to ACUS, Oct. 17, 1973) (not addressing question of proper forum).

11. *See infra* text accompanying notes 126-236.

12. *See infra* text accompanying notes 237-516.

13. *See infra* text accompanying notes 517-83. The Administrative Conference is currently conducting a more general study of specialized courts in administrative law.

I. IMMIGRATION ADJUDICATION: AN OVERVIEW

A. *Substantive Principles*

The federal statute that governs immigration to the United States is the Immigration and Nationality Act of 1952,[14] as amended. The Act distinguishes two basic processes—the exclusion of aliens who seek admission to the country and the deportation of aliens already here.[15]

Within the realm of admission, the statute further distinguishes between immigrants and nonimmigrants. Nonimmigrants are defined as aliens who fit within any of several statutorily enumerated categories of temporary visitor.[16] Common examples are tourists, business visitors, students, and temporary workers.[17] Immigrants, defined residually, encompass everyone else.[18] Aliens admitted as immigrants may remain in the United States permanently, provided only that they do not engage in behavior rendering them deportable.[19]

As might be expected, aliens who seek to enter as immigrants face more stringent obstacles than do aliens who seek to enter as nonimmigrants. Admission of nonimmigrants is numerically unrestricted.[20] In contrast, with certain important exceptions,[21] immigrants are subject to an annual statutory quota of 270,000, with no more than 20,000 from any one country.[22] The total is subdivided among six "preference categories," each of which is allocated a specified percentage of the worldwide quota.[23] Four of those categories comprise aliens who possess specified family ties to American citizens or, in some cases, to other lawfully admitted permanent resident aliens.[24] The other two categories comprise aliens who meet

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14. *See* Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1557 (1982)).

15. For purposes of that distinction, physical presence in the United States is not always dispositive. For treatment of the numerous technical problems arising in that context, see, for example, T. ALEINIKOFF & D. MARTIN, *supra* note 8, at 315-47.

16. *See* I. & N. Act § 101(a)(15), 8 U.S.C. § 1101(a)(15) (1982).

17. *Id.* § 101(a)(15)(B), (F), (H), 8 U.S.C. § 1101(a)(15)(B), (F), (H).

18. *Id.* § 101(a)(15), 8 U.S.C. § 1101(a)(15).

19. *See id.* §§ 101(a)(20), 241(a), 8 U.S.C. §§ 1101(a)(20), 1251(a); *see also infra* notes 22-72 and accompanying text..

20 *See* 1 C. GORDON & H. ROSENFIELD, *supra* note 8, § 2.5b.

21. There is no quota on certain "immediate relatives" of United States citizens, or on "special immigrants." *See* I. & N. Act § 201(a), 8 U.S.C. § 1151(a) (1982). The most significant category of special immigrants is returning residents. *See id.* § 101(a)(27), 8 U.S.C. § 1101(a)(27). Special provisions apply to refugees and asylees. *See id.* §§ 201(a), 207, 209(b), 8 U.S.C. §§ 1151(a), 1157, 1159(b).

22. *Id.* §§ 201(a), 202(a), 8 U.S.C. §§ 1151(a), 1152(a).

23. Although the percentages assigned to the six preference categories add up to 100%, it is theoretically possible to award spots to nonpreference immigrants if the preference categories do not fill up. *Id.* § 203(a)(7), 8 U.S.C. § 1153(a)(7). In practice, however, all six preference categories have been oversubscribed since 1977; nonpreference visas are not expected to be available in the near future unless the statute is amended. *See* R. STEEL, *supra* note 8, § 9:2, at 287.

24. *See* I. & N. Act § 203(a)(1)-(2), (4)-(5), 8 U.S.C. § 1153(a)(1)-(2), (4)-(5) (1982).

certain occupational criteria.[25] Within each preference category, places are normally distributed on a first-come, first-served basis.[26]

Both immigrants and nonimmigrants are subject to qualitative exclusions. The Act enumerates thirty-three classes of inadmissible aliens.[27] These exclusion grounds reflect an assortment of congressional concerns—economic, criminal, moral, ideological, and medical.

The Act also provides for waiving certain exclusion grounds. Some waiver provisions are automatic; they make specified exclusion grounds inapplicable once specified prerequisites have been met.[28] Others provide only that, if certain facts exist, the Attorney General has the discretion to waive designated exclusion grounds.[29]

Analogous provisions govern deportation. The Act sets out nineteen categories of deportable aliens.[30] Though slightly less expansive, these deportation grounds generally reflect the same concerns as the exclusion grounds. As with exclusion, certain deportation grounds are subject to either automatic[31] or discretionary[32] waivers when certain conditions are met.

B. The Initial Decisionmaking Process

Several governmental departments have roles in administering the Immigration and Nationality Act. They include the Departments of State,[33] Labor,[34] and Health and Human Services.[35] Principal responsibility, however, rests with the Attorney General,[36] who in turn has delegated

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25. *See id.* § 203(a)(3), (6), 8 U.S.C. § 1153(a)(3), (6).

26. *Id.* § 203(c), 8 U.S.C. § 1153(c).

27. *See id.* § 212(a), 8 U.S.C. § 1182(a).

28. *E.g., id.* §§ 212(b), (d)(1)-(2), (10), (g), 243(h), 8 U.S.C. §§ 1182(b), (d)(1)-(2), (10), (g), 1253(h). In addition, several of the exclusion grounds contain built-in exceptions. *See, e.g., id.* § 212(a)(9), (16)-(17), (22), (24)-(25), (28)(E), (I), 8 U.S.C. § 1182(a)(9), (16)-(17), (22), (24)-(25), (28)(E), (I).

29. *E.g., id.* §§ 212(c), (d)(3)-(4), (h)-(i), (k), 213, 8 U.S.C. §§ 1182(c), (d)(3)-(4), (h)-(i), (k), 1183.

30. *See id.* § 241(a), 8 U.S.C. § 1251(a).

31. *Id.* §§ 241(b)(1)-(2), 243(h)(1), 8 U.S.C. §§ 1251(b)(1)-(2), 1253(h)(1). Some of the deportation grounds also contain internal exceptions. *See, e.g.*, § 241(a)(3), (5), (6)(E), (7)-(8), (10), 8 U.S.C. § 1251(a)(3), (5), (6)(E), (7)-(8), (10).

32. *Id.* §§ 241(f)(1)-(2), 244(a), (e), 245, 249, 8 U.S.C. §§ 1251(f)(1)-(2), 1254(a), (e), 1255, 1259.

33. The principal role of the State Department is in issuing visas. *See id.* § 104, 8 U.S.C. § 1104; 22 C.F.R. §§ 41-42 (1985); *see also* I. & N. Act § 105, 8 U.S.C. § 1105 (1982) (national security information); 22 C.F.R. § 46 (1985) (control of alien departures).

34. The Labor Department passes on applications for labor certification, which are filed by certain aliens entering to perform labor. I. & N. Act § 212(a)(14), 8 U.S.C. § 1182(a)(14) (1982); 20 C.F.R. §§ 655-656 (1985). *See generally* Rubin & Mancini, *An Overview of the Labor Certification Requirement for Intending Immigrants*, 14 SAN DIEGO L. REV. 76 (1976).

35. The Public Health Service examines entering aliens for possible medical disqualifications. I. & N. Act § 234, 8 U.S.C. § 1224 (1982).

36. *Id.* § 103, 8 U.S.C. § 1103.

broad powers, within the Justice Department, to the Immigration and Naturalization Service (INS)[37] and to the Executive Office for Immigration Review (EOIR).[38]

The Justice Department renders a host of different, immigration-related, adjudicative decisions. Two of them—exclusion and deportation—have already been noted. But the Department also makes a number of collateral decisions. When an alien wishes to immigrate on the basis of either family ties or occupational qualifications, it must decide whether the alien's "visa petition" has established the facts bringing the alien within the statutory preference.[39] Once approved, visa petitions can be revoked for various reasons.[40] Aliens may apply for waivers of certain exclusion or deportation grounds, as discussed above. The Justice Department must decide whether to detain aliens pending either exclusion or deportation proceedings;[41] whether to require the posting of bond and, if so, in what amount;[42] whether to revoke bond;[43] whether to reopen or reconsider exclusion or deportation decisions already made;[44] and whether to stay temporarily the execution of exclusion or deportation orders.[45]

Nor are immigration-related decisions confined to the realm of exclusion and deportation. Permanent resident aliens file "preliminary applications" for favorable administrative recommendations as to eligibility for naturalization.[46] A nonimmigrant who is present in the United States and who meets specified statutory conditions may apply for "adjustment of status" to lawful permanent residence.[47] Adjustment of status, once granted, may be rescinded within five years.[48] A nonimmigrant alien may

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37. *See* 8 C.F.R. § 2.1 (1985) (delegation to Commissioner of INS); *id.* § 100.2 (delegation by Commissioner to subordinates within INS).

38. *See id.* § 3.

39. I. & N. Act § 204(a), 8 U.S.C. § 1204(a) (1982); 8 C.F.R. § 204 (1985); 22 C.F.R. §§ 42.41-.42 (1985). The visa petition is merely a preliminary to the visa application, which is made to the appropriate American consulate abroad. *See* I. & N. Act §§ 221-222, 8 U.S.C. §§ 1201-1202 (1982). Approval of the visa application, in turn, is ordinarily a necessary, *id.* § 212(a)(20), (26), 8 U.S.C. § 1182(a)(20), (26), but not sufficient, *id.* § 221(h), 8 U.S.C. § 1201(h), condition for admission. Having arrived at the border with a visa, the alien must again establish admissibility. *Id.*, 8 U.S.C. § 1201(h).

40. I. & N. Act § 205, 8 U.S.C. § 1155 (1982); 8 C.F.R. § 205 (1985).

41. I. & N. Act §§ 212(d)(5), 235(b), 8 U.S.C. §§ 1182(d)(5), 1225(b) (1982) (exclusion); *id.* § 242(a), 8 U.S.C. § 1252(a) (deportation); 8 C.F.R. § 235.3(b)-(c) (1985) (detention versus parole for aliens in exclusion proceedings); *id.* § 242.2(b) (detention versus release for aliens in deportation proceedings).

42. I. & N. Act § 237(d), 8 U.S.C. § 1227(d) (1982) (exclusion proceedings); *id.* § 242(a), 8 U.S.C. § 1252(a) (deportation proceedings); *see* 8 C.F.R. § 242.2(b) (1985).

43. I. & N. Act § 242(a), 8 U.S.C. § 1252(a) (1982); 8 C.F.R. § 242.2(c) (1985).

44. 8 C.F.R. §§ 3.2, 3.8, 103.5, 242.22 (1985).

45. I. & N. Act § 237(d), 8 U.S.C. § 1227(d) (1982); 8 C.F.R. § 237.1 (1985) (exclusion); *id.* § 243.4 (deportation).

46. I. & N. Act § 334, 8 U.S.C. § 1445 (1982); 8 C.F.R. § 334.11 (1985).

47. I. & N. Act § 245, 8 U.S.C. § 1255 (1982); 8 C.F.R. § 245.1 (1985).

48. I. & N. Act § 246(a), 8 U.S.C. § 1256(a) (1982); *see also* 8 C.F.R. § 246 (1985) (rescission procedure).

apply for a change to another nonimmigrant category,[49] or for an extension of stay,[50] or for permission to work.[51] An alien student may apply for permission to transfer to another INS-approved school.[52] A school may apply to be included on the list of approved institutions,[53] or it may be necessary to withdraw a school approval previously granted.[54] Administrative fines and other penalties may be levied against commercial carriers who violate the immigration laws.[55]

Virtually all of these initial adjudicative immigration decisions made by the Justice Department are assigned initially to either of two types of officials. Certain decisions are made by "special inquiry officers," known also as "immigration judges."[56] Previously part of the INS, immigration judges were transferred in 1983 to the newly created Executive Office for Immigration Review.[57] All the immigration judges are attorneys,[58] and their only responsibility is adjudication. They conduct relatively formal, evidentiary, adversarial hearings.[59]

Almost all other initial adjudicative immigration decisions of the Justice Department are made in the names of the "district directors." These officials have the principal responsibility for administering and enforcing the immigration laws within their local geographical districts.[60] In practice, subordinate "immigration examiners" perform the adjudicative functions of the district directors. They utilize informal procedures that in some cases include personal interviews with the affected parties.[61] Cases that

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49. I. & N. Act § 248, 8 U.S.C. § 1258 (1982); 8 C.F.R. § 248 (1985).

50. 8 C.F.R. §§ 214.1-.2 (1985).

51. *Id.* § 214.2(f)(9)(ii).

52. *Id.* § 214.2(f)(7)(iv), (8).

53. I. & N. Act § 101(a)(15)(F)(i), 8 U.S.C. § 1101(a)(15)(F)(i) (1982); 8 C.F.R. § 214.3 (1985).

54. I. & N. Act § 101(a)(15)(F)(i), 8 U.S.C. § 1101(a)(15)(F)(i) (1982); 8 C.F.R. § 214.4 (1985).

55. I. & N. Act §§ 271-273, 8 U.S.C. §§ 1321-1323 (1982); 8 C.F.R. § 280 (1985).

56. The statute uses the term "special inquiry officer." *See, e.g.*, I. & N. Act §§ 235-236, 242(b), 8 U.S.C. §§ 1225-1226, 1252(b) (1982). The regulations use both terms, synonymously. *See* 8 C.F.R. § 1.1(l) (1985).

57. Before the move, many prominent immigration authorities had objected strenuously to the location of the immigration judges within the INS, because the INS is one of the two adversarial parties appearing before the immigration judges in each case. *See* Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 NOTRE DAME LAW. 644, 645-47 (1981); Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 SAN DIEGO L. REV. 1, 8-12 (1980).

58. Roberts, *supra* note 57, at 8.

59. *See* I. & N. Act §§ 236(a), 242(b), 8 U.S.C. §§ 1226(a), 1252(b) (1982); 8 C.F.R. §§ 236, 242.8-.20 (1985).

60. 8 C.F.R. § 100.2(e) (1985). The district directors report to the regional commissioners, *id.*, who in turn report to the Commissioner, *id.* § 100.2(d). A few district directors serve overseas; they report to the Executive Associate Commissioner. *Id.* § 100.2(e).

61. *See, e.g.*, *id.* § 204.1(d)(4) (visa petitions based on occupational preferences); *id.* § 208.6 (asylum applications); *id.* § 245.8 (applications for adjustment of status).

in the view of the INS do not require personal interviews are now commonly transferred to "regional adjudications centers," or "RAC's," where they are processed by anonymous immigration officers whose sole function is adjudication.[62] These officers, like their counterparts in the main district offices, are not normally attorneys.

How are the various adjudicative decisions allocated between the immigration judges and either the district directors or their subordinates? By statute, immigration judges issue both exclusion and deportation orders after evidentiary hearings.[63] Apart from those decisions, however, the statute does not constrain the Attorney General's power to select the officials to whom adjudicative responsibilities may be delegated.

The Attorney General's regulations assign to the immigration judges not only the exclusion and deportation decisions, but also the decisions whether to grant certain applications for either automatic or discretionary waivers of exclusion or deportation.[64] Some of these applications may be made only to immigration judges, in exclusion or deportation proceedings.[65] Others may be renewed before immigration judges after denials by district directors.[66]

Immigration judges also decide whether aliens should be detained, released on bond, or released on their own recognizance pending deportation proceedings.[67] They decide whether to rescind grants of adjustment of status to permanent residence.[68] And, although in practice such cases seldom occur, immigration judges decide whether to withdraw the names of schools from the list of approved institutions that alien students may be admitted into the United States to attend.[69]

Virtually all other adjudicative decisions made by the Justice Department in immigration cases are assigned to district directors or their subordinates.[70] They run the gamut from such significant decisions as visa petitions and adjustment of status[71] to less important decisions such as extensions of stays for nonimmigrants.[72]

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62. *See* Letter from Harriet B. Marple, Assistant Commissioner of Adjudications, INS, to Gary Althen, Foreign Student Advisor for the Office of International Education and Services, University of Iowa (May 16, 1985), *reprinted in* 62 INTERPRETER RELEASES 542, 543-44 app. (1985). There is one RAC in each of the four INS regions. *Id.*; *see also* 62 INTERPRETER RELEASES 827, 827-32 app. (1985) (describing in detail procedures employed at RAC for Eastern Region).

63. I. & N. Act §§ 236(a), 242(b), 8 U.S.C. §§ 1226(a), 1252(b) (1982).

64. *See, e.g.*, 8 C.F.R. §§ 236.3-.4, 242.8(a), .17 (1985).

65. *Id.* § 242.17(e).

66. *Id.* § 208.9 (asylum); *id.* §§ 236.4, 242.17(d), 245.2(a)(4) (adjustment of status); *id.* § 249.2 (registry).

67. *Id.* § 242.2(b).

68. *Id.* § 246.4.

69. *Id.* § 214.4(d)-(i).

70. *See id.* § 3.1(b).

71. *See id.* § 204.1 (visa petitions); *id.* § 245.2 (adjustment of status).

72. *See id.* §§ 214.1-.2.

C. *Administrative Review*

Most[73] of the major administrative decisions made under the Immigration and Nationality Act are subject to some form of administrative review. Within the Department of Justice,[74] immigration appeals are channeled to two different reviewing bodies—the Board of Immigration Appeals and the Associate Commissioner for Examinations.

The Board of Immigration Appeals (BIA) was created in 1940 by the Attorney General's regulations.[75] It is now located within the Justice Department's Executive Office for Immigration Review.[76] The BIA has five members,[77] all attorneys, all of whom normally participate in every case.[78] They are assisted by a staff that includes, at present, twenty-four attorney examiners[79] and the Chief Attorney Examiner.[80] Reviewing de novo,[81] the BIA decides cases on the basis of the administrative record, supplemented on occasion by oral argument in the discretion of the BIA.[82] The BIA selects, for publication, precedent decisions that will bind the

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73. The principal exception is the consular decision denying a visa. *See infra* note 74.

74. Other departments also make some important immigration decisions. Within the Labor Department, decisions by certifying officers denying applications for labor certification are appealable to the Department's administrative law judges. 20 C.F.R. § 656.26 (1985). Within the State Department, consular officers' decisions denying visa applications are not at present subject to any formal administrative review, although nonbinding advisory opinions can be obtained from the Visa Office. 22 C.F.R. § 42.130(c) (1985). For general discussions of the reviewability of visa denials, see T. ALEINIKOFF & D. MARTIN, *supra* note 8, at 205-12; S. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA, ch. II, § A (forthcoming 1986); Gordon, *The Need to Modernize Our Immigration Laws*, 13 SAN DIEGO L. REV. 1, 9-10 (1975) (recommending Board of Visa Appeals); Rosenfield, *Consular Nonreviewability: A Case Study in Administrative Absolutism*, 41 A.B.A. J. 1109 (1955); Note, *Judicial Review of Visa Denials: Reexamining Consular Nonreviewability*, 52 N.Y.U. L. REV. 1137 (1977); Wildes, *Review of Denial of Visa* (pts. 1-3), N.Y.L.J., Nov. 17-19, 1959, at 4, cols. 1-3.

75. *See* 5 Fed. Reg. 3503 (1940) (adding 8 C.F.R. §§ 90.2-.12 (Supp. 1940)). The BIA, however, did have predecessors in the departments previously responsible for enforcing the immigration laws. *See* Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29, 33-34 (1977); *see also* F. Goodman, *supra* note 10, at 1.

76. 8 C.F.R. § 3.1(a)(1) (1985).

77. *Id.*

78. Interview with David B. Holmes, Chief Attorney Examiner of the BIA, and Gerald S. Hurwitz, Counsel to the Director of the EOIR (June 12, 1985).

79. *Id.*

80. 8 C.F.R. § 3.1(a)(2) (1985). The Chief Attorney Examiner may serve as an alternate BIA member. *Id.*

81. *See, e.g.*, Noverola-Bolaina v. INS, 395 F.2d 131, 138 (9th Cir. 1968); Kam Ng v. Pilliod, 279 F.2d 207, 209, 211 (7th Cir. 1960), *cert. denied*, 365 U.S. 860 (1961). This is true even on questions of witness credibility, *In re* Vilanova-Gonzalez, 13 I. & N. Dec. 399, 403 (B.I.A. 1969), although in practice the BIA ordinarily defers to the credibility determinations of the immigration judge, who has had the opportunity to observe the demeanor of the witnesses, *see, e.g.*, *In re* Wong, 12 I. & N. Dec. 733, 735 (B.I.A. 1968); *In re* T—, 7 I. & N. Dec. 417, 419 (B.I.A. 1957). Agencies operating under APA hearing procedure view the findings of administrative law judges in a similar manner. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 495 (1951).

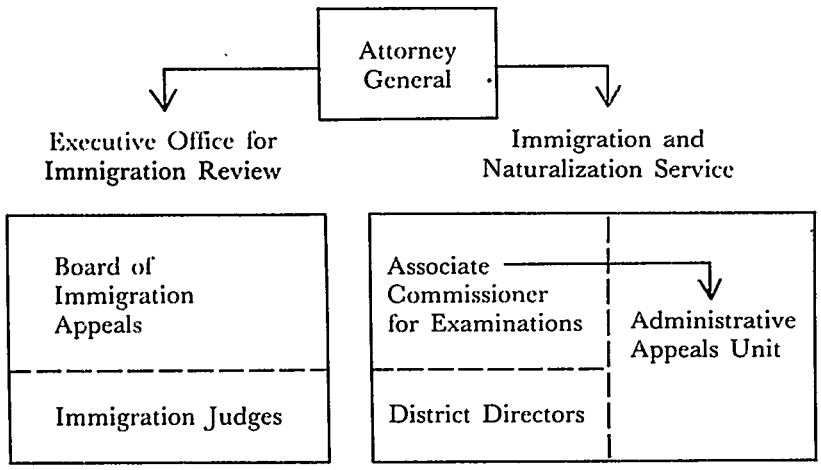
82. *See* 8 C.F.R. § 3.1(e) (1985).

INS and the immigration judges.[83] In theory, the Attorney General may review BIA decisions upon his or her own motion or upon the request of the Chairperson of the BIA, a majority of its members, or the Commissioner of the INS.[84] In practice, such review is rare.

The Associate Commissioner for Examinations, unlike the BIA, has broad administrative and policymaking responsibilities.[85] The Administrative Appeals Unit (AAU) exercises the appellate jurisdiction of the Associate Commissioner. This unit consists of five "appellate examiners" and the Chief of the Unit, none of whom is an attorney. Each case is considered de novo by one of the appellate examiners and reviewed by the Chief, whose decision prevails in the event of a conflict. The resolution by the Chief is normally final, since personal involvement by the Associate Commissioner is rare.[86] All decisions are made on the administrative record, together with oral argument in the discretion of the AAU.[87] Decisions are published very infrequently.

Here, then, are the principal Justice Department units with adjudicative roles in immigration:

Immigration Adjudication in the Justice Department



Two very different processes for reviewing the initial adjudications are thus in place. The BIA is a multimember body composed of attorneys who perform only adjudicative functions. The Associate Commissioner for Examinations is a policymaking official in whose name decisions are made by individual nonattorneys.

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83. *See id.* § 3.1(g).
84. *See id.* § 3.1(h).
85. The authority of the Associate Commissioner for Examinations is described in *id.* § 103.1(f).
86. Interview with Lawrence J. Weinig, Chief of the Administrative Appeals Unit (June 12, 1985).
87. *Id.*

How are the initial decisions described earlier[88] distributed between these two appellate processes? Almost all[89] decisions by immigration judges—exclusion, deportation,[90] bond/detention, and rescission of adjustment of status—are appealable to the BIA.[91] For decisions by district directors, however, generalization is difficult. Some district director decisions are not administratively appealable at all.[92] Some others are not technically "appealable," but the applications may be renewed in subsequent exclusion or deportation proceedings and then, if necessary, reviewed by the BIA in appeals from any resulting exclusion or deportation orders.[93]

Still other district director decisions are appealable to the BIA directly. They include denials of "212(c) applications," by which certain aliens domiciled in the United States seven years or longer may obtain discretionary relief from either exclusion[94] or deportation;[95] decisions imposing administrative fines;[96] denials of most, but not all, of the visa petitions that are based on family preference;[97] and denials of applications by nonimmigrants to waive various exclusion grounds.[98]

Twenty-five other categories of district director decisions are appealable

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88. *See supra* text accompanying notes 33-72.

89. There are only two apparent exceptions. Immigration judges' decisions in proceedings to withdraw the approval of schools are appealable to the Associate Commissioner for Examinations. 8 C.F.R. § 103.1(f)(2)(ix) (1985). And, when an immigration judge in a deportation proceeding grants voluntary departure and allows the alien 30 days or more in which to leave, the alien may not appeal on the ground that the period was too short. *Id.* § 3.1(b)(2). Maurice Inman, the INS General Counsel, has proposed removing all voluntary departure decisions, as well as bond decisions, from the immigration judges and giving the district directors unreviewable authority in those cases. *See* Speech by Maurice C. Inman, Jr., General Counsel of the INS, Recent Developments at the Justice Department, American Immigration Lawyers Ass'n Convention (June 1985) (copy on file at *Iowa Law Review*).

90. Deportation orders accounted for 61% of BIA dispositions in fiscal year 1984. *See* Appendix. Visa petition denials constituted another 20%, exclusion cases 10%, and bond determinations 6%. *Id.* Other categories added up to only 3%. *Id.*

91. 8 C.F.R. § 3.1(b)(1)-(2), (7)-(8) (1985).

92. Examples of nonappealable decisions are denials of applications by nonimmigrants for extensions of stay, *id.* § 214.1(c)(4), denials by district directors of applications to extend the voluntary departure periods specified by immigration judges, *id.* § 244.2, and denials of applications for changes of nonimmigrant status, *id.* § 248.3(f).

93. Examples are asylum, *id.* §§ 208.8(c), .9, and adjustment of status, *id.* § 245.2(a)(4). A proposed amendment to *id.* § 3.1(b)(3), however, would provide similar treatment for applications to district directors for discretionary relief under I. & N. Act § 212(c), 8 U.S.C. § 1182(c) (1982). *See* 50 Fed. Reg. 25,994 (1985). At present, the BIA has direct appellate jurisdiction over district director denials of those applications. *See id.* at 25,994-95 (1985); *see also infra* note 386; *cf.* 8 C.F.R. § 243.4 (1985) (denial of stay of deportation not appealable, but either immigration judge or BIA may subsequently stay deportation during pendency of motion to reopen or reconsider).

94. *See* I. & N. Act § 212(c), 8 U.S.C. § 1182(c) (1982); 8 C.F.R. § 3.1(b)(3) (1985). *But see supra* note 93.

95. Francis v. INS, 532 F.2d 268, 272-73 (2d Cir. 1976).

96. 8 C.F.R. § 3.1(b)(4) (1985).

97. *Id.* § 3.1(b)(5).

98. *Id.* § 3.1(b)(6).

to the Associate Commissioner for Examinations.[99] Numerically the most significant are decisions denying those visa petitions, filed by both immigrants and nonimmigrants, that are based on occupational preference.[100] The next largest category comprises district director decisions finding breaches of bond conditions.[101] Appeals from denials of applications for certain discretionary waivers of either exclusion or deportation are also assigned to the Associate Commissioner.[102]

D. Judicial Review

The Immigration and Nationality Act contains no fewer than four provisions governing judicial review of administrative action. By far the most important is section 106(a), which by its own terms is the exclusive vehicle for reviewing "all final orders of deportation . . . pursuant to administrative proceedings under section 242(b) of this Act [the provision detailing the administrative hearing procedure for deportation cases]."[103] The prescribed procedure is the filing of a petition for review in the court of appeals.[104] Service of the petition automatically stays the deportation unless the court directs otherwise.[105] To minimize delay, the statute codifies the principle of res judicata[106] and requires that the petition be filed within six months after the deportation order becomes administratively final.[107] Except when the petitioner makes a nonfrivolous claim of United States nationality,[108] the court of appeals reviews the case on the basis of the administrative record.[109]

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99. *Id.* § 103.1(f)(2). This section grants appellate jurisdiction to the Associate Commissioner for Examinations in 26 categories of cases. All but one, *see id.* § 103.1(f)(2)(ix), are district director decisions.

100. These are applications filed under I. & N. Act § 203(a)(3), (6), 8 U.S.C. § 1153(a)(3), (6) (1982) (occupational preferences for immigrants), and *id.* § 101(a)(15)(H), (L), 8 U.S.C. § 1101(a)(15)(H), (L) (temporary workers). In fiscal year 1984 these categories together accounted for 1428 of the 2649 cases completed by the Administrative Appeals Unit. *See* Appendix.

101. *See* 8 C.F.R. § 103.1(f)(2)(i) (1985). In fiscal year 1984 bond breaches accounted for 822 of the 2649 cases completed. *See* Appendix.

102. *See, e.g.*, 8 C.F.R. § 103.1(f)(2)(iii), (v)-(vii) (1985).

103. *See* 8 U.S.C. § 1105a(a) (1982). Section 242(b) is codified as 8 U.S.C. § 1252(b) (1982).

104. Section 106(a) incorporates by reference the procedure contained in the Hobbs Act, now codified as 28 U.S.C. §§ 2341-2351 (1982). Venue is in the circuit in which the deportation hearing was held or in which the petitioner resides. I. & N. Act § 106(a)(2), 8 U.S.C. § 1105a(a)(2) (1982).

105. I. & N. Act § 106(a)(3), 8 U.S.C. § 1105a(a)(3) (1982).

106. *Id.* § 106(c), 8 U.S.C. § 1105a(c).

107. *Id.* § 106(a)(1), 8 U.S.C. § 1105a(a)(1).

108. In that case, if the court of appeals discovers any genuine issue of material fact, it must remand to the district court for a de novo trial on the issue of nationality. *Id.* § 106(a)(5), 8 U.S.C. § 1105a(a)(5); *see* Agosto v. INS, 436 U.S. 748, 753 (1978).

109. I. & N. Act § 106(a)(4), 8 U.S.C. § 1105a(a)(4) (1982).

The most difficult interpretation problem raised by section 106(a) has been the meaning of the phrase "final orders of deportation." As discussed earlier, the statute and regulations require a host of miscellaneous decisions that either affect or flow from the deportation decision itself. Which of these collateral orders, if any, are reviewable in the courts of appeals?

The enactment of section 106(a) in 1961 triggered a flurry of jurisdictional litigation that has only recently begun to subside.[110] That litigation has made clear that an order issued during the course of the deportation proceeding—typically, a disposition of an application for discretionary relief—is part of the deportation order and thus reviewable exclusively in the court of appeals.[111] So, too, is the denial of a motion to reopen a deportation proceeding.[112] Although the Supreme Court had suggested early on that no other collateral order would qualify,[113] the Court recently announced in *INS v. Chadha*[114] that the courts of appeals would also have jurisdiction to review "all matters on which the validity of the final order is contingent"—whether or not the determinations were made at the hearing.[115] How literally the lower courts will construe that language is not yet known.[116]

A second judicial review provision is an exception to the general rule contained in section 106(a). To avoid possible constitutional problems,[117] the statute allows an alien "held in custody" under a deportation order to obtain judicial review by habeas corpus in the district court.[118] The

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110. *See generally* T. ALEINIKOFF & D. MARTIN, *supra* note 8, at 569-86; 2 C. GORDON & H. ROSENFIELD, *supra* note 8, §§ 8.1-.30d; R. STEEL, *supra* note 8, §§ 14:51-:52; Note, *Judicial Review of Final Orders of Deportation*, 42 N.Y.U. L. REV. 1155 (1967) [hereinafter cited as Note, *Judicial Review*]; Note, *Jurisdiction to Review Prior Orders and Underlying Statutes in Deportation Appeals*, 65 VA. L. REV. 403 (1979) [hereinafter cited as Note, *Prior Orders*]; Comment, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts*, 71 YALE L.J. 760 (1962); F. Goodman, Judicial Review of Deportation Orders (Report to ACUS, Preliminary Draft, Mar. 7, 1973).

111. *See* Foti v. INS, 375 U.S. 217, 232 (1963); Che-Li Shen v. INS, 749 F.2d 1469, 1472 (10th Cir. 1984).

112. Giova v. Rosenberg, 379 U.S. 18, 18 (1964). *But see* Young v. United States Dep't of Justice, 759 F.2d 450, 457 (5th Cir.) (court of appeals lacks jurisdiction to review denial of motion to reopen *bond* hearing), *cert. denied*, 106 S. Ct. 412 (1985).

113. *See, e.g.*, Cheng Fan Kwok v. INS, 392 U.S. 206, 215-16 (1968).

114. 462 U.S. 919 (1983).

115. *See id.* at 938.

116. Even when the validity of the challenged order is a predicate for the ultimate deportation order, court decisions have tended to turn on whether an evidentiary hearing would be required. *See* Abedi-Tajrishi v. INS, 752 F.2d 441, 443 (9th Cir. 1985); Mohammadi-Motlagh v. INS, 727 F.2d 1450, 1452 (9th Cir. 1984). The Supreme Court's recent decision in Florida Power & Light Co. v. Lorion, 105 S. Ct. 1598 (1985), deemphasizing the relevance of the need for a further evidentiary hearing, may endanger the more restrictive holdings. *See infra* text accompanying notes 196-211.

117. *See infra* text accompanying notes 276-84.

118. *See* I. & N. Act § 106(a)(9), 8 U.S.C. § 1105a(a)(9) (1982).

courts have disagreed over the breadth of the term "custody" and over the scope of the resulting review once custody is established.[119]

A third provision authorizes judicial review of final exclusion orders "by habeas corpus and not otherwise."[120] As with deportation, there is some uncertainty whether an alien must be detained in order to obtain review.[121]

A final judicial review provision is a catchall. Section 279 of the Act invests the district courts with "jurisdiction of all causes, civil and criminal, arising under any of the provisions of this title."[122] This section has been used to review denials of visa petitions, adjustments of status, extensions of stay, various applications for discretionary relief from exclusion or deportation, and many other miscellaneous decisions.[123] It has, however, two major limitations: it cannot be used to obtain review of deportation or exclusion orders because of the exclusivity clauses contained in the more specific judicial review provisions discussed above,[124] and it is limited to cases arising under "this title," a problem considered in Part III.[125]

II. Choosing a Review Forum: General Criteria

This part of the Article formulates general criteria for determining in what forum a given class of administrative decisions should be reviewed. To put the question another way, how can the attributes of a given class of cases be most sensibly matched with the attributes of a given administrative or judicial reviewer? To answer that question, one must first identify the sometimes competing goals inherent in selecting a review forum. Once that is done, the possible forum choices must be identified and their relevant distinguishing characteristics isolated.

Forum characteristics are of two types. A forum has certain objective features that I shall describe as primary attributes. Flowing from these are more subjective secondary attributes. The latter reflect more visibly the advantages and disadvantages of placing the review function in the particular forum. They are the qualities that advance or impede the stated goals of the forum selection process.

Whether the advantages of a particular review forum outweigh the disadvantages depends on the type of case for which review is contemplated.

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119. *See* T. Aleinikoff & D. Martin, *supra* note 8, at 599-611 (contrasting United States *ex rel.* Marcello v. District Director, 634 F.2d 964 (5th Cir.), *cert. denied*, 452 U.S. 917 (1981), with Daneshvar v. Chauvin, 644 F.2d 1248 (8th Cir. 1981), and analyzing other recent cases); *see also* R. Steel, *supra* note 8, § 14:53, at 463.

120. *See* I. & N. Act § 106(b), 8 U.S.C. § 1105a(b) (1982).

121. *See infra* text accompanying notes 278-80.

122. *See* 8 U.S.C. § 1329 (1982).

123. These and many other orders reviewed under section 279 are listed in 2 C. Gordon & H. Rosenfield, *supra* note 8, § 8.23, at 8-167 to -170.

124. Daneshvar v. Chauvin, 644 F.2d 1248, 1250-51 (8th Cir. 1981).

125. *See infra* notes 504-13 and accompanying text.

My ultimate aim in this Part, therefore, is to identify those attributes of cases that favor the selection of a review forum with particular forum attributes. Once the case attributes that point toward particular forum choices are articulated, they can be used to determine which administrative or judicial tribunals, if any, should review a given class of cases.

A. Goals in Selecting a Forum

Review, whether administrative or judicial, is but one component of the overall adjudication process. Among the goals of a review system, therefore, are those associated generally with administrative procedure. Roger Cramton has suggested,[126] and others have refined,[127] three goals of any administrative process—accuracy, efficiency, and acceptability. The accuracy goal reflects the need to ascertain the truth.[128] The goal of efficiency encompasses a desire to minimize not only the monetary costs to the parties and to the public, but also the costs of the waiting time and the decisionmakers' time.[129] The acceptability goal recognizes the importance of having a procedure that the litigants and the general public perceive as fair.[130] These goals, naturally, can point in opposite directions.

Consistency should be viewed as a fourth goal of administrative procedure. It overlaps partly, but not entirely, with the other three. One benefit of consistency is enhanced stability. Conflicts among equally authoritative bodies have ways of becoming reconciled eventually, either by gradual evolution or by pronouncements from above. The mere presence of a momentary conflict, therefore, can create at least the perception of imminent change, leaving affected sectors of the population uncertain how to plan for the future. Consistency reduces this uncertainty. This benefit can possibly be subsumed within the general rubric of acceptability (to the public),[131] and is particularly important when policy questions are at issue.[132]

A second benefit of consistency is conservation of judicial and administrative resources. A difference of opinion cannot arise unless at least two bodies have considered the same issue. There certainly are benefits in this type of maturation process, but the cost includes duplication of effort. This benefit of consistency is probably included within the general goal of efficiency.

But a third reason for valuing consistency is one that does not fit

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126. *See* Cramton, *Administrative Procedure Reform: The Effects of S.1663 on the Conduct of Federal Rate Proceedings*, 16 AD. L. REV. 108, 111-12 (1964).

127. *See, e.g.*, Cass, *supra* note 1, at 154-57; Currie & Goodman, *supra* note 1, at 4.

128. Cramton, *supra* note 126, at 112.

129. Cass, *supra* note 1, at 155.

130. Cramton, *supra* note 126, at 112.

131. For reasons given *infra* note 133, however, the acceptability goal seems unlikely to cover even this component of consistency.

132. *See infra* note 166; *see also infra* notes 186, 466-502 and accompanying text.

neatly within any of the three traditional goals of administrative procedure.[133] Consistency assures equal treatment of similarly situated litigants. Consistency—or at least equality—might thus be visualized best as a fourth, independent goal.

Each of those four general goals is important at two levels that correspond to what have traditionally been described as the dual functions of appellate review. Appellate tribunals perform a retrospective "error-correcting" function concerned only with the outcome of the particular dispute, and a prospective "guidance" function concerned with the future development of the law.[134] This duality means that, for purposes of choosing a review forum, a given goal of administrative procedure can be internally conflicting. The most efficient error corrector, for example, is not necessarily the most efficient explicator of the law.[135]

B. Forum Attributes

Those are the major goals of the forum selection process. What forum choices are available, and what attributes does each forum possess that might be relevant to the attainment of those goals?

At the judicial level, the principal choice in most areas of administrative law is between the district courts and the courts of appeals.[136] The leading treatment of the optimal forum for judicial review of administrative ac-

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133. Perhaps equality need not be envisioned as a separate goal; acceptability to the public might be viewed as encapsulating equal treatment. By similar reasoning, however, acceptability could be described as the only goal of administrative procedure, since the public presumably would not tolerate a system sufficiently lacking in either accuracy or efficiency. More likely, Cramton's conception of acceptability was meant to be confined to acceptably fair procedure.

Nor, at least on questions of law, does the accuracy goal necessarily encompass consistency. Unless one accepts the declaratory theory, under which the judicial role is to do nothing more than locate and declare preexisting principles, *see, e.g.*, E. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 571-77 (1953); R. WASSERSTROM, THE JUDICIAL DECISION 12-38 (1961), there cannot be said to be only one "correct" decision on a question of law. Consequently, a split of authority is not irrefutable proof that one of the decisions must be "inaccurate." Of course, although the declaratory theory is currently in disfavor, its repudiation has not been unanimous. *See, e.g.*, R. STEVENS, LAW AND POLITICS: THE HOUSE OF LORDS AS A JUDICIAL BODY, 1800-1976, at 622-23 (1978).

134. *See, e.g.*, P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 2-3 (1976); Leonard, *The Correctness Function of Appellate Decision-Making: Judicial Obligation in an Era of Fragmentation*, 17 LOYOLA L.A.L. REV. 299, 299-302 (1984); Levinson, *supra* note 57, at 649-50.

135. At the judicial level, for example, a single district judge might be the most efficient error corrector, *see* Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 781-82 (1957); *infra* text accompanying notes 151-52, at least if the appeal rate is low, *see* Currie & Goodman, *supra* note 1, at 18; *infra* notes 192-95 and accompanying text. For reasons considered below, however, a court of appeals will generally be better equipped to harmonize conflicts in the law. *See infra* notes 173-75 and accompanying text.

136. There is also the possibility of creating a specialized court, but that subject will be deferred until Part IV. *See infra* text accompanying notes 517-83.

tion is the distinguished study by David Currie and Frank Goodman, prepared in 1975.[137] The authors appraised the advantages and disadvantages of direct review by the courts of appeals and applied their observations to illustrative categories of administrative action.[138] The present section builds on that study. It aims to develop general factors that should influence the weight to be placed on the various advantages and disadvantages, and to relate the whole discussion to analogous problems posed by administrative review.

In analyzing the merits of direct court of appeals review, I shall assume that the alternative is "mandatory" two-tier judicial review—initial review by the district court, with an automatic right of appeal by either party to the court of appeals. A system of one-tier district court review would be possible, but Currie and Goodman demonstrate the insuperable difficulties that such a system would create.[139] Less drastic would be initial review in the district court as of right, followed by further review in the court of appeals only at the discretion of the latter (or, as one variant, at the discretion of either court). Discretionary two-tier review would mitigate some of the problems associated with one-tier review, but it would generate still other problems that impelled Currie and Goodman to caution against its general use.[140] This Article accepts that conclusion.

The consequence of adopting mandatory two-tier review is that, in every case reviewed judicially at all, either the district court decision is appealed, in which event both the district court and the court of appeals will have reviewed the same administrative decision, or the district court decision becomes final. When an appeal is taken, the question is what was gained by district court review. The usual reason for direct court of appeals review is that the district court would otherwise be performing a function that was either unimportant or duplicative of what the agency had already done.[141] In contrast, when no appeal is taken and the district court decision stands, the question is not whether two courts are better than one, but which of the two courts possesses attributes more conducive to reviewing the particular type of case. The predicted frequency of these

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137. *See* Currie & Goodman, *supra* note 1. The study was performed for both the Administrative Conference and the Commission on Revision of the Federal Court Appellate System. *See also* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 23:5 (2d ed. 1983); H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 173-96 (1973); *Developments in the Law—Remedies Against the United States and its Officials*, 70 HARV. L. REV. 827, 901-23 (1957); F. Goodman, *supra* note 110.

138. *See* Currie & Goodman, *supra* note 1, at 31-36 (deportation); F. Goodman, *supra* note 110, at 15-38 (largely incorporated into Currie & Goodman, *supra* note 1).

139. *See* Currie & Goodman, *supra* note 1, at 15-16 (main disadvantage would be inconsistent rulings).

140. *See id.* at 19-23 (advantages exist but are outweighed by disadvantages of inconsistency, wasted screening time, and delay). For a contrary view, see H. FRIENDLY, *supra* note 137, at 176-77.

141. Currie & Goodman, *supra* note 1, at 5-6.

two scenarios is itself a factor bearing on the choice of forum.[142] The point here, however, is that either scenario requires a comparison of the qualities of the two courts.

What, then, are the primary, objective features that distinguish courts of appeals from district courts in ways relevant to the broad goals discussed earlier? One primary distinguishing attribute is that courts of appeals are collegial bodies; they normally work in three-judge panels.[143] Another is that appointments to courts of appeals are generally viewed as more prestigious.[144] A third primary attribute is that courts of appeals are fewer in number than are district courts.

These primary attributes generate five secondary attributes that highlight these courts' strengths and weaknesses as reviewing bodies. For reasons more fully developed by Currie and Goodman, decisions of the courts of appeals tend to be of a higher quality than those of the district courts. The authors stress collegiality,[145] the greater prestige of the positions and therefore their greater attractiveness to people of high caliber,[146] and the judges' experience with the appellate process generally and with opinion writing in particular.[147] An additional quality factor might be added: the fewer the number of courts reviewing a particular class of cases, the more cases of that class each of those courts will decide, and thus the more specialized expertise each will acquire. The importance of this factor will vary with the type of subject matter and with the volume of the particular type of case in the particular region.

The preceding discussion on the quality of the decisionmaking goes to the goal of accuracy. For analogous reasons, courts of appeals are objectively seen as superior reviewers, a factor bearing on the goal of acceptability.[148] A third secondary attribute, relevant to the consistency goal, is that courts of appeals, being fewer in number, create fewer conflicts.[149] Judicial deference to agency interpretations reduces the magnitude of this factor.

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142. *See infra* notes 193-95 and accompanying text.

143. *See* 28 U.S.C. § 46 (1982).

144. Currie & Goodman, *supra* note 1, at 12.

145. *Id.* at 12; *accord* P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 134, at 10; *Views of the Administrative Conference of the United States on the "Report on Selected Independent Regulatory Agencies" of the President's Advisory Council on Executive Organization*, 57 VA. L. REV. 927, 928 (1971) (benefits of collegiality include "diversity of background and experience, an open decision process, and a tendency toward moderation in policy") [hereinafter cited as *ACUS Views on Ash Council Report*]. Collegiality does, however, have some negative effects on quality. It can impair flexibility, Currie & Goodman, *supra* note 1, at 9-11, and can, because of a desire for consensus, produce compromise opinions lacking in clarity or decisiveness, Robinson, *On Revamping the Independent Regulatory Agencies*, 57 VA. L. REV. 947, 961-62 (1971) (acknowledging Ash Council criticisms of collegiality but arguing that problems are minimal).

146. Currie & Goodman, *supra* note 1, at 12.

147. *Id.* at 13.

148. *Id.* at 13-14.

149. *Id.* at 15-16; *see also* 4 K. DAVIS, *supra* note 137, § 23:5, at 135.

All three of those secondary attributes—higher quality results, perceived superior justice, and more uniformity—generally favor court of appeals review. Two others, both bearing on the goal of efficiency, are of mixed effect. Because there are fewer courts of appeals, they are, on the average, geographically farther from the aggrieved parties.[150] The increased distance can elevate travel costs for counsel. Moreover, since it takes three judges to decide the case, the cost to the public will generally be greater.[151] As Currie and Goodman point out, however, the difference in public expense is much less than might be thought because a high proportion of the decisionmaking time is consumed by the drafting of the opinion, for which only one of the three judges will generally be responsible.[152] Further, in those cases in which district court decisions are appealed, two-tier review is *more* expensive than direct court of appeals review, both for the individual and for the public.[153]

For administrative review, the major forum choices vary by agency. In the immigration context, the principal alternatives are the Board of Immigration Appeals and the Associate Commissioner for Examinations, which were described earlier.[154] Because the powers of the latter have been delegated to the Administrative Appeals Unit, whose decisions the Associate Commissioner generally does not disturb,[155] the present comparison will actually be between the BIA and the AAU.

Several primary attributes distinguish these two bodies. As discussed earlier,[156] the BIA decides all cases collectively; AAU decisions, in contrast, are made by single appellate examiners. BIA positions are more prestigious and higher paying than AAU positions.[157] All BIA members are attorneys; the AAU appellate examiners and Unit Chief are not. A staff of twenty-four attorneys assists the BIA; the appellate examiners in the AAU must do their own legal research, analysis, and drafting of disposi-

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150. Currie & Goodman, *supra* note 1, at 7-8.

151. *Id.* at 9.

152. *See id.*

153. How high the appeal rate must be before direct court of appeals review will save judicial resources is discussed by Currie and Goodman. *See id.* at 18-19.

154. *See supra* notes 75-102 and accompanying text; *see also* F. Goodman, *supra* note 10, at 14-15. For commentary on the general subject of agency review boards, see, for example, ACUS Recommendation No. 68-6, 1 C.F.R. § 305.68-6 (1985); Berkemeyer, *Agency Review by Intermediate Boards*, 26 AD. L. REV. 61 (1974); Freedman, *Review Boards in the Administrative Process*, 117 U. PA. L. REV. 546 (1969). *See generally* Cass, *supra* note 1; Note, *Intermediate Appellate Review Boards for Administrative Agencies*, 81 HARV. L. REV. 1325 (1968). ACUS Recommendation No. 83-3, which is based on the Cass report, *see* Cass, *supra* note 1, discusses some of the factors that should guide agency heads in deciding whether to delegate the review function to multimember boards. *See* 1 C.F.R. § 305.83-3, recommendation 3 (1985).

155. *See supra* text accompanying note 86.

156. The BIA and the AAU are described *supra* notes 75-102 and accompanying text.

157. Appellate examiners in the AAU are classified as GS-14 and BIA members as GS-15. The Chief of the AAU is classified as GS-15; the present Chairperson of the BIA is in the Senior Executive Service, though partly because he simultaneously occupies the post of Director of the Executive Office for Immigration Review.

tions. The BIA publishes opinions in those cases it considers precedential; AAU opinions are almost never published.

The resulting secondary attributes of the BIA and the AAU are roughly analogous to those that distinguish courts of appeals from district courts, although they do not flow from exactly the same set of primary attributes. The quality of the BIA decisions would be expected to exceed that of the AAU decisions[158] because the BIA has the benefits of collegiality, far superior staffing support, and higher ranks and greater prestige that widen the range of people the positions can attract. Given the differences in attorney resources, the quality differential would be expected to be especially great when legal issues are presented or when precedent opinions must be drafted. For similar reasons, the BIA is objectively perceived as a better reviewing body,[159] a factor affecting acceptability.

Because the appellate jurisdiction of the Associate Commissioner is now[160] as centralized as that of the BIA, the decisions by the two forums might be expected to be equally uniform. One primary attribute of the BIA, however, gives it an advantage in promoting uniformity—its practice of designating, and then making available to the public, opinions it regards as precedential. Since its published opinions bind the immigration judges and all INS officials,[161] and since those opinions are readily accessible,[162] government officials have a means of providing uniform treatment and immigration lawyers have a means of predicting BIA interpretations and counseling their clients accordingly. In contrast, the AAU seldom designates its opinions as precedent, and its opinions are not easily accessible to the public.[163] Consequently, the AAU cannot achieve a nationally

158. Several immigration specialists in the private sector expressed to the author their view that in fact the AAU decisions have not attained the same level of quality as the BIA decisions.

159. Interview with Charles Gordon (June 14, 1985); Interview with Warren Leiden, *supra* note 6; Interview with Maurice Roberts (June 14, 1985).

160. Before 1983, the appellate jurisdiction now entrusted to the Associate Commissioner for Examinations had been distributed geographically among four regional commissioners. The change was made in order to equalize processing times and to enhance the uniformity of the interpretations. *See* 48 Fed. Reg. 43,160 (1983). The four regions were established in 1955. Now that the regional commissioners are no longer preoccupied with adjudication, the INS is considering reducing the number of regions to three. *See INS Considers Re-Alignment of Regions*, 62 INTERPRETER RELEASES 627, 627 (1985).

161. 8 C.F.R. § 3.1(g) (1985).

162. Precedential decisions of the BIA are published in *Administrative Decisions Under Immigration and Nationality Laws of the United States* (at present 18 volumes supplemented by decisions rendered since publication of the last bound volume). This publication is also where a decision of the Associate Commissioner for Examinations would appear in the unusual event that it were designated as precedent.

163. The AAU deposits copies of its decisions in the INS central reading room in Washington, D.C. It also distributes copies to the American Immigration Lawyers Association and to each of three immigration publications. Without a discriminating selection of cases by the AAU, however, there is no way to know which, among the mass of cases the AAU decides, it considers precedential. Moreover, neither the immigration judges

uniform application of the immigration laws as effectively as the BIA. Nor, at least with present staffing resources, would the AAU be capable of preparing large numbers of carefully drafted published opinions.

The preceding discussion reveals advantages enjoyed by the BIA in its capacity to advance the goals of accuracy, acceptability, and consistency. The trade off is its greater operational costs. The collegial decisionmaking process, the higher rank of the adjudicators, and its large support staff make the BIA a far more expensive enterprise than the AAU.[164]

Since the AAU reports to the Associate Commissioner for Examinations, and since the latter has important administrative and policymaking responsibilities,[165] one might assume that the AAU is better equipped than the BIA to make decisions with heavy political components. That factor can be critical in other administrative settings,[166] but in the immigration context it has little practical import. The Associate Commissioner, in practice, does not become involved in adjudication. In addition, since the BIA is subject to review by the Attorney General, the BIA is no less subject to political constraints, and no less likely to be policy sensitive, than is the AAU. The BIA is probably no more politically restricted or policy sensitive either, because the Attorney General exercises the review power so infrequently.

Two qualifications are necessary. First, personnel can change.[167] There is no certainty that future Associate Commissioners will remain aloof from

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and immigration examiners who do the initial adjudicating, nor the immigration lawyers who must predict it, have easy physical access to the written decisions. *But see* AAU, *Third Preference Case Law Relating to the Professions*, 62 INTERPRETER RELEASES 836 (1985) (paper prepared by AAU on the subject of third preference (professional) visa petitions).

164. In fiscal year 1984 the BIA decided 3131 cases. *See* Appendix. That was accomplished by five BIA members, one Chief Attorney Examiner, and 24 staff attorneys. Interview with David B. Holmes and Gerald S. Hurwitz, *supra* note 78. In the same fiscal year the AAU disposed of 2649 cases. *See* Appendix. That was accomplished by five appellate examiners and the Chief of the Unit. Interview with Lawrence J. Weinig, *supra* note 86. Thus, the AAU disposed of almost as many cases as the BIA, with only a small fraction of the staff. No difference in the difficulty of the cases is apparent.

165. *See* 8 C.F.R. § 103.1(f)(1) (1985).

166. As others have pointed out, preference for a particular review structure often hinges on whether one prefers the judicial or the political model of agency decisionmaking. *See, e.g.*, Cass, *supra* note 1, at 117-18; Freedman, *supra* note 154, at 559. Many writers have urged increased efforts to improve the coherence of agency policy formulation. *See, e.g.*, H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS 142-47 (1962); Freedman, *supra* note 154, at 547-49; Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1259-60, 1274-75 (1974); *see also* Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 DUKE L.J. 163, 182-99. That emphasis underlies in part the view that important policy questions should be subject to agency head control. *See, e.g.*, ACUS Recommendation No. 83-3, 1 C.F.R. § 305.83-3, para. 6 (1985); Freedman, *supra* note 154, at 563; Gladstone, *The Adjudicative Process in Administrative Law*, 31 AD. L. REV. 237, 243 (1979); Strauss, *supra*, at 1256-60.

167. A new Associate Commissioner for Examinations, Mr. Richard E. Norton, was

the AAU adjudication process. Second, even if they do, the public might perceive the AAU to be less independent than the BIA, which has greater insulation in theory[168] and an organizational location outside the INS. Subject to those caveats, however, a safe general statement is that the chief comparative strengths of the BIA are its greater accuracy, acceptability, and consistency, while the major advantage of the AAU is the lower cost of its operation.

Here is where we are so far:

Forum Attributes

Courts of Appeals (relative to district courts)	Board of Immigration Appeals (relative to Administrative Appeals Unit)
Primary Distinguishing Attributes	
1. Collegial decisionmaking	1. Collegial decisionmaking
2. Greater prestige	2. Greater prestige
3. Fewer in number	3. Attorney adjudicators
	4. Attorney staff
	5. Publication of precedents
	6. In theory, less policymaking responsibility (not in practice)
Secondary Distinguishing Attributes	
1. Higher quality results	1. Higher quality results
2. Perception of superior justice	2. Perception of superior justice
3. Better able to effect uniform application of law	3. Better able to effect uniform application of law
4. Possibly greater monetary cost to public (depends on what appeal rate would otherwise be)	4. Greater monetary cost to public
5. Possibly greater monetary cost to litigants (depends on what appeal rate would otherwise be)	5. In theory, more independence from political officials (not in practice)
	6. Possibly gives greater appearance of impartiality

recently appointed. *See Richard E. Norton Named INS Assoc. Commr., Examinations*, 62 INTERPRETER RELEASES 898, 898 (1985).

168. *See* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 267-68 (1954)

C. Case Attributes

Do the advantages of direct review in the courts of appeals outweigh the disadvantages? And do the advantages of the BIA outweigh those of the AAU? The answer to each question is that it all depends on the attributes of the particular class of cases. But what kinds of attributes are relevant?

1. Impact on the Litigants

Like other procedural decisions,[169] choice of forum must reflect the practical impact that the outcome of the case will have on the parties.[170] The greater the expected impact on both the individual and the public, the more important it is to assure accurate decisionmaking. For reasons given earlier, emphasizing the goal of accuracy usually suggests administrative review in the BIA and judicial review in the courts of appeals.[171]

Impact is a factor for other reasons as well. The greater the stakes, the more critical it is that litigants perceive that justice was done. A high impact therefore points toward choosing the courts of appeals, in which there is reason for litigants to perceive greater attention to their cases than in the district courts, and toward the BIA, in which there is reason for litigants to perceive both greater attention and more independence than in the AAU.

A great impact also accentuates the need to promote uniformity. Two of the interests that uniformity serves—predictability and equality—assume greater importance when the stakes are high. The BIA and the courts of appeals are better able to produce uniform results than are the AAU and the district courts.

Finally, the chief disadvantage of the BIA relative to the AAU, and that of the courts of appeals relative to the district courts, is the greater monetary cost to the public. The procedural costs that the system is willing to tolerate should increase as the magnitude of the interests at stake increases.

These considerations all suggest that a high impact is a factor favoring review in the BIA and in the courts of appeals. With respect to the courts of appeals, however, two caveats are necessary. First, since courts of appeals are, on the average, geographically more isolated, travel costs of counsel are generally greater. Just as the magnitude of the impact affects the cost level that the legal system should be willing to absorb, so

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(Attorney General, bound by own regulations, may not dictate to BIA how it should decide case). The Attorney General, however, may reverse the BIA decision after it is issued, *see* 8 C.F.R. § 3.1(h) (1985), and may dissolve the BIA entirely simply by amending the regulations.

169. *See generally* Verkuil, *supra* note 9.

170. *See* Currie & Goodman, *supra* note 1, at 15.

171. *See supra* text accompanying notes 145-47.

too would it be expected to influence the level of resources that the litigants are willing to invest to obtain review. Willingness and ability are two different things, however, and when the personal stakes are great, pricing judicial review beyond the means of the litigants would be intolerable. Second, almost all the above considerations apply in reverse if the consequence of placing original jurisdiction in the district courts turns out to be a very high rate of appeals to the courts of appeals. When both courts review the administrative decision, the case receives more, not less, attention than if review had originated in the court of appeals. The objective perception of fair procedure would also seem greater, as would both the cost to the public and the cost to the litigants.

2. *Types of Issues Raised*

The issues raised in administrative adjudication have traditionally been grouped as legal, factual, or discretionary. Difficulties inherent in classifying borderline cases have not proved easy to resolve. Important contributions have been made,[172] however, and remaining problems at the edges have not prevented either the conscious or intuitive use of those distinctions in cases whose categorization is clear cut.

While the law/fact/discretion distinction is of principal relevance to the scope of review, it bears also on forum choice. A type of case that frequently presents issues of law is best handled by a collegial forum. The impact of a legal conclusion, almost by definition, tends to be more widespread than the impact of a finding of fact. Thus, all else being equal, there is a stronger argument for investing greater monetary resources to achieve a higher quality decision. Collegiality contributes to that quality in several ways. It provides a means for the interchange and testing of views. It diffuses the effects of personal values and subjective biases that inevitably influence judgments on close legal questions. And it reduces the chance of simple inadvertence.[173] All these elements are especially vital when the question is one of law.

Thus, when legal issues are frequent, the importance of collegiality and the greater tolerance for increased costs both militate toward administrative review in the BIA and judicial review in the courts of appeals. That result is reinforced by the interest in promoting uniform interpretations of law—a function that, as discussed earlier, is best entrusted to the BIA and to the courts of appeals.[174]

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172. *See, e.g.*, Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1 (1985).

173. Currie & Goodman, *supra* note 1, at 12; *cf.* Robinson, *supra* note 145, at 972 (discussing policy questions). The Administrative Conference has cited the prevalence of legal questions as a factor favoring direct court of appeals review. ACUS Recommendation No. 75-3, 1 C.F.R. § 305.75-3(g), recommendations 1(a), 2, 6(b)(i) (1985).

174. *See supra* text accompanying note 149.

The BIA has two other features that make it vastly superior to the AAU when the issues are legal: its members are themselves attorneys, and they are assisted by a large staff of attorneys. The BIA is thus better able to research the law, to analyze the legal issues once the pertinent authorities have been located, and to draft precedent opinions.

The courts of appeals enjoy additional advantages over the district courts in resolving questions of law. Those are the kinds of questions that occupy almost all their time. They are more experienced in drafting opinions. And, because courts of appeals are fewer in number, they would be exposed more intensively to, and therefore become more familiar with, any specialized subject matter they are assigned. That expertise takes on increased importance when the subject matter is such that resolution of one question requires a strong conceptual understanding of highly specialized, related problems.[175]

Questions of descriptive fact do not call for the same resources. They present two tasks—taking evidence and making findings. As discussed separately below,[176] reviewing bodies rarely take evidence. And when they make findings of fact, they usually do so on the basis of frozen administrative records, at least in the immigration context. The BIA[177] and the AAU[178] substitute their judgments for those of the initial fact finders. Judicial review, in contrast, is generally confined to a determination whether the finding is supported by substantial evidence.[179] Under either scope of review, however, the tribunal must perform an often laborious search of the administrative record—ordinarily a wasteful use of the time of a multimember panel. Further, findings of fact do not have the precedential effects that might justify the more elaborate mechanisms recommended for questions of law.[180]

Because fact questions do not normally require the combined efforts of a multimember tribunal, and because they do not have the future impact that legal interpretations generate, case categories laden with issues of fact can be suitable candidates for the AAU and for the district courts. As for the latter, an additional consideration is that district judges are more experienced fact finders than are circuit judges. While both often pass on the sufficiency of the evidence, district judges also make their own findings of fact in bench trials and make evidentiary rulings even in jury trials.

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175. *Cf.* Currie & Goodman, *supra* note 1, at 15 (collegiality useful in resolving difficult technical issues).

176. *See infra* text accompanying notes 196-211.

177. *See supra* note 81 and accompanying text.

178. Interview with Lawrence J. Weinig, *supra* note 86.

179. *See* I. & N. Act § 106(a)(4), 8 U.S.C. § 1105a(a)(4) (1982). An exception is made for certain cases in which citizenship is disputed. *See id.* § 106(a)(5), 8 U.S.C. § 1105a(a)(5).

180. That is not to minimize the consequences for the individual litigants. It therefore bears emphasis that the law/fact/discretion distinction, like each of the other items considered in this section, is only one of several factors to be weighed and balanced.

A final category of administrative decision is the exercise of discretion. Although that term can mean different things to different people, I use it here to include the application of broadly worded statutory provisions to individual fact situations. Congress has entrusted primary enforcement of the immigration laws to the Attorney General,[181] but in appellate matters the Attorney General's discretionary authority has been delegated to the BIA explicitly[182] and to the Associate Commissioner implicitly.[183] Thus, at the administrative level, the exercise of discretion by either the BIA or the AAU does not usurp a power entrusted elsewhere. Rather, the question is to which tribunal it would be wiser to entrust cases frequently requiring the exercise of discretion.

A simple act of administrative discretion can require the formulation of policy if the impact of the decision will be sufficiently widespread. That will be the case when the fact situation is a common one, or when a decision is likely to have a sweeping a fortiori effect. When the BIA concludes that a given set of primary facts does not constitute "extreme hardship,"[184] it in effect suggests the same conclusion in subsequent cases that present hardships even less severe.

Since the exercise of discretion at the administrative level can require major policy formulation, there is often reason to assign to policymaking officials those cases that frequently present discretionary questions. Those officials possess a broader perspective because their work is not confined to adjudication.[185] Moreover, because of their powers to formulate policy through other means, their decisions can achieve a measure of coherence not attainable by those who must wait for the proper case.[186]

In choosing between the BIA and the AAU, however, resort to the policymaker/adjudicator distinction is illusory. Decisions of both bodies are subject in theory to approval by their policymaking superiors; in practice, review of either body's decisions would be rare. Rather, in cases likely to require the exercise of discretion, the choices between the AAU and

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181. I. & N. Act § 103(a), 8 U.S.C. § 1103(a) (1982).

182. 8 C.F.R. § 3.1(d) (1985).

183. The regulations give the Associate Commissioner "appellate jurisdiction" over designated cases, *see id.* § 103.1(f)(2), a delegation the Administrative Appeals Unit has interpreted to authorize de novo review. Interview with Lawrence J. Weinig, *supra* note 86.

184. *See* I. & N. Act § 244(a)(1), 8 U.S.C. § 1254(a)(1) (1982) (suspension of deportation). By analogy, when reviewing courts hold that the BIA did not abuse its discretion in finding no extreme hardship, *see, e.g.*, INS v. Rios-Pineda, 105 S. Ct. 2098, 2102 (1985); INS v. Jong Ha Wang, 450 U.S. 139, 144-46 (1981), they dictate similar conclusions in later cases raising hardships less severe.

185. Courts in other contexts have declined to defer to those administrative tribunals whose responsibilities are solely adjudicative. *See, e.g.*, Potomac Elec. Power Co. v. Director, 449 U.S. 268, 278 n.18 (1980) (Benefits Review Board); Donovan v. A. Amorello & Sons, Inc., 761 F.2d 61, 65-66 (1st Cir. 1985) (Occupational Safety and Health Review Commission); Hastings v. Earth Satellite Corp., 628 F.2d 85, 94 (D.C. Cir.) (Benefits Review Board), *cert. denied*, 449 U.S. 905 (1980).

186. *See generally* H. FRIENDLY, *supra* note 166, at 143-47; Freedman, *supra* note 154, at 548-49; Strauss, *supra* note 166, at 1275.

the BIA and between the district courts and the courts of appeals rest on attributes other than degree of policymaking responsibility. Some of the reasons considered earlier for preferring collegial bodies on issues of law apply also to issues of discretion. Since discretion requires a judgment that can rest on personal values and attitudes, collegiality disperses the biases and permits the exchange and testing of ideas. If the discretionary issues that the cases are likely to raise are ones that will have a widespread impact, then these advantages are intensified, again for reasons analogous to those offered in the discussion on questions of law.

3. Volume

A huge caseload can impair both the error-correcting and the guidance functions of appellate review.[187] If the tribunal operates collegially, high volume can be especially devastating. If high volume is not to result in less time spent per case, it can require expanding the size of the tribunal. At some point a tribunal becomes too large to function effectively as a collegial body.[188] High volume, therefore, favors district court review.[189]

For the same reasons, a large caseload favors noncollegial review at the administrative level.[190] In the immigration context, that factor militates toward AAU review for high-volume case categories. Still, if expanding the jurisdiction of the BIA is otherwise found desirable, an alternative to increasing the membership would be to adopt a panel system. That possibility is explored below.[191]

4. Rate of Appeals

Much of what has already been said about the comparative benefits of district courts and courts of appeals hinges on a question that can be extremely difficult to answer in practice: what proportion of district court decisions would be appealed to the courts of appeals if a system of two-tier judicial review were adopted for a particular group of cases? As noted above, one major advantage of district court review is that it saves the time of the circuit judges.[192] The lower the appeal rate, the greater the savings will be.[193] Of course, the time of the appellate judges, while a

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187. P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 134, at 4-7.

188. Currie & Goodman, *supra* note 1, at 10.

189. *Accord* ACUS Recommendation No. 75-3, 1 C.F.R. § 305.75-3, recommendations 1, 2, 6(b)(iii) (1985); Currie & Goodman, *supra* note 1, at 10; *see also* Currie, *Judicial Review Under Federal Pollution Laws*, 62 IOWA L. REV. 1221, 1233-34 (1977) (based on report leading to ACUS Recommendation No. 76-4, 1 C.F.R. § 305.76-4 (1985)).

190. *Accord* ACUS Recommendation No. 83-3, 1 C.F.R. § 305.83-3, recommendations 3(a)-(b) (1985).

191. *See infra* notes 444-57 and accompanying text; *see also* ACUS Recommendation No. 83-3, 1 C.F.R. § 305.83-3, recommendation 3(c) (1985).

192. *See supra* text accompanying notes 151-53.

193. ACUS Recommendation 75-3, 1 C.F.R. § 305.75-3, recommendations 1, 6(b)(iii) (1985); *see* Currie & Goodman, *supra* note 1, at 18-19.

critical resource, is not the only consideration. Crowded trial court dockets make it impossible to ignore the scarcity of the district judges' time.

Estimating how high the appeal rate must be before direct court of appeals review becomes worthwhile is difficult. As for total judge time, the break-even point cannot be ascertained exactly. A three-judge appellate panel does not need three times as many hours to decide a case as does a single district judge, because the opinion-drafting can generally be consigned to one judge. But Currie and Goodman estimate that, on the average, a district judge can probably decide in two hours a case that would have taken at least three total hours of circuit judges' time.[194] Under that assumption, they conclude that the break-even point occurs when approximately thirty percent of the district court decisions are appealed.[195]

That estimate does not reflect, however, the select nature of appealed cases. One consideration in deciding whether to appeal is probability of success. Appealed cases, therefore, will generally include a disproportionate share of the closer, more difficult, and thus more time-consuming, cases. Consequently, when a system of direct court of appeals review is instituted, the extra cases the courts of appeals will have to absorb (that is, the cases that the district courts would have weeded out had two-tier review been adopted) will tend to be disproportionately easy.

Further difficulties lie in predicting what the appeal rate would actually be, in a given category of cases, were two-tier review adopted. If the current review system is two-tier, statistics on the actual appeal rate might be segregable. But if the administrative decision is newly created, or if it is currently nonreviewable, or if it is currently reviewable directly in the courts of appeals, the estimate will be more speculative. A starting point might be the overall rate of appeals from the district courts, or the appeal rate for administrative cases only, or the rate for certain closely analogous administrative cases originating in the district courts. Predictions should reflect the financial means of the aggrieved parties, the interests at stake, and any special incentive the parties might have to delay the effect of the administrative order. If the decisions are ones that at some former time were reviewed in district court, that historical experience might be relevant, even though dated.

5. Need for Taking New Evidence

Generally, having multimember tribunals conduct evidentiary hearings is inefficient.[196] Thus, if deficiencies in the administrative record frequently will require the reviewing body to take additional evidence, a strong

194. *See* Currie & Goodman, *supra* note 1, at 9 & n.38; *id.* at 18-19 & n.58. Less important factors augmenting this disparity are the consultation time and the time spent drafting concurring and dissenting opinions. *Id.* at 9 n.38.

195. *See id.* at 18.

196. *Id.* at 11.

case can be made for placing review in the district courts.[197] The same reasoning would dictate that administrative review be performed by the AAU rather than the BIA in classes of cases in which frequent additional fact-finding by the reviewer is anticipated.

Fortunately, however, a reviewing court—whether a district court or a court of appeals—rarely takes additional evidence. Judicial review of administrative action is normally confined to the administrative record.[198] If the record is inadequate to permit review, the usual recourse is to remand to the agency for clarification or for further findings.[199] A court of appeals can remand as easily as a district court can. In the immigration context, analogous observations can be made about administrative review. Although the BIA and the AAU both make independent findings of fact,[200] they do not take additional evidence. Their findings are based on a preexisting record.[201]

Nonetheless, a reviewing tribunal will sometimes need to take evidence. The parties might disagree over whether particular evidence was considered below, over what the actual reason for the agency's decision was, over whether the decisionmaking official had a personal bias, over whether particular events had occurred after the record had been compiled, or over whether the government had behaved illegally or should for other reasons be estopped. In any of those cases, the record might be an inadequate basis for resolving the dispute,[202] and a remand to the agency might be either inefficient or inappropriate.[203]

Further, although having courts of appeals conduct evidentiary hearings regularly would be inefficient, they are capable of doing so when the need arises.[204] Alternatively, Congress can establish direct review in the

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197. *Id.*; *accord* ACUS Recommendation 75-3, 1 C.F.R. § 305.75-3, recommendations 1, 6(a), (b)(ii) (1985); P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 134, at 191; 4 K. DAVIS, *supra* note 137, § 23:4, at 131 (but noting that statutory language often suggests otherwise).

198. Florida Power & Light Co. v. Lorion, 105 S. Ct. 1598, 1607 (1985); *see also* I. & N. Act § 106(a)(4), 8 U.S.C. § 1105a(a)(4) (1982); 2 C. GORDON & H. ROSENFIELD, *supra* note 8, § 8.11b.

199. Florida Power & Light Co. v. Lorion, 105 S. Ct. 1598, 1607 (1985); *accord* 4 K. DAVIS, *supra* note 137, § 23:5, at 136; 2 C. GORDON & H. ROSENFIELD, *supra* note 8, § 8.11b; Currie & Goodman, *supra* note 1, at 11 (though remand can create problems); Johnson & Stoll, *Judicial Review of Federal Employee Dismissals and Other Adverse Actions*, 57 CORNELL L. REV. 178, 188 (1972).

200. *See supra* notes 81, 86 and accompanying text.

201. Interview with David B. Holmes and Gerald S. Hurwitz, *supra* note 78; Interview with Lawrence J. Weinig, *supra* note 86.

202. *See generally* McMillan & Peterson, *The Permissible Scope of Hearings, Discovery, and Additional Factfinding During Judicial Review of Informal Agency Action*, 1982 DUKE L.J. 333.

203. Currie & Goodman, *supra* note 1, at 11.

204. *See id.* at 11 & nn.44, 58; *see, e.g.*, National Nutritional Foods Ass'n v. FDA, 491 F.2d 1141, 1144 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974).

courts of appeals but authorize transfers of individual cases to the district courts when judicial fact-finding is necessary.[205]

One commonly invoked criterion for choosing a judicial forum is the degree of formality of the administrative proceeding.[206] The theory is that a formal hearing increases the likelihood of a fully developed record that will obviate the need for judicial fact-finding. There is validity to that view, since a formal record is likely to aid the resolution of certain kinds of disputes without a remand. A hearing transcript, for example, might reveal whether particular evidence was considered or whether the hearing officer was biased. If the decision was oral, the transcript might clarify the reasons for it. Even if the decision was in writing, the formality might induce the hearing officer to provide a more detailed analysis than would have been supplied in a less formal proceeding.[207]

Yet the relevance of the formality level is easily overplayed. First, the question for the reviewing court might be purely legal, in which event no taking of evidence would be necessary.[208] Second, even when a court reviews a finding of fact, an informal proceeding can yield documentary evidence adequate to permit review. As Professor Davis has observed in another context, the real question is whether the record is full, not whether the hearing was quasi-judicial[209]—a suggestion taken up recently by the Supreme Court.[210] Third, even if there has been a formal proceeding, the reviewing court might be unable to avoid taking further evidence—for example, when the aggrieved party alleges illegal government acts committed outside the proceedings or seeks temporary relief on the basis of events that occurred after the close of proceedings. That a collegial body can review informal agency action quite effectively, without the need to take additional evidence, is borne out by the BIA, which reviews the informal decisions of district directors. One might even argue that the absence of a formal evidentiary hearing makes review by a collegial body even more pressing.[211]

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205. *See* ACUS Recommendation No. 75-3, 1 C.F.R. § 305.75-3, recommendation 7 (1985); 4 K. DAVIS, *supra* note 137, § 23:5, at 136; Currie, *supra* note 189, at 1253-54; Johnson & Stoll, *supra* note 199, at 194 & n.92.

206. *See* ACUS Recommendation No. 75-3, 1 C.F.R. § 305.75-3, recommendations 1, 6(a) (1985); Currie, *supra* note 189, at 1232; Currie & Goodman, *supra* note 1, at 5-6; Strauss, *supra* note 166, at 1255-56.

207. Along the same lines, the formality of the administrative *review* process can influence the wisdom of choosing a particular judicial review forum in ways examined *infra* text accompanying notes 222-28.

208. *See* Abedi-Tajrishi v. INS, 752 F.2d 441, 443 (9th Cir. 1985); *see also* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 23.03-1, at 535-38 (1976); 4 K. DAVIS, *supra* note 137, § 23:03, at 138.

209. K. DAVIS, *supra* note 208, § 23.03-1, at 536 (quoting Deutsche Lufthansa Aktiengesellschaft v. CAB, 479 F.2d 912, 916 (D.C. Cir. 1973)).

210. *See* Florida Power & Light Co. v. Lorion, 105 S. Ct. 1598, 1607 (1985).

211. The argument would be that a lack of procedural care at one stage of the process magnifies the need for care at other stages. A counterargument would be that the lack

To summarize, a class of cases generally should not be assigned to a collegial reviewing tribunal when the reviewer will frequently have to take additional evidence. But the need for the reviewer to take evidence is rare, at least in immigration cases. And the formality of the original administrative hearing, while slightly increasing the probability that the resulting record will be adequate, should not be a weighty consideration.

6. *Similarity of Issues to Those in Other Cases*

Once a class of cases is committed to a given administrative or judicial forum, there is benefit in assigning to that same forum other classes of cases tending to raise similar issues. The knowledge and insights that the tribunal acquires in grappling with the issues in one set of cases can assist it in reaching informed and thoughtful decisions in the other set of cases. In addition, having the same tribunals resolve similar issues serves the interest of judicial efficiency[212] by avoiding the need to reinvent the wheel. Finally, this process facilitates the uniform, coherent development of the case law.

7. *Avoidance of Bifurcation*

The problem of "bifurcation" can arise whenever one tribunal has exclusive jurisdiction over one group of cases and another tribunal has exclusive jurisdiction over a somehow related group of cases. The "problem" is really two problems, and in principle they can arise in the context of either administrative or judicial forum selection.

The first problem is the wasteful jurisdictional litigation that arises when the bar is uncertain which tribunal has jurisdiction over which cases.[213] One response would be to send all cases in the same general subject area, or all decisions made under the same comprehensive statute, to the same reviewing body.[214] That course would eliminate or at least reduce the jurisdictional confusion, and would trigger the side benefits associated with issue similarity. Much can be said for such a bright-line test, but the price, absent fortuity, is the loss of the many advantages that would have accrued had the attributes of the review forum been more carefully tailored to the attributes of the case.

Moreover, thoughtful drafting of the statutes and administrative regulations can minimize the need for jurisdictional litigation. Limits to the human imagination and to the English language concededly prevent complete eradication of this problem, but lessons about what to anticipate can often be gleaned from prior experience. Further, even when an am-

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of a formal evidentiary hearing reflects Congress' view that the interests at stake are trivial. The same congressional philosophy would militate against collegial review.

212. *See supra* text accompanying note 129.

213. *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 23.03, at 798-99 (Supp. 1970).

214. *See id.*

biguity does surface, court decisions can quickly reduce the jurisdictional confusion. This last consideration is of special relevance when the issue is whether an existing scheme that allocates related orders to two different tribunals should be altered to place both orders in the same body. If the reason for the contemplated change is to clarify the law, one factor to consider is how many of the initial interpretation issues have already been resolved.

A second, distinct problem is the possible bifurcation of a single case. That problem can arise when different tribunals have jurisdiction over different administrative orders that affect the same individual. Courts have often interpreted jurisdictional statutes to require bifurcation.[215]

What is wrong with splitting a case? Sometimes, nothing. Depending on the relationship between the two orders, however, bifurcation can undermine judicial efficiency. The validity of both orders might, for example, turn on a common question of either law or fact. Resolution of the same underlying issue by both bodies then creates the potential for both duplicated effort and inconsistent results. Further, resolution of one claim might either moot the other claim entirely or affect the way the other should be resolved on the merits. In either of those instances, routing the two cases to the same tribunal would be beneficial.

Apart from the problem of extra judicial work, bifurcation can delay the ultimate results. Either the individual or the government might have to wait for both decisions to learn the final consequences. If so, the individual might be unable to make important planning decisions and the government will be unable to close out the case.

The Supreme Court has recently favored statutory constructions that would avoid the need to splinter core issues from ancillary issues.[216] The above discussion suggests that the drafting of statutes and regulations should reflect an analogous philosophy. Frequently recurring ancillary orders should be anticipated, the likelihood and consequences of bifurcation should be assessed along with the other factors relevant to the selection of a review forum, and the forum decision should be made explicit so that jurisdictional litigation can be minimized. Alternatively, depending on the likely effects in the particular setting, the statute or regulations could call for bifurcation but give either one or both of the two tribunals discretion to assert pendent jurisdiction.[217]

8. Incentive to Delay

In some contexts, delay operates to the advantage of the individual challenging governmental action. One who is currently receiving a benefit from the government generally has an interest in prolonging a govern-

215. 4 K. DAVIS, *supra* note 137, § 23:5, at 142-43.
216. *See* Florida Power & Light Co. v. Lorion, 105 S. Ct. 1598, 1606 (1985).
217. *See infra* notes 438-40 and accompanying text.

mental decision whether to terminate that benefit, even though that interest might be partly offset by a longing for the certainty that a final decision will bring. One aim in choosing a review forum, therefore, is to minimize the total time consumed by the review process. Speed is crucial because, the longer the processing time, the greater the incentive to file a frivolous appeal becomes. And the more appeals that are filed, the more rapidly the processing time will increase. This cycle is best broken at the start.

In theory, therefore, one factor in choosing a review forum should be the speed with which cases will be decided. But that factor can be extremely difficult to apply. At the judicial level, the time from filing to disposition varies from one circuit to another and from one district to another.[218] For immigration cases, hard data on the average processing times for the two major administrative reviewers are not available. The AAU estimates a mean time of about one to two months;[219] the BIA disposition times fluctuate widely from one case to another, but a rough estimated mean might be three months.[220] Even if the estimates were solid, building a permanent review structure around those data would be problematic because processing times can change with variations in both case volume and staffing.

Eliminating steps can potentially decrease the processing time. At the judicial level, bypassing the district courts and placing review directly in the courts of appeals saves the time needed for district court processing. But the efficacy of that strategy depends on the rate at which district court decisions would otherwise be appealed, and on the comparative speeds of district courts and courts of appeals. If the appeal rate would have been low, and if district court review time turns out to be appreciably less than court of appeals review time, bypassing the district courts could actually increase the aggregate delay.

Keeping down the review time depresses the incentive to file a frivolous appeal to achieve delay. As long as some incentive remains, however, minimizing the capacity to manipulate the review system is also important. Subject to the qualifications just discussed, eliminating district court review can serve that purpose as well. Other means, however, should also be explored. Speeding the overall process is of course the most effective remedy, but that is not always possible without adding staff or adopting other measures that impose costs the system is unwilling to absorb.

Still, existing vehicles are available. Administrative and judicial

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218. That has certainly been true in immigration cases. Interview with Robert L. Bombaugh, Director of the Office of Immigration Litigation of the Department of Justice (June 13, 1985).

219. Interview with Lawrence J. Weinig, *supra* note 86.

220. David Holmes, the Chief Attorney Examiner of the BIA, produced that estimate by dividing the current backlog by the average number of monthly decisions. Interview with David B. Holmes and Gerald S. Hurwitz, *supra* note 78.

tribunals can use summary procedures when they find cases to be frivolous. In appropriate cases, tribunals can impose sanctions on attorneys who file frivolous appeals,[221] so long as the lack of merit is sufficiently clear that the sanctions will not chill vigorous advocacy in future cases.

Finally, the manipulation problem must be kept in perspective. Statements urging that procedures be "streamlined" are easy to make and difficult to resist. The abuses attributable to the particular procedural step criticized might be small in scale, or the elimination of that step might remove important protections for the individual or indirectly add work or delay at other stages.

9. Relationship Between Administrative Forum and Judicial Forum

Administrative review and judicial review connect at many points. Though their functions are not identical, they are complementary in several respects that are examined below.[222] Administrative review will sometimes eliminate a party's need to resort to more costly judicial review. At least one commentator has argued that, the more expansive the administrative review, the less intrusive the judicial review is likely to be.[223] If frequent judicial review is anticipated, administrative review should be of a type likely to culminate in a well-written opinion that will clarify the reasons for the decision and convey any specialized knowledge that will aid a generalist court in discharging its review function. And, as discussed below,[224] the question whether the agency head should be empowered to review the decisions of an administrative review board is intimately tied to the question whether the agency should be authorized to challenge the review board decision in court.

The thrust of this subsection, however, is that in at least two respects the choice of administrative review forum, once made, should itself be a factor influencing the choice of judicial review forum, and vice versa.[225] First, since one of the functions of the district court in a two-tier system is to sort out the issues,[226] the case for direct court of appeals review is strongest when the administrative reviewer has already sharpened the issues by drafting a carefully reasoned opinion. As discussed earlier, the BIA is better equipped than the AAU to fill that role.[227] Thus, a decision to

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221. Immigration cases in which courts have imposed sanctions include Dallo v. INS, 765 F.2d 581, 589-90 (6th Cir. 1985); Muigai v. United States INS, 682 F.2d 334, 336-37 (2d Cir. 1982); Der-Rong Chour v. INS, 578 F.2d 464, 468-69 (2d Cir. 1978), *cert. denied*, 440 U.S. 980 (1979).

222. See the discussion on combining the strengths of generalists and specialists, *infra* text following note 539.

223. *See* Verkuil, *supra* note 9, at 1180.

224. *See infra* notes 493-502 and accompanying text.

225. In addition, as this entire list of case attributes illustrates, both forum choices can depend on common factors.

226. Currie & Goodman, *supra* note 1, at 6.

227. *See supra* text accompanying notes 156-58.

place administrative review in the BIA is a reason to place judicial review in the courts of appeals. Conversely, if for independent reasons judicial review is placed in the courts of appeals, that placement is a reason to send the case to the BIA for administrative review. Second, some find it undignified for a single individual to set aside the collective decision of a specialized, multimember tribunal.[228] That premise, if accepted, also favors judicial review in the courts of appeals when administrative review has been entrusted to the BIA.

10. Status Quo

Any change entails a certain amount of disruption. Statutes, regulations, and job descriptions might have to be altered. Personnel moves might have to be made. Those who will be taking on new functions might require training. These costs are short term, but they must nonetheless be weighed against the benefits that the change is expected to bring.

11. Constitutional Limitations

For some administrative decisions, the choice of review forum is constrained either directly or indirectly by the Constitution. For example, if review by a specialized court is contemplated, article III may limit the range of options as to type of reviewing tribunal.[229]

Even when the choice is between district courts and courts of appeals, constitutional limitations can be pertinent. If personal liberty is implicated, particularly by possible administrative detention, the constitutional bar on suspension of habeas corpus[230] must be considered. If, in the particular context, the availability of habeas corpus is constitutionally required, then the judicial forum options are limited. Habeas corpus applications could be channeled to the courts of appeals,[231] but the collective decisionmaking process would hinder the promptness that is vital when unlawful governmental restraint is alleged. One solution might be to provide that any habeas application filed in the court of appeals must be adjudicated by a single circuit judge. Given the magnitude of the individual interest, however, it would seem important to provide for appeal of that judge's decision to a regular court of appeals panel. And if that is done, little is gained over traditional two-tier review originating in the district court.[232]

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228. Currie & Goodman, *supra* note 1, at 14.

229. *See infra* text accompanying notes 572-83.

230. *See* U.S. CONST. art. I, § 9, cl. 2.

231. The general federal habeas statute authorizes circuit judges to grant writs of habeas corpus, *see* 28 U.S.C. § 2241(a) (1982), though the applicant must explain why relief was not sought in the district court, *see id.* § 2242.

232. The only apparent gain is that the superior prestige of appellate judgeships might attract individuals whose higher caliber would improve both the actual and the perceived quality of the decision. *See supra* text accompanying notes 145-47. There would be a loss if one accepts the premise that circuit judge time, being part of a collegial process, is more valuable than district judge time. *See* Currie & Goodman, *supra* note 1, at 18.

Thus, in classes of cases in which the Constitution will frequently mandate the preservation of habeas, the most viable option might be two-tier judicial review. Another alternative might be exclusive jurisdiction in the courts of appeals, with a proviso allowing habeas applications in the district courts whenever habeas is constitutionally required, or when liberty is constricted in some lesser manner.[233] These considerations are of particular relevance in immigration cases, as discussed below.[234]

A final constitutional concern is procedural due process. If the interests are great enough that fundamental fairness requires a de novo judicial trial,[235] the district court will be the obvious forum.

The preceding discussion lists eleven factors that should influence the choice of forum for the review of administrative action. I wish to emphasize that I am not suggesting the application of these factors on a case-by-case basis. Many are quite general. Several, whether general or specific, will often conflict. And most, when applied to individual cases, will be heavily affected by personal values.[236] For all these reasons, a case-by-case approach would concededly produce interminable jurisdictional uncertainty. Rather, the proposal is for a categorical approach, in which whole classes of cases are examined for tendencies to possess the attributes discussed here. That judgment is no less subjective, but, once it is made, the results can be embodied in statutes or regulations that supply a reasonable measure of certainty.

III. Choosing a Review Forum: Immigration Cases

The framework developed in the preceding Part can now be applied to various classes of immigration decisions.

A. Deportation

As discussed earlier,[237] a deportation order is entered by an immigration judge after an evidentiary hearing. The order is appealable to the BIA. Judicial review is by petition for review in the court of appeals, ex-

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233. *See, e.g.*, I. & N. Act § 106(a)(9), 8 U.S.C. § 1105a(a)(9) (1982) ("custody" test). Issues are whether the Constitution requires habeas and whether Congress should authorize habeas even when not constitutionally required.

234. *See infra* text accompanying notes 277-84.

235. *See* Ng Fung Ho v. White, 259 U.S. 276, 282-85 (1922) (citizenship claimed as defense to deportation); I. & N. Act § 106(a)(5), 8 U.S.C. § 1105a(a)(5) (1982) (court of appeals must transfer case to district court if alien in deportation proceedings makes nonfrivolous claim of United States nationality and genuine issue of material fact is presented).

236. The role of personal values in shaping procedural choices, and the devices by which value conflicts are resolved, are discussed carefully in Resnik, *Tiers*, 57 S. Cal. L. Rev. 837 (1984).

237. *See supra* text accompanying notes 63, 89-91, 103-19.

cept that an alien held in custody may obtain review by applying for a writ of habeas corpus in the district court.

Judicial review of deportation orders has an interesting history,[238] but only one development requires mention here. Before 1961 deportation orders could be reviewed only in the district courts.[239] The 1961 amendments assigning deportation cases to the courts of appeals were prompted almost entirely by Congress' belief that aliens were manipulating judicial review to delay deportation.[240] Bypassing the district court was intended to eliminate one element of delay and thus diminish the incentive to bring frivolous actions.

Whether direct review in the courts of appeals has actually inhibited delay seems doubtful. A two-tier system in which district court review is by habeas corpus would not add significant delay, because habeas ap-

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238. For descriptions of that history, see, for example, T. ALEINIKOFF & D. MARTIN, *supra* note 8, at 562-69; 2 C. GORDON & H. ROSENFIELD, *supra* note 8, § 8.2; F. Goodman, *supra* note 110, at 1-3.

239. Some of the very early cases interpreted the immigration statutes as barring all judicial review. *See, e.g.*, Chin Ying v. United States, 186 U.S. 202, 202 (1902); Chin Bak Kan v. United States, 186 U.S. 193, 201 (1902); Li Sing v. United States, 180 U.S. 486, 495 (1901). Eventually, however, the courts began to assume that aliens taken into custody could challenge the lawfulness of the deportation order by applying for habeas corpus. *See* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1387-96 (1953). But even habeas had its limitations. It was then generally assumed that the habeas application would lie only after the alien had been taken into custody—an event that ordinarily did not occur until a deportation order had been issued and the INS had prepared to execute it. Thus, aliens sought injunctive or declaratory relief to obtain review of deportation orders in advance of detention. In Heikkila v. Barber, 345 U.S. 229 (1953), however, the Supreme Court interpreted the pre-1952 immigration statute, which made the immigration officers' decisions "final," as precluding judicial review other than by habeas corpus. *See id.* at 234-35. When the Court later had occasion to interpret an analogous provision in the 1952 Act, *see* I. & N. Act § 242(b), 8 U.S.C. § 1252(b) (1982), it reversed direction. Because the 1952 Act had been passed after the Administrative Procedure Act, Pub. L. No. 404, ch. 324, 60 Stat. 237 (1946), the 1952 Act would not be held to preclude judicial review in the absence of clear statutory language to that effect. Shaughnessy v. Pedreiro, 349 U.S. 48, 49-52 (1955). Declaratory and injunctive relief thus became available once again as a means to challenge deportation orders. The 1961 amendments ended that practice by making petitions for review in the courts of appeals the sole means for reviewing deportation orders, except for habeas corpus once the alien was in "custody." *See* Act of Sept. 26, 1961, Pub. L. No. 87-301, sec. 5(a), § 106(a)(9), 75 Stat. 650, 652 (codified at 8 U.S.C. § 1105a(a)(9) (1982)).

240. *See* H.R. REP. No. 565, 87th Cong., 1st Sess. 11-13 (1961), *reprinted in* IMMIGRATION AND NATIONALITY ACTS LEGISLATIVE HISTORY AND RELATED DOCUMENTS, Doc. No. 52, at 11-13 (O. Trelles & J. Bailey eds. 1979) [hereinafter cited as H.R. REP. No. 565]. Toward the same end, Congress imposed a six-month time limit for filing a petition for review, *see* Act of Sept. 26, 1961, Pub. L. No. 87-301, sec. 5(a), § 106(a)(1), 75 Stat. 650, 651 (codified at 8 U.S.C. § 1105a(a)(1) (1982)), and prohibited all judicial review, whether by petition for review or by habeas, once the case has already been litigated, *see id.* § 106(c), 75 Stat. at 653 (codified at 8 U.S.C. § 1105a(c) (1982)).

plications are adjudicated promptly.[241] The real problem in 1961, at least as Congress perceived it, was not the two-tier system but the practice of repeated actions, in whatever forum, challenging the same deportation order.[242] Congress addressed that particular problem by codifying res judicata.[243] Further, much of the delay, if not most, occurs at the administrative level, a problem that the petition for review does not solve.[244] And the petition for review carries with it an automatic stay of deportation,[245] as it must if judicial review is to have any value.

Direct court of appeals review can even prolong the litigation process. Absent a high appeal rate from district court decisions,[246] direct review lengthens the total review time unless the courts of appeals can decide petitions for review more expeditiously than district courts can decide habeas applications, which is doubtful. Finally, direct review of deportation orders in the courts of appeals can require the bifurcation of cases when certain orders collateral to the deportation decision are also challenged, a problem discussed below.[247] When that occurs, additional delay is possible.

Even if petitions for review did indeed tend to shorten the review period and thus lessen the incentive to file frivolous claims, alternative means can accomplish those aims. Summary procedures can be employed in frivolous cases.[248] The Justice Department can ask the court to invoke the existing statutory mechanism for dissolving the automatic stay that accompanies service of the petition for review.[249] And courts could more frequently levy sanctions on attorneys who bring frivolous actions.[250]

Finally, before forum decisions are measured by their effectiveness in reducing delay, the magnitude of the problem must be placed in perspec-

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241. *See* 2 C. GORDON & H. ROSENFIELD, *supra* note 8, § 8.2, at 8-13; *see also* 28 U.S.C. § 2243 (1982).

242. *See* H.R. REP. No. 565, *supra* note 240, at 3, 5-11, 20-26; *see also* Note, *Judicial Review*, *supra* note 110, at 1155-56.

243. *See* Act of Sept. 26, 1961, Pub. L. No. 87-301, sec. 5(a), § 106(c), 75 Stat. 650, 653 (codified at 8 U.S.C. § 1105a(c) (1982)).

244. Juceam & Jacobs, *Constitutional and Policy Considerations of an Article I Immigration Court*, 18 SAN DIEGO L. REV. 29, 33 (1980).

245. I. & N. Act § 106(a)(3), 8 U.S.C. § 1105a(a)(3) (1982).

246. *See infra* notes 269-72 and accompanying text.

247. *See infra* text accompanying notes 411-42.

248. This point has been made by others. *See* 2 C. GORDON & H. ROSENFIELD, *supra* note 8, § 8.9Af, at 8-89; Currie & Goodman, *supra* note 1, at 34 & n.123. There is, however, an important practical problem. If the INS moves for summary affirmance, the alien must be given the opportunity to respond to the motion. If the motion is ultimately denied, the net effect will be to set back the briefing schedule and thus to *increase* the delay. Interview with Robert L. Bombaugh, *supra* note 218.

249. *See* I. & N. Act § 106(a)(3), 8 U.S.C. § 1105a(a)(3) (1982). Motions to dissolve the statutory stay are often granted. *See* 2 C. GORDON & H. ROSENFIELD, *supra* note 8, § 8.9Af, at 8-89 n.84. This strategy, however, is subject to constraints analogous to those described *supra* note 248.

250. *See* 2 C. GORDON & H. ROSENFIELD, *supra* note 8, § 8.9Af, at 8-89.

tive. No one has attempted to estimate how many requests for judicial review are actually motivated solely by a desire to delay deportation. Critics of the 1961 amendments believed there were very few then,[251] and, in absolute numbers, it seems unlikely that frivolous petitions for review are a serious national problem today. In fiscal year 1984 a total of 418 petitions for review were filed nationwide.[252] Even if a hefty fraction of those petitions were frivolous—and there is no evidence to indicate that that was the case—the extra months bought by so small an absolute number of aliens seem trivial in the face of several million undocumented aliens present indefinitely. The executive and judicial resources taken up by frivolous petitions for review are, of course, a separate concern. Again, however, neither the number of cases nor the small amount of executive and judicial time that a truly frivolous claim consumes makes the problem a serious one.

Should deportation orders, then, be returned to the district courts? At least one leading jurist believed they should.[253] Certainly the foregoing discussion suggests that the original rationale of reducing delay is not a persuasive reason for keeping deportation orders in the courts of appeals. But the case for direct review in the courts of appeals need not rest on so thin a reed, for the other factors influencing choice of forum do tend generally to favor court of appeals review. These same factors also suggest that administrative review should continue to be in the BIA.

One factor that militates toward review by the BIA and by the courts of appeals is the impact of the decision on both the individual and the public. Like other immigration-related decisions, deportation can vary dramatically in its impact. Permanent residents will most likely have developed stronger community ties than will temporary visitors. Aliens who have close relatives in the United States may have greater interests in defending against deportation than those who do not. Aliens here lawfully may have more at stake than do aliens who entered surreptitiously or who have overstayed their temporary visas. Aliens who claim that they will be persecuted if returned to their native countries may have more to lose from a deportation order than do other aliens. And American citizens who are erroneously deported lose more than do aliens who assert other defenses. Many writers have considered both the relevance and the magnitude of those factors.[254]

Those and other variations in individual circumstances make it dangerous to generalize about the impact of deportation. But two obser-

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251. *See* H.R. REP. No. 565, *supra* note 240, at 28-32 (minority report).

252. Interview with Robert L. Bombaugh, *supra* note 218.

253. *See* H. FRIENDLY, *supra* note 137, at 175-76. Apart from his concerns as to timing, Judge Friendly also cited the need for jurisdictional litigation. *See id.* at 176.

254. *See* Aleinikoff, *Aliens, Due Process, and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237, 245 (1983); Hart, *supra* note 239, at 1392 n.92; Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 208-10 (1983); Verkuil, *supra* note 9, at 1149-55.

vations can be made. First, the stakes for the individual can at least be described as *frequently* great. Even undocumented aliens who claim only facts that if proved would qualify them for discretionary relief might well have a great deal riding on the outcome. Second, all deportations share a common element traditionally viewed as relevant to the desirable degree of procedural protection—disturbance of the status quo, as distinguished from conferral of an initial benefit.[255] Both factors elevate the need for procedural safeguards and thus bolster the case for accepting greater monetary costs to the public.

The types of issues raised by deportation are also well suited to resolution by the BIA and the courts of appeals. Deportation cases frequently require interpretations of law and the exercise of discretion.[256] As discussed earlier,[257] review of both these types of decisions is improved by collegial decisionmaking and by the uniformity of interpretation that the BIA and the courts of appeals are better equipped to foster. In addition, the legal training of the BIA members and staff provides strong advantages in resolving issues of law. Moreover, deportation issues are capable of stirring fierce emotions that can magnify the contribution of personal values. A collegial process helps to diffuse those biases. Above all, the statutory interpretation problems presented by deportation cases often require an understanding of complex relationships among several provisions.[258] That feature enhances the benefits of expertise and thus favors courts of appeals because, as discussed earlier, they are fewer in number and thus receive a more concentrated exposure to whatever subject matter they are assigned.

The volume of deportation appeals is large, but not so great as to threaten the benefits of collegial review. The BIA decided 1909 deportation cases in fiscal year 1984, a load it was able to handle even in combination with the 1222 cases of other types.[259] In the same year, the courts of appeals received 418 petitions for review of deportation orders.[260] That

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255. *See* Greenholtz v. Inmates of Neb. Penal & Correction Complex, 442 U.S. 1, 10 (1979); Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1295 (1975); Verkuil, *supra* note 9, at 1149-50; *see also* McInnes v. Onslow Fane, [1978] 3 All E.R. 211, 218 (Ch.).

256. Even a casual perusal of almost any volume of the *Federal Reporter* reveals numerous published deportation decisions that resolve questions of law and review the exercise of discretion. The same is true of the published BIA reports, which are stocked with deportation cases that the BIA regards as precedential. And several recent Supreme Court decisions have reviewed the exercise of BIA discretion, *see* INS v. Rios-Pineda, 105 S. Ct. 2098, 2099 (1985); INS v. Jong Ha Wang, 450 U.S. 139, 139-41 (1981), or interpreted the statutory prerequisites to the granting of discretionary relief, *see* INS v. Phinpathya, 464 U.S. 183, 188 (1984); INS v. Chadha, 462 U.S. 919, 923 (1983); *cf.* INS v. Stevic, 104 S. Ct. 2489, 2490 (1984) (mandatory relief).

257. *See supra* text accompanying notes 172-75, 181-86.

258. See the frequently quoted passage from Yuen Sang Low v. Attorney General, 479 F.2d 820, 821 (9th Cir.) ("[W]e are in the never-never land of the Immigration and Nationality Act, where plain words do not always mean what they say."), *cert. denied*, 414 U.S. 1039 (1973).

259. *See* Appendix.

260. Interview with Robert L. Bombaugh, *supra* note 218.

caseload also is not overbearing, although the distribution of the cases among the circuits was very uneven.[261]

Other factors fortify the case for review of deportation orders by the BIA and the courts of appeals. One factor is that a deportation order is preceded by a formal evidentiary hearing that results in the compilation of a detailed administrative record. Another is that review by the BIA and the courts of appeals preserves the status quo, and thus avoids the temporary disruption engendered by change. In addition, the two forum choices are compatible; as discussed earlier, administrative review in the BIA is itself a reason for judicial review in the courts of appeals, and vice versa.[262] The effects of these choices on the litigants' costs are minimal. At the administrative level, the AAU and the BIA seem to require comparable attorney fees and expenses. They are located in the same metropolitan area,[263] litigants in both tribunals are generally represented by counsel,[264] and in each tribunal counsel normally submit written briefs and sometimes participate in oral argument.[265] At the judicial level, court of appeals review is in theory costlier to the alien because, on average, the distance to the nearest court of appeals will be greater than the distance to the nearest district court. That was a concern at the time the 1961 amendments were enacted,[266] but complaints along those lines have not been heard in recent years,[267] probably because the immigration bar is based disproportionately in cities where courts of appeals regularly schedule oral argument.[268]

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261. A total of 490 INS decisions were "appealed" to the courts of appeals during the year ending June 30, 1984 (not the fiscal year, which ends September 30), of which 307 were filed in the Ninth Circuit. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS table 4, at 110 (1984). It is not clear whether those figures include INS decisions that were reviewed by district courts and then appealed to courts of appeals, or are limited to petitions for review of deportation orders. Either way, the concentration of cases in the Ninth Circuit is evident.

262. *See supra* text accompanying notes 225-28.

263. The AAU is located at the central INS office in Washington, D.C. The BIA sits in Falls Church, Virginia.

264. Interview with David B. Holmes and Gerald S. Hurwitz, *supra* note 78; Interview with Lawrence J. Weinig, *supra* note 86.

265. Interview with David B. Holmes and Gerald S. Hurwitz, *supra* note 78; Interview with Lawrence J. Weinig, *supra* note 86.

266. H.R. REP. No. 565, *supra* note 240, at 35 (minority report).

267. Interview with Warren Leiden, *supra* note 6.

268. *See* American Immigration Lawyers Ass'n, Geographical Listing (Nov. 1984). The listing reveals especially heavy concentrations of immigration lawyers in the environs of Los Angeles and San Francisco, cities in which the Ninth Circuit holds oral argument. That fact is critical in view of the disproportionate importance of the Ninth Circuit in immigration cases. *See supra* note 261. The listing also shows large numbers of immigration lawyers in Atlanta, Boston, Chicago, Miami, New York, Philadelphia, and Washington, D.C.—all cities in which oral argument is regularly held. The only cities that house a large immigration bar and that are not the sites of regularly scheduled oral argument are Dallas and Houston, where the Fifth Circuit holds oral argument on occasion.

Although other factors point in the opposite direction, they are either minor in impact or difficult to apply. One such factor, applicable only at the judicial level, is rate of appeal. Because deportation orders have been reviewable exclusively in the courts of appeals since 1961, it is difficult to predict what proportion of district court decisions would be appealed to the courts of appeals if two-tier review were reinstated.

One way to estimate the rate is to focus on section 106(a)(9) of the Immigration and Nationality Act. That provision is the exception that authorizes district court review of deportation orders by habeas corpus when aliens are held in custody. In fiscal year 1984 sixty-six of those cases were filed in the district courts, and eleven district court decisions denying deportation-related habeas corpus applications were appealed to the courts of appeals.[269] Although the appeals were not all from district court cases filed in the same fiscal year, the promptness with which habeas applications are processed makes it likely that the appeal rate for the group at least approximates eleven-sixty-sixths, or seventeen percent. That rate is lower than the thirty percent break-even point estimated by Currie and Goodman, but there are problems in extrapolating from this sample. First, the size of the sample is very small. Second, since the sample is composed only of those aliens who are held in custody, it contains two systematic, though countervailing, biases. On the one hand, aliens in custody have more at stake, and thus might be expected to appeal more frequently. On the other hand, since they are restrained, although not necessarily incarcerated,[270] they have less incentive to file frivolous appeals to prolong the deportation process.

An alternative approximation might be based on the pre-1961 experience. Evidence presented to the House immigration subcommittee showed appeal rates for fiscal years 1954 through 1957 inclusive that ranged from seventeen percent to twenty-nine percent.[271] But projections from historical data are tenuous. Today, because the immigration bar is so much larger, more aliens have access to counsel. The stakes might also be greater today, since far more deportation cases turn on asylum claims and the appeal rates tend to be higher when asylum is sought.[272] Future appeal rates might thus be highly sensitive to changes in the world refugee situa-

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269. *See* Appendix.

270. *See infra* text accompanying notes 277-80.

271. *See Judicial Review of Deportation and Exclusion Orders: Hearing on H.R. 13311 Before the Subcomm on Immigration and Naturalization of the House Comm. on the Judiciary*, 85th Cong., 2d Sess. 57 (1958) (statement of Harry Rosenfield), *reprinted in* 35 INTERPRETER RELEASES 188, 192 (1958). In fiscal year 1961, the last full year before the 1961 amendments became effective, the appeal rate inexplicably dropped to nine percent. *See* Foti v. INS, 308 F.2d 779, 785 n.6 (2d Cir. 1962), *rev'd*, 375 U.S. 217 (1963).

272. In fiscal year 1984, within the class of deportation cases that originated in district courts because the aliens were in custody, the ratio of appeals to district court filings was 6 to 15 when asylum was an issue, and 5 to 51 when it was not. *See* Appendix.

tion, as well as to changes in INS detention policy. For all these reasons, the anticipated appeal rate should not be weighted heavily in choosing a forum for review of deportation orders.

One advantage of reinstating district court review of deportation orders is that then no immigration-related decisions would be reviewed directly in the courts of appeals. Consequently, when aliens seek review of orders collateral to deportation, there would be neither jurisdictional confusion nor bifurcation of individual cases. Evaluating these advantages requires analysis of the options for reviewing the collateral orders, and thus will be deferred until the discussion of those orders.[273] That analysis will show that the practical disadvantages of direct court of appeals review of deportation orders are not great and, in any event, can be lessened.

The last consideration is constitutional. Two limitations, both accommodated by existing statutory mechanisms, are relevant. When a bona fide claim of United States nationality is advanced as a defense to deportation, procedural due process requires a de novo judicial trial.[274] The current statute provides that procedure.[275]

The other pertinent limitation is the constitutional bar on suspending habeas corpus.[276] As noted earlier, section 106(a)(9) of the Act permits aliens "held in custody" pursuant to deportation orders to apply for habeas corpus in the district courts. Numerous issues, worthy of a separate paper, are raised. The problems can be outlined briefly.

First, as a matter of statutory interpretation, is the habeas remedy provided by section 106(a)(9) confined to the constitutional minimum, or is the section comparable in scope to the broader general federal habeas corpus statute?[277] There are at least two subissues here—the availability of habeas and the scope of review. Availability turns on the meaning of the word "custody." Under the Immigration and Nationality Act, the Attorney General has the discretion whether to detain an alien pending the execution of a deportation order.[278] If the Attorney General elects not to detain, and the alien is released on bond or released subject to travel restrictions, is the alien in custody for purposes of section 106(a)(9)? The Supreme Court has made clear in other contexts that the general federal habeas statute does not require actual incarceration; certain other restraints on liberty will suffice.[279] The courts are divided over whether section 106(a)(9) should be similarly interpreted.[280] As to scope of review, the

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273. *See infra* notes 411-42 and accompanying text.
274. Ng Fung Ho v. White, 259 U.S. 276, 283 (1922).
275. I. & N. Act § 106(a)(5), 8 U.S.C. § 1105a(a)(5) (1982).
276. U.S. CONST. art. I, § 9, cl. 2.
277. *See* 28 U.S.C. §§ 2241-2256 (1982).
278. *See* I. & N. Act § 242(c), 8 U.S.C. § 1252(c) (1982).
279. *See* Hensley v. Municipal Court, 411 U.S. 345, 351 (1973) (person released on own recognizance before start of criminal sentence may invoke habeas); Jones v. Cunningham, 371 U.S. 236, 238 (1963) (parolee may invoke habeas).
280. *See* T. ALEINIKOFF & D. MARTIN, *supra* note 8, at 599-611 (comparing United States

question is whether section 106(a)(9) permits review of the underlying deportation order, or merely review of the lawfulness of the temporary restraint, or something in between. On that question, too, the decisions are in conflict.[281]

Second, as a matter of constitutional law, when *is* a restriction on habeas corpus permissible? That question is difficult enough to answer in the abstract. The history of the constitutional prohibition is sparse, and the existence of a broadly construed federal habeas statute has enabled the Supreme Court to avoid the constitutional issue.[282] The question takes on added complexity in the deportation context, for the Supreme Court has frequently held that the congressional power to regulate immigration is subject to few constitutional constraints.[283] The one constraint that does clearly apply to deportation cases, however, is procedural due process.[284] Perhaps the same desire to afford a procedure for redress would impel the Court to hold the constitutional habeas provision likewise applicable, but there is no way to predict with confidence.

Third, apart from the problems of interpreting either the various statutory provisions or the Constitution, under what circumstances is it good policy to make habeas available to aliens who have been ordered deported? Only when the alien is physically detained? Whenever the alien's movement or activities are restricted, for example by imposition of bond or by limitations on travel or association? Whenever a deportation order is issued? Competing values must be balanced. On the one hand, district court review of deportation orders undercuts the general advantages, discussed above, that result from direct court of appeals review. On the other hand, habeas furnishes a prompt remedy that becomes vital when individual liberty is significantly curtailed.

Fourth, again as a matter of policy, how broad should the scope of review be once it is decided that habeas will lie? Should the court be limited to reviewing the lawfulness of the restraint? Or should habeas be a vehicle for obtaining judicial review of the underlying deportation order or, as one variant, review of certain discretionary decisions ancillary to deportation? Questions as to availability and scope of review are related because, the more widely available habeas is, the narrower the scope of review must

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ex rel. Marcello v. District Director, 634 F.2d 964, 970 (5th Cir.), *cert. denied*, 452 U.S. 917 (1981) with Daneshvar v. Chauvin, 644 F.2d 1248, 1251 (8th Cir. 1981)); *see also* Gordon, *Habeas Corpus—New Limits for an Ancient Remedy?*, 4 IMMIGRATION J., Nov.-Dec. 1981, at 7, 23.

281. *See, e.g.*, Daneshvar v. Chauvin, 644 F.2d 1248, 1251 (8th Cir. 1981); *see also* T. ALEINIKOFF & D. MARTIN, *supra* note 8, at 611 & n.21.

282. *See* Memorandum from Leland E. Beck, Legislative Attorney for the Congressional Research Service, to Hon. Bill McCollum 14-15 (July 19, 1982).

283. *See generally* Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255.

284. *Id.* at 259.

be if the habeas exception is not to swallow the general rule that deportation orders are reviewable exclusively in the courts of appeals.

Fifth, once the policy decisions are made, how should the statute be worded? The existing habeas provision for deportation orders, as noted earlier, has produced conflict and confusion. Redrafting is needed. But what should the statute say? One approach would be to spell out precisely what type of restraint is necessary before an alien ordered deported may apply for habeas, and precisely what the court may review when habeas is available. An alternative, which would maximize the number of cases for which court of appeals review is exclusive, would be to permit habeas only "to the extent required by the Constitution." That approach would also remove the possibility of later judicial invalidation, but it would produce serious jurisdictional uncertainty for an indefinite period of time.

Taken as a whole, the factors that should influence the choice of review forum favor preserving BIA review of deportation orders. Similarly, these factors favor retaining judicial review in the courts of appeals, subject to the limitations imposed by procedural due process and habeas corpus requirements.

B. Exclusion

As explained earlier, the decision whether to exclude an alien who has applied for admission is made by an immigration judge.[285] Either the alien or the INS may appeal to the BIA.[286] The alien may obtain judicial review by applying for habeas corpus in the district court.[287] Either side may appeal the district court decision to the court of appeals.[288]

The following discussion will show that the general forum selection factors strongly favor the BIA over the AAU in exclusion cases. Indeed, there has been no apparent movement toward change.[289] But many of

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285. I. & N. Act § 236(a), 8 U.S.C. § 1226(a) (1982). The immigration officer at the border makes a preliminary determination whether the alien is "clearly and beyond a doubt entitled to land." *Id.* § 235(b), 8 U.S.C. § 1225(b).

286. 8 C.F.R. § 3.1(b)(1) (1985).

287. I. & N. Act § 106(b), 8 U.S.C. § 1105a(b) (1982). The early cases assumed that final administrative orders of exclusion were not subject to judicial review. *See, e.g.*, Lee Lung v. Patterson, 186 U.S. 168, 175 (1902); Lem Moon Sing v. United States, 158 U.S. 538, 549-50 (1895); Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892). Eventually, aliens seeking review of exclusion orders turned successfully to habeas corpus, although for a while review by declaratory judgment action still was not permitted. *See* Tom We Shung v. Brownell, 346 U.S. 906, 906 (1953) (per curiam). Then, after the enactment of the 1952 Act, the Supreme Court interpreted the new legislation as permitting judicial review not only by habeas corpus, but also by actions for declaratory or injunctive relief. *See* Brownell v. Tom We Shung, 352 U.S. 180, 182-84 (1956). Finally, in 1961, Congress amended the Act to make habeas corpus the exclusive form of judicial review of exclusion orders. *See* Act of Sept. 26, 1961, Pub. L. No. 87-301, sec. 5(a), § 106(b), 75 Stat. 650, 653 (codified at 8 U.S.C. § 1105a(b) (1982)).

288. 28 U.S.C. § 1291 (1982).

289. There have been proposals, however, to give the BIA statutory recognition and

those same factors also suggest transferring judicial review to the courts of appeals. Bills have been introduced in Congress to do just that.[290]

Impact is one of the more critical factors, and in exclusion cases it can be difficult to assess. Excluded aliens are commonly assumed to have less at stake than deported aliens, in part because exclusion is merely the denial of a benefit while deportation is the removal of a benefit. This principle is reflected in some of the cases that confer broader constitutional protection in deportation proceedings than in exclusion proceedings.[291] The statute and judicial interpretations of it reflect a similar philosophy.[292]

But so clean a separation ignores the practicalities. As has been pointed out elsewhere,[293] the excluded alien can have much at stake. With the demise of nonpreference immigrant visas,[294] virtually the only aliens who apply for admission as immigrants are those who claim either to qualify as refugees or to fit a statutory preference. The latter category is reserved for those who have either close family members or a needed skill and a prospective employer in the United States.[295] In all those cases the individual interests are potentially great. Moreover, as with deportation, the magnitudes of the interests are subject to many variables, including immigrant versus nonimmigrant and initial entrant versus returning resident.[296] Further, just as the alien has an interest in admission, the public

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to change its name. *See, e.g.*, H.R. 30, 99th Cong., 1st Sess. § 211 (1985); H.R. 1510, 98th Cong., 2d Sess. § 122, 130 CONG. REC. H6166, H6171-72 (daily ed. June 20, 1984); S. 529, 98th Cong., 1st Sess. § 122, 129 CONG. REC. S6970, S6973-74 (daily ed. May 18, 1983). There have also been proposals to substitute a summary exclusion procedure in certain cases. *See, e.g.*, H.R. 1510, 98th Cong., 2d Sess. §§ 121-122, 130 CONG. REC. H6166, H6171-72 (daily ed. June 20, 1984); S. 529, 98th Cong., 1st Sess. §§ 121-122, 129 CONG. REC. S6970, S6973-74 (daily ed. May 18, 1983). That possibility is at present the subject of a separate study by the Administrative Conference.

290. *See, e.g.*, H.R. 1510, 98th Cong., 2d Sess. § 123(a)(10), 130 CONG. REC. H6166, H6172 (daily ed. June 20, 1984); H.R. 2361, 98th Cong., 1st Sess. § 122 (1983). See also the discussion on specialized courts *infra* text accompanying notes 517-83.

291. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 762 (1893) (Fuller, C.J., dissenting). *See generally* T. ALEINIKOFF & D. MARTIN, *supra* note 8, at 448-63; Hart, *supra* note 239, at 1392-93; Legomsky, *supra* note 283, at 260-61. Those cases may rest also on territorial considerations. *See* T. ALEINIKOFF & D. MARTIN, *supra* note 8, at 454; Legomsky, *supra* note 283, at 275-77.

292. For example, the statutory deportation grounds are generally fewer and narrower than the exclusion grounds. *Compare* I. & N. Act § 212(a), 8 U.S.C. § 1182(a) (1982) (exclusion) *with id.* § 241(a), 8 U.S.C. § 1251(a) (deportation). Ambiguities in deportation provisions are generally to be construed in favor of the aliens, INS v. Errico, 385 U.S. 214, 225 (1966); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948), a principle not yet applied to exclusion. In deportation proceedings, the statute has been construed to require the government to prove its case by "clear, unequivocal, and convincing evidence." *See* Woodby v. INS, 385 U.S. 276, 286 (1966); Rassano v. INS, 492 F.2d 220, 222 (7th Cir. 1974). In exclusion proceedings, the burden of proof is on the alien. I. & N. Act § 291, 8 U.S.C. § 1361 (1982).

293. *See* T. ALEINIKOFF & D. MARTIN, *supra* note 8, at 452-63.

294. *See supra* note 23.

295. *See* T. ALEINIKOFF & D. MARTIN, *supra* note 8, at 101-83.

296. This point is made very effectively by Aleinikoff and Martin. *See id.* at 453-63.

has an interest in assuring the exclusion of those aliens whose presence Congress has declared detrimental.

For all those reasons, the potential impact of the exclusion decision seems great enough to justify the use of a collegial tribunal, at least for prospective immigrants. This factor points, therefore, toward review in the BIA and in the courts of appeals. A different conclusion is possible for nonimmigrants, but factors other than impact suggest similar treatment even for that class, as discussed below.

An exclusion hearing is a quasi-formal, transcribed, evidentiary proceeding that yields an administrative record as detailed as that compiled in a deportation case.[297] That factor, which reduces the likelihood that a reviewing tribunal will need to take additional evidence, also favors the BIA and the courts of appeals.

Absent a world event that produces a sudden influx of aliens—as happened recently in Cuba and in Haiti—the number of cases in which aliens seek either administrative or judicial review of exclusion orders tends to be small. In fiscal year 1984 the BIA decided 307 exclusion cases (ten percent of its total caseload),[298] and the federal district courts adjudicated only twenty-seven habeas corpus applications challenging exclusion orders.[299] Several factors keep the numbers low. Inadmissible aliens are ordinarily screened out at the visa application stage. Thus, except for asylees, aliens without visas normally have no reason to travel to the United States to apply for admission.[300] In addition, even when an immigration officer stationed at an entry point does refuse admittance, the alien frequently accepts that decision, rather than demand a formal hearing before an immigration judge. There are various reasons to forgo an exclusion hearing. First, under current INS practice, the alien is generally incarcerated pending the hearing.[301] In addition, once an alien is formally excluded, the statute bars reentry for one year.[302] Finally, the alien might simply be unable to afford counsel.[303] As noted earlier, the low volume tends to favor review by the BIA and by the courts of appeals.

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297. *See* I. & N. Act § 236(a), 8 U.S.C. § 1226(a) (1982); 8 C.F.R. § 236 (1985).

298. *See* Appendix.

299. *See id.* There were also at least 51 habeas cases in which excluded aliens challenged only their detention. Interview with Robert L. Bombaugh, *supra* note 218.

300. *See* I. & N. Act § 212(a), 8 U.S.C. § 1182 (1982) (grounds for visa denials same as grounds for exclusion); *id.* § 212(a)(20), (26), 8 U.S.C. 1182(a)(20), (26) (alien not in possession of proper entry documents inadmissible). Further, certain aliens may be "preinspected" at foreign points. *See* 8 C.F.R. § 235.5 (1985); 1A C. GORDON & H. ROSENFIELD, *supra* note 8, § 3.16c, at 3-163 to -164.

301. Interview with Paul Schmidt, Deputy General Counsel of the INS (June 11, 1985); *see* 8 C.F.R. § 235.3(b) (1985) (aliens without documents or with false documents); *id.* § 235.3(c) (aliens with documents); *id.* § 212.5 (factors in deciding whether to parole).

302. *See* I. & N. Act § 212(a)(16), 8 U.S.C. § 1182(a)(16) (1982).

303. All these reasons for the low volume were expressed by Bombaugh, *see* Interview with Robert L. Bombaugh, *supra* note 218, and Leiden, *see* Interview with Warren Leiden, *supra* note 6. The latter cited intimidation by the immigration officer as another possible factor. *See id.*

Another factor reinforcing that result is the similarity between the issues typically raised in exclusion proceedings and those raised in deportation proceedings. One common deportation ground, for example, is that the alien was excludable at the time of entry.[304] Even apart from that specific example, the exclusion grounds and deportation grounds cover similar conduct and use similar language that raises similar interpretation problems.[305] Further, certain waiver provisions described earlier apply in both exclusion cases and deportation cases,[306] and even those that do not often share several common elements.[307]

Those similarities are significant in two ways. They permit the extrapolation, to exclusion cases, of many of the reasons advanced for BIA and court of appeals review of deportation orders. In addition, as developed earlier, once deportation cases are channeled to the BIA and to the courts of appeals, having those bodies review cases presenting similar issues is advantageous.[308]

The forum choices for administrative review and judicial review also affect one another. If BIA review of exclusion orders is preserved, then court of appeals review would be beneficial for reasons given earlier.[309]

Analysis of the costs to the litigants is the same for exclusion as for deportation. At the administrative level, the choice between the AAU and the BIA has no apparent effect on litigants' costs. The lesser proximity of the courts of appeals may increase costs in theory, but, as with deportation, the distribution of the immigration bar reduces the practical relevance of that consideration.[310]

Aliens seeking admission are sometimes "paroled" into the United States for emergent reasons pending the decision whether to exclude.[311] Once paroled, the alien has an incentive to prolong the process through frivolous litigation. In theory, therefore, another benefit of direct court of appeals review would be to eliminate one step and thus decrease the incentive to delay. In practice, however, this consideration does not seem significant. The paucity of appeals from district court exclusion cases[312]

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304. I. & N. Act § 241(a)(1), 8 U.S.C. § 1251(a)(1) (1982).

305. *Compare id.* § 212(a), 8 U.S.C § 1182(a) (exclusion) *with id.* § 241(a), 8 U.S.C. § 1251(a) (deportation). Note especially the similarities in the grounds pertaining to criminal conduct, ideology, and morals.

306. *See, e.g., id.* §§ 212(c), 243(h), 8 U.S.C. §§ 1182(c), 1253(h); *see also* Francis v. INS, 532 F.2d 268, 272-73 (2d Cir. 1976) (section 212(c) applies to both deportation and exclusion).

307. *Compare* I. & N. Act § 212(a)-(b), (d), 8 U.S.C. § 1182(a)-(b), (d) (1982) (exclusion) *with id.* §§ 241(a)-(b), (f), 244(a), (e), 8 U.S.C. §§ 1251(a)-(b), (f), 1254(a), (e) (deportation).

308. *See supra* text accompanying note 212.

309. *See supra* text accompanying notes 225-28.

310. *See supra* note 268 and accompanying text.

311. *See* I. & N. Act § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1982).

312. In fiscal year 1984 only two such appeals were filed; twenty-seven habeas actions were brought in the district court to challenge exclusion orders. *See* Appendix.

suggests that delay is not a problem in this area. Further, the INS decision to make detention the norm rather than the exception[313] greatly reduces the number of aliens who would benefit from delay.

The factors discussed thus far generally favor review of exclusion orders by the BIA and the courts of appeals. BIA review presents no significant problems, but court of appeals review does have some potential disadvantages. The status quo would be altered. The disruption should be minimal, however, because the volume is small, the new procedure would be one that is already familiar, and no additional training would be required. The current rate at which district court decisions reviewing exclusion orders are further appealed is negligible.[314] And, since many kinds of immigration decisions are collateral to exclusion,[315] assignment of exclusion cases to the courts of appeals could trigger jurisdictional disputes and could result in bifurcation of cases. The problem of collateral orders is considered later.[316]

But the most serious difficulty with court of appeals review of exclusion orders is timing. As noted earlier, most excluded aliens are now detained pending administrative and judicial review. Those aliens need ways to test the legality of their detention promptly. Even aliens temporarily paroled into the United States are in limbo as they await the outcome of the litigation. For them, speed is also paramount. Courts of appeals are cumbersome vehicles for emergency decisionmaking. A habeas application in the district court is more conducive to rapid disposition. Whether or not habeas is constitutionally compelled,[317] its availability is desirable when restrictions on liberty make speed important.

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313. Interview with Paul Schmidt, *supra* note 301.

314. *See supra* note 312.

315. *See supra* notes 28-29, 39-45 and accompanying text.

316. *See infra* text accompanying notes 411-42.

317. It is not clear whether the present statutory provision, I. & N. Act § 106(b), 8 U.S.C. § 1105a(b) (1982), authorizes habeas when the alien is not in detention. The statutory language suggests that detention is not required. It refers to "any alien against whom a final order of exclusion has been made," provides for review of the exclusion order (not just the detention), and states not only that no other review is available, but also that habeas *is* available. *See id.*, 8 U.S.C. § 1105a(b). The House Judiciary Committee Report preceding the 1961 enactment of this statutory provision assumed that all excluded aliens—not merely those physically detained—would be able to obtain review by habeas corpus. *See* H.R. REP. No. 565, *supra* note 240, at 18-19; *see also* R. STEEL, *supra* note 8, § 13:25, at 388 (assuming "detention" not prerequisite). The committee relied on this assumption in concluding that restricting excluded aliens to habeas would not deprive them of any opportunities previously enjoyed through use of declaratory judgment actions. *See* H.R. REP. No. 565, *supra* note 240, at 17. *But see id.* at 32-33 (minority report) (assuming detention required); T. ALEINIKOFF & D. MARTIN, *supra* note 8, at 567-68 (assuming that "custody" is a prerequisite to use of section 106(b)).

The constitutional limitations are equally uncertain. The early cases that refused review after reading the statute to preclude it, *see supra* note 287, would seem to stand sub silentio for the proposition that the Constitution similarly does not compel habeas in exclusion cases. The difficulties attending the analogous question in deportation cases, *see supra* text

Can these competing concerns be accommodated? One option would be to make court of appeals review generally exclusive but to create an exception permitting detained aliens to challenge their exclusion orders by habeas corpus in the district courts. Such a change would permit the advantages of court of appeals review to operate in those cases in which habeas is not sought. The disadvantage is that it would force aliens whose liberty has been constricted in ways less severe than detention to wait longer for judicial determinations of the legality of the restraint. This last problem could simply be tolerated, or it could be cured by broadening the exception to include all significant incursions on freedom of movement. But unless the contemplated restrictions can be both predicted and articulated in advance, it would be difficult to draft statutory language elastic enough to cover serious future restrictions, yet specific enough to supply reasonable jurisdictional certainty. The statute could, for example, parallel the current deportation provision: the courts of appeals have exclusive jurisdiction, except that aliens "held in custody" may apply for habeas corpus in the district court. That course would be plausible in exclusion cases as well, but, as discussed earlier, the disadvantage is that the word "custody" has triggered wasteful jurisdictional litigation.

An alternative that I favor is simply to give excluded aliens a choice. They could either apply for habeas corpus in the district court (with a right of appeal by either party to the court of appeals) or directly petition for review in the court of appeals—but not both. Either court would have jurisdiction to review the legality of the temporary restraint and the validity of the underlying exclusion orders.

As a practical matter, since most excluded aliens are now temporarily detained, the majority of those aliens who want judicial review of exclusion orders will probably select the habeas corpus option because it will tend to be the speedier remedy. For them, the proposed change will have no effect. But those aliens who are not detained might well prefer the courts of appeals. When they make that choice, the previously discussed benefits of court of appeals review will be achieved: enhanced coherence of legal doctrine, both within the exclusion area and between exclusion and deportation; compatibility of the administrative and judicial review forums; the added suitability of the courts of appeals for cases in which formal records have been compiled; and more careful decisionmaking in cases in which the impact on the individual may be great.

The disadvantage of this proposal is that it would allow the nondetained alien to employ two-tier review to increase the delay. But the oppor-

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accompanying notes 277-84, are even more pronounced here because excluded aliens have even fewer constitutional rights than deported aliens. *See* Legomsky, *supra* note 283, at 259-60. As with deportation, the questions in exclusion cases include whether detention is necessary to trigger a constitutional right to habeas corpus, whether it is sufficient to do so, and whether, if habeas is required, its scope encompasses review of the underlying exclusion order as well as the legality of the detention.

tunity to delay the outcome would be no greater than it is under current law, and, as shown above, delay is not currently a problem in exclusion cases. Moreover, establishing concurrent jurisdiction would eliminate the kinds of jurisdictional squabbles that have plagued the analogous habeas provision for deportation cases.[318]

When the Administrative Conference debated the present proposal, a snag developed. As noted earlier, aliens who have been ordered excluded are normally detained in the United States pending review, although occasionally an alien is "paroled" into the country for emergent reasons and permitted to remain at large.[319] In either case, the question arises whether the INS should be free to remove the alien from the United States while judicial review is pending. The statute creates an automatic stay of deportation orders pending judicial review,[320] but it contains no analogous provision for exclusion orders. Thus, the INS can remove the alien unless the reviewing court, in its discretion, grants a stay. The Department of Justice opposes creating automatic stays of exclusion because it fears that the availability of those stays would encourage aliens to seek review in frivolous cases to delay their removal. The Department urged the Conference not to recommend direct court of appeals review of exclusion orders unless the Conference was also prepared to take a position on stays.[321]

My own view is that the automatic stay should be extended to exclusion orders regardless of whether review is assigned to the district courts or the courts of appeals. Whatever delay deportation appeals might be thought to cause,[322] analogous problems are not present in exclusion cases. For all the reasons given earlier, the excluded alien rarely has any incentive to delay the outcome.[323] Further, under the present system, aliens who seek judicial review of exclusion orders must couple their habeas corpus applications with motions to stay their exclusion until the court has ruled. The reviewing court must therefore decide, on an emergency basis, whether to stay the exclusion; then it must reexamine the case later to reach a decision on the merits. All of this might be worthwhile if it screened out frivolous cases and thus avoided the second step. But in practice the stay motions are virtually always granted.[324] Thus, for all practical purposes, the stay presently *is* automatic; yet, as noted earlier, only a handful of aliens seek judicial review of exclusion orders each year. And if further assurance against frivolous review petitions is thought necessary, a provi-

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318. *See supra* text accompanying notes 277-84.

319. *See supra* text accompanying notes 301, 311.

320. *See* I. & N. Act § 106(a)(3), 8 U.S.C. § 1105a(a)(3) (1982).

321. U.S. Dep't of Justice, Alternative Recommendation on Judicial Review in Immigration Proceedings 2 (Dec. 12, 1985) (copy on file at *Iowa Law Review*).

322. *See supra* notes 238-52 and accompanying text.

323. *See supra* notes 298-303, 311-13 and accompanying text.

324. Telephone interview with Robert L. Bombaugh, Director of the Office of Immigration Litigation of the Department of Justice (Dec. 9, 1985) (district court "almost always" grants stay; "unable to recall a single case" in which stay refused).

sion that automatically stays exclusion pending judicial review could contain the same safeguard as the analogous provision for deportation—authority for the reviewing court to dissolve the stay at any time.[325] Under the latter provision, the need for the court to perform the inconvenient and time-consuming task of studying the arguments twice—as it must now do in all exclusion cases—would be confined to those cases that the INS argues are frivolous.

An automatic stay of exclusion would therefore make eminent sense. More important, if an automatic stay were enacted, the argument for court of appeals review would if anything be even more compelling. If the Justice Department truly fears that the automatic stay would encourage frivolous petitions for review, one would expect the Department to *favor* direct court of appeals review as a device for bypassing the district court and thus eliminating one element of the delay.

Assertions that the stay issue and the forum issue are interdependent came from another quarter as well. Two United States Court of Appeals judges argued that, if there is no automatic stay, the reviewing court must be one that is well equipped to make emergency decisions—a characterization that fits the district courts better than the courts of appeals.[326] The point is well taken, but it does not seem a strong enough reason to reject concurrent jurisdiction. First, even courts of appeals have mechanisms for emergency decisionmaking. These devices are especially suitable when, as is true here, the number of cases requiring prompt decisions is extremely small. A motions panel could be assigned the task of adjudicating the stay issue soon after the case is filed. If logistical constraints make a prompt collegial decision impracticable, single circuit judges could decide the stays.[327] Collegiality would be lost, but no more so than if district judges were making the decisions. Second, a better and more direct way to meet the concern of the circuit judges would be to make the stay automatic. As just noted, there are strong, independent reasons for choosing that course.

C. Other Orders

Part I described many of the other, miscellaneous orders issued under the Immigration and Nationality Act. Some of these decisions are made by immigration judges during the course of formal exclusion or deportation hearings. Others, also made by immigration judges, are the subjects of their own formal proceedings. Still other orders are entered by district directors after less formal procedures. Some of those, if adverse to the

325. *See* I. & N. Act § 106(c), 8 U.S.C. § 1105a(c) (1982).

326. Comments of Hon. Stephen Breyer and Hon. Jerre S. Williams, Plenary Session of ACUS (Dec. 12, 1985).

327. *Compare* 28 U.S.C. § 2253 (1982) (single circuit judge authorized to issue certificate of probable cause, which is essential to appeal from district court decision denying habeas relief from state conviction).

aliens, can set the stage for subsequent formal exclusion or deportation proceedings, in which the denied applications might be renewable.[328]

The Attorney General's regulations specify, with laudable clarity, which of these decisions are administratively appealable and to whom.[329] Certainty is not a problem. But rationality is another question. David Carliner, writing in 1960, forcefully criticized the then existing allocation of administrative appeals between the BIA and the regional commissioners.[330] If there are patterns in the present distribution between the BIA and the Associate Commissioner for Examinations, they are no more obvious now than analogous patterns were then.

The one relatively steady pattern is the assignment to the BIA of appeals from decisions of immigration judges.[331] Even that generalization, however, is not perfect.[332] More important, there is no apparent rhyme or reason to the distribution of appeals from district directors' decisions. Nor did an exhaustive search of the Federal Register reveal past reasons for choosing particular forums for appeals from particular orders. It might be, as several seasoned observers whom I interviewed suggested, that the placement decisions were simply the products of turf wars within the Justice Department at a time when the regional commissioners were exercising the appellate jurisdiction now centralized in the Associate Commissioner for Examinations.[333]

The statutory provisions that govern judicial review of immigration decisions present converse problems. As discussed earlier,[334] some of those provisions lack certainty. Unlike the system of administrative review, however, the general scheme of judicial review is not irrational. Even so, some improvements are possible.

Given the plethora of administrative decisions required by the Immigration and Nationality Act and accompanying regulations, detailed examination of all the miscellaneous orders is not practical. Studying selected examples, however, is both feasible and worthwhile. The selections in this subsection are based on the practical importance of the particular order and on the illustrative value of applying to that order the general forum selection criteria developed in Part II.

Whether a particular forum is appropriate for a particular order can depend on the context in which the order is issued. It will first be assumed

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328. *See supra* notes 74-102 and accompanying text.

329. *See* 8 C.F.R. §§ 3.1(b), 103.1(f)(ii) (1985).

330. *See* Carliner, *Administrative Consideration and Review of Immigration Appeals*, 37 INTERPRETER RELEASES 340, 341-46 (1960).

331. *See* 8 C.F.R. § 3.1(b)(1)-(2), (7)-(8) (1985).

332. When an immigration judge decides whether to withdraw the approval of a school, *see id.* § 214.4, appeal lies to the Associate Commissioner for Examinations, *id.* § 103.1(f)(2)(ix).

333. The suggestion was that the assignment of appeals to the regional commissioners was a political concession to them. *See also supra* notes 60, 160.

334. *See supra* notes 103-25 and accompanying text.

that the alien is not the subject of an exclusion or deportation order. Under that assumption, the issue is which forum, if any, should independently review the miscellaneous order. Next, an outstanding exclusion or deportation order will be posited. The issues then become whether the miscellaneous order and the exclusion or deportation order should be reviewed together and, if so, in what tribunal.

1. Visa Petitions

A "visa petition" is a standardized form, supplemented by documentary evidence, asking the INS to classify a given alien as fitting within a claimed statutory preference. With only narrow exceptions, the district director's approval of a visa petition is a prerequisite to both admission for permanent residence[335] and adjustment of status to permanent residence.[336] It is also a requirement for admission of certain nonimmigrants, including fiancé(e)s of American citizens[337] and temporary workers.[338]

At present, denials of some visa petitions are appealable to the BIA, while denials of others are appealable to the AAU. When visa petitions seek immigrant preference based on occupation,[339] or when prospective nonimmigrants seek to enter as temporary workers under what are commonly called "H" or "L" visas,[340] appeal lies to the AAU.[341] In contrast, when visa petitions are based on family preference,[342] denials are generally appealable to the BIA.[343] There are, however, two exceptions. If an alien seeks admission as the fiancée or fiancé of an American citizen,[344] or is an orphan who has been adopted by an American family,[345] a denial is appealable to the AAU.[346]

Judicial review, at least in the absence of an exclusion or deportation order, can be described more simply. Under section 279 of the Act, all

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335. The alien cannot be admitted without a visa, I. & N. Act § 212(a)(20), 8 U.S.C. § 1182(a)(20) (1982), and the consulate will not issue the visa until the visa petition authorized by *id.* § 204, 8 U.S.C. § 1154, has been approved, *see* 22 C.F.R. §§ 42.41-.42 (1985).

336. 8 C.F.R. § 245.2(a)(2) (1985).

337. *See* I. & N. Act §§ 101(a)(15)(K), 214(d), 8 U.S.C. §§ 1101(a)(15)(K), 1184(d) (1982).

338. *Id.* §§ 101(a)(15)(H), (L), 214(c), 8 U.S.C. §§ 1101(a)(15)(H), (L), 1184(c).

339. *Id.* § 203(a)(3), (6), 8 U.S.C. § 1153(a)(3), (6).

340. The letters refer to the statutory subsections establishing the particular nonimmigrant classifications. *See id.* § 101(a)(15)(H), 8 U.S.C. § 1101(a)(15)(H) (aliens of "distinguished merit and ability" coming to render temporary services, temporary laborers when unemployed Americans cannot be found, and trainees); *id.* § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L) (intracompany, management-level, transferees).

341. 8 C F.R. § 103.1(f)(2)(ii), (x) (1985).

342. I. & N. Act § 203(a)(1)-(2), (4)-(5), 8 U.S.C. § 1153(a)(1)-(2), (4)-(5) (1982).

343. 8 C.F.R. § 3.1(b)(5) (1985).

344. *See* I. & N. Act § 101(a)(15)(K), 8 U.S.C. § 1101(a)(15)(K) (1982).

345. *See id.* § 101(b)(1)(F), 8 U.S.C. § 1101(b)(1)(F).

346. 8 C.F.R. §§ 3.1(b)(5), 103.1(f)(2)(x), (xxiv) (1985).

of the visa petition denials discussed here are reviewable in federal district court.[347]

Whatever the historical reasons for the differences in administrative review forum, there are strong reasons today for BIA review of all the visa petitions discussed above. A case can also be made for shifting judicial review to the courts of appeals, though on that point the arguments are more evenly balanced.

Decisions denying family-based visa petitions are of obvious importance to the parties. The reunification of a family is at stake, and the petitioner seeks permanent resident status. The impact is as great as in an exclusion case because, as noted earlier, approval of the visa petition is a prerequisite to admission. High impact favors keeping administrative review in the BIA and transferring judicial review to the courts of appeals.

Many of the cases raise only simple factual questions concerning the bona fides of a marriage, but legal issues also abound. The BIA frequently resolves questions concerning the legal requirements for legitimation and adoption, although some adoption issues also arise in the AAU orphan cases.[348] Both kinds of issues often require interpretations of foreign law. Consequently, a high proportion of family-based visa petition cases culminate in published BIA opinions.[349] The prevalence of legal issues reinforces the case for BIA and court of appeals review.

At the administrative level, the volume is large but manageable. In fiscal year 1984 family-based visa petitions accounted for 635 cases, or twenty percent of the BIA caseload.[350] That proportion is second only to deportation.[351] In the same year, the district courts reviewed a total of 152 immigrant visa petition cases, but the number of those petitions that were based on family preference is not available.[352] The total figure represents a significant proportion of the total immigration litigation. The high volume, which points toward preserving district court review, is for-

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347. 8 U.S.C. § 1329 (1982). All these visa petitions are filed pursuant to provisions contained in title II of the Act, *see* I. & N. Act §§ 204, 214(c)-(d), 8 U.S.C. §§ 1154, 1184(c)-(d) (1982), and thus fall within the jurisdiction conferred by section 279. *See infra* notes 504-13 and accompanying text.

348. Legitimation issues arise under I. & N. Act § 101(b)(1)(C), 8 U.S.C. § 1101(b)(1)(C) (1982), and adoption issues under *id.* § 101(b)(1)(E), 8 U.S.C. § 1101(b)(1)(E). Though the AAU has exclusive jurisdiction over orphan petitions, 8 C.F.R. § 103.1(f)(2)(xxiv) (1985), not all adoption petitions are for "orphans," as that term is defined in the Act. For example, to enter under the orphan provision, a child must be adopted by a United States citizen, I. & N. Act § 101(b)(1)(F), 8 U.S.C. § 1101(b)(1)(F) (1982), whereas the general adopted child provisions may be invoked also by a lawfully admitted permanent resident alien, *see id.* §§ 101(b)(1)(E), 203(a)(2), 8 U.S.C. §§ 1101(b)(1)(E), 1153(a)(2) (1982).

349. *See* Appendix; *see also* I. & N. Act § 101(b)(1)(C), (E), 8 U.S.C. § 1101(b)(1)(C), (E) (1982).

350. *See* Appendix.

351. *Id.*

352. *Id.*

tified by the extremely low frequency with which the district court decisions are appealed to the courts of appeals.[353]

Although the administrative record does not normally contain a transcript of a formal evidentiary hearing, it is nonetheless fairly detailed. The record typically contains the petition itself, the supporting documentary evidence, either a transcript of a taped question-and-answer session between the immigration examiner and the alien or counsel or affidavits executed at that session, the examiner's written decision containing reasons for the denial, the notice of appeal, and written briefs.[354] That record has thus far been adequate to permit BIA review without additional fact-finding. There is no apparent reason that a court of appeals would be unable to perform the same task, especially after the BIA has further enhanced the record with its own reasoned disposition.

Many analogous statements can be made about the orphan petitions, which are currently decided by the AAU. They too have enormous impact on the parties. Like the other family-based visa petition cases, orphan petitions often raise legal issues, such as the meaning of "abandonment."[355] Orphan cases can also raise many of the same issues as the other family cases concerning the adoption laws of foreign countries.[356] If the BIA is generally going to resolve those issues in family cases, it would be beneficial to channel the orphan cases to the BIA as well. Further, the low volume of orphan cases[357] makes BIA and court of appeals review feasible.

The same factors generally favor BIA and court of appeals review in fiancé(e) cases. Although a fiancé(e) is technically a nonimmigrant,[358] the statute conditions admittance on the parties marrying within three months, at which time the alien becomes eligible for permanent residence.[359] Thus, the individual interests are functionally equivalent to those of an intending immigrant and his or her American citizen spouse. Again, the volume of both administrative and judicial review is low.[360] The major

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353. In fiscal year 1984 only five immigrant visa petitions were the subjects of appeals from district court decisions. *Id.*

354. Interview with David B. Holmes and Gerald S. Hurwitz, *supra* note 78; Telephone interview with Paul Schmidt, Deputy General Counsel of the INS (Jan. 30, 1986). In the Southern District of New York, a consent decree requires the INS, for all immediate relative petitions, to conduct and to record on tape formal hearings approaching those held by immigration judges. *See* 1A C. GORDON & H. ROSENFIELD, *supra* note 8, § 3.5f, at 3-57 to -59 (discussing *Stokes v. INS*). The INS does not plan to implement *Stokes* nationwide. Telephone interview with Paul Schmidt, *supra*.

355. Interview with David B. Holmes and Gerald S. Hurwitz, *supra* note 78; *see also* I. & N. Act § 101(b)(1)(F), 8 U.S.C. § 1101(b)(1)(F) (1982).

356. Interview with David B. Holmes and Gerald S. Hurwitz, *supra* note 78.

357. The numbers of administrative appeals were too small to be separated out. Interview with Lawrence J. Weinig, *supra* note 86; *see* Appendix. Separate figures are also unavailable for judicial review of orphan petitions, but the small number of administrative appeals virtually assures that judicial review is infrequent.

358. I. & N. Act § 101(a)(15)(K), 8 U.S.C. § 1101(a)(15)(K) (1982).

359. *Id.* § 214(d), 8 U.S.C. § 1184(d).

360. Again, administrative appeals have not been segregated because of the low numbers.

countervailing consideration is that fiancé(e) cases tend generally to raise only relatively simple factual issues concerning the bona fides of the relationship or the solidity of the marriage plans. Even that factor cuts both ways, however, at least with respect to administrative review. Since the genuineness of the marriage can also be an issue in the spousal visa petitions heard by the BIA, directing the fiancé(e) cases to the same body would promote both consistency and efficiency.

Strong arguments can also be made for channeling to the BIA denials of those immigrant visa petitions that are based on occupational preference. A somewhat weaker argument can be made for court of appeals review. The impact is of a different nature from that in the family cases, but it is still great. The economic effects of the decision are felt by the alien who seeks to enter, the employer who seeks to hire, and the public for whose benefit the statutory occupational provisions were enacted.[361] Legal issues of first impression are common.[362] For example, certain of these petitions set precedents on the meaning of the word "professional," a subject of major concern to the immigration bar.[363] The record is fairly sophisticated. It typically contains the original petition; documentary evidence describing the alien's work experience, the prevailing wages for that work, and the employer's business; a report of any investigation performed by the district office; the district director's written decision giving reasons for the denial; the notice of appeal; and a brief filed by the alien's attorney.[364] And the BIA is already accustomed, in the family cases, to handling appeals from high-volume, informal, visa petition denials.

Similar arguments can be made about the employment-based visa petitions filed by nonimmigrants. The economic impact can again be quite significant, although the interests probably do not reach the same level as in the immigrant cases. Difficult and important legal issues are frequently presented.[365] The record is essentially the same as that in the immigrant cases.[366] And, if the immigrant visa petitions are transferred to the BIA, as recommended here, the similarity of the issues would make it beneficial to transfer simultaneously the appeals from denials of nonimmigrant employment petitions.

By far the strongest argument against moving either group of employment cases, at least at the administrative level, is their sheer volume. The immigrant employment preference petitions accounted for 625 of the 2649 cases decided by the AAU in fiscal year 1984.[367] Another 803 of the AAU

See Appendix. Separate judicial figures are also unavailable, but the total number of district court cases reviewing all nonimmigrant classifications was only 16. *See id.*

361. *See* I. & N. Act § 212(a)(14), 8 U.S.C. § 1182(a)(14) (1982).
362. Interview with Lawrence J. Weinig, *supra* note 86.
363. Interview with Warren Leiden, *supra* note 6.
364. Interview with Lawrence J. Weinig, *supra* note 86.
365. *Id.*
366. *Id.*
367. *See* Appendix.

cases involved nonimmigrant employment petitions ("H" and "L" visa petitions).[368] The analogous figures for judicial review are not known, but it is certain that at least the nonimmigrant employment cases are very few in number.[369] Court of appeals review might be manageable, depending on the data, but BIA review of such a large number of cases would require major changes in either the size or the procedure of the BIA.

The preceding discussion suggests that, with the exception of volume, the general forum selection factors strongly favor making all visa petition denials administratively appealable to the BIA. Decisions in each of the various visa petition categories are of potentially vital importance to the parties. In the nonimmigrant employment cases, the impact is less pronounced, but even in those cases important interests can be at stake. Moreover, if the immigrant employment cases are shifted to the BIA, the benefits arising from issue similarity might alone justify transferring the nonimmigrant cases as well. The administrative records are sufficiently detailed to eliminate any need for further fact-finding by the reviewing tribunal. And, most important of all, these cases frequently raise complex legal issues with which the BIA is far better equipped to deal.

Volume, however, is a critical consideration. It is not a problem with the orphan and fiancé(e) petitions; their numbers are small. But the AAU currently decides more than 1400 employment-based visa petitions each year. Adding the visa petition cases would increase the BIA's caseload by almost half, and its members and staff are already fully occupied. Without certain structural changes, the BIA could not do justice to the visa petition cases and at the same time maintain the quality of its decisionmaking in the cases for which it is already responsible. But coupling the case transfer with the BIA's adoption of a panel system, as recommended below, would leave the personal caseload of each BIA member roughly unchanged.[370] Additional vehicles for increasing the BIA's productivity are also available.[371] Moreover, the BIA's publication of precedent decisions might well reduce, over time, the number of appeals filed. With these changes, review of visa petition cases could be transferred to the BIA.

The same factors that favor BIA review of visa petition denials also favor transferring judicial review to the courts of appeals. Countervailing considerations, however, make this recommendation more tentative. The high volume poses the danger of straining already hard-pressed collegial

368. *See id.*

369. In fiscal year 1984 the district courts decided 152 immigrant, and 16 nonimmigrant, visa petition cases. *See id.* Breakdowns by family versus employment are not available.

370. The total caseload would be slightly less than one and one-half times what it is at present, *see infra* note 443 and accompanying text, and each member would hear slightly more than three-fifths of the BIA's cases, *see infra* notes 444-49 and accompanying text. In theory, therefore, the combination would leave each member with about nine-tenths of his or her present caseload.

371. *See infra* text accompanying notes 458-59.

resources, and the very low appeal rate means that much circuit judge time would be saved by preserving district court review. The balance is a close one. No change in judicial review should be made until the statistical data can be more carefully segregated and the experience then observed for a longer period of time.

2. *Waivers*

As discussed in Part I, the Immigration and Nationality Act contains numerous provisions for automatic and discretionary waivers of designated exclusion and deportation grounds.[372] Applications for many of those waivers are made to immigration judges during exclusion or deportation proceedings; applications for others are made to district directors in advance of formal proceedings.[373] When an immigration judge denies an application, the rules governing review are the same as those for the corresponding exclusion and deportation orders: administrative review is by the BIA,[374] and judicial review is by the courts of appeals for orders entered in the course of deportation proceedings and by the district courts otherwise.[375]

When it is the district director who denies the waiver application, however, administrative review is by the BIA in some cases and by the AAU in others. The current regulations list two categories of waiver denials appealable to the BIA and four to the AAU.[376] In every case, absent a subsequent exclusion or deportation order, the judicial forum will be the district court.[377]

Certain characteristics are common to all these appeals. Volume at the administrative[378] level, and especially at the judicial[379] level, is low, a factor favoring collegial review. The rate at which district court decisions are appealed to the courts of appeals is close to zero,[380] a factor that

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372. *See supra* text accompanying notes 28-32.

373. *See supra* text accompanying notes 64-66.

374. *See* 8 C.F.R. § 3.1(b)(1)-(2) (1985) (exclusion and deportation orders appealable to BIA).

375. Foti v. INS, 375 U.S. 217, 232 (1963).

376. The cases currently appealable to the BIA are those arising under I. & N. Act § 212(c), 8 U.S.C. § 1182(c) (1982), and *id.* § 212(d)(3), 8 U.S.C. § 1182(d)(3). *See* 8 C.F.R. § 3.1(b)(3), (6) (1985). Those appealable to the Associate Commissioner for Examinations, and therefore the AAU, arise under I. & N. Act § 212(a)(16)-(17), 8 U.S.C. § 1182(a)(16)-(17) (1982) (permission to reapply for admission after previous exclusion or deportation), and *id.* § 212(e), (h)-(i), 8 U.S.C. § 1182(e), (h)-(i). *See* 8 C.F.R. § 103.1(f)(2)(v)-(vii) (1985).

377. All the statutory waivers of exclusion and deportation are authorized by title II of the Act and thus fall within I. & N. Act § 279, 8 U.S.C. § 1329 (1982). *See infra* notes 504-13 and accompanying text.

378. The BIA decided only 32 waiver cases in fiscal year 1984. *See* Appendix. The AAU was more active, but even it decided only 191 cases. *See id.*

379. Only 18 cases were filed in fiscal year 1984. *See id.*

380. The data are not broken down by type of waiver, but in fiscal year 1984 the district

favors district court review. Aliens who seek these waivers have no incentive to induce delay because they are either requesting admission or filing applications in advance of exclusion or deportation proceedings. Hence, the issues that are raised tend to be genuine, a factor that favors collegial review. The proceedings are not highly formalized,[381] but the record typically contains enough information to permit meaningful review.[382]

The major factors that separate the various waiver provisions are the impact on the individuals and the nature of the issues. One type of waiver case arises under section 212(c) of the Act.[383] Section 212(c) gives the Attorney General the discretion to waive specified exclusion grounds when an alien is returning to a lawful unrelinquished domicile of seven years in the United States. The BIA and the courts have applied this provision in deportation proceedings as well.[384] Although 212(c) applications are normally filed with immigration judges during the course of the exclusion or deportation proceedings, they may also be filed with district directors before those proceedings are instituted.[385] Aliens who choose the latter route are ordinarily permanent residents who wish to leave the country temporarily, and who seek advance determination from the district director that they will be admissible upon return. In those cases the district directors' decisions are appealable to the BIA, at least under current regulations.[386]

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courts decided 18 waiver cases, while only one district court waiver decision was appealed. *See id.*

381. *See* 1 C. GORDON & H. ROSENFIELD, *supra* note 8, § 1.9e(4).

382. In fiscal year 1984 the AAU needed to remand only 1.6% of its waiver cases for further information. *See* Appendix. The BIA does not develop that type of data.

383. 8 U.S.C. § 1182(c) (1982).

384. *See* Tapia-Acuna v. INS, 640 F.2d 223, 224-25 (9th Cir. 1981); Francis v. INS, 532 F.2d 268, 271-73 (2d Cir. 1976); *In re* Hom, 16 I. & N. Dec. 112, 113-14 (B.I.A. 1977); *In re* Silva, 16 I. & N. Dec. 26, 29-30 (B.I.A. 1976).

385. 8 C.F.R. § 212.3 (1985).

386. *Id.* § 3.1(b)(3). The Attorney General has recently proposed eliminating BIA jurisdiction over district directors' denials of 212(c) applications. *See* 50 Fed. Reg. 25,994 (1985). The announced rationale is that the 212(c) application may be renewed before the immigration judge in any subsequent exclusion or deportation proceeding, and the immigration judge's decision is already appealable to the BIA. Thus, the revision would "streamline" the procedure by removing the possibility of duplicate BIA appeals. *Id.*

Although the proposal seems innocuous, it could generate serious problems. Aliens, having immigrated from foreign lands, frequently have occasion or even need to visit family members and others who live outside the United States. A lawfully admitted permanent resident who has lived here more than seven years must know before leaving that there will be no problem returning. Residence, family, home, and livelihood can all be at stake. If an immigration officer at the local INS office or an anonymous decisionmaker at a "RAC," *see supra* note 62 and accompanying text, erroneously denies the application, current regulations enable the BIA to correct the error. Under the proposed amendment, the alien would be unable to test the correctness of the decision before leaving. The alien would either have to risk everything that depends on continued residence or remain within United States territory indefinitely.

Perhaps, if the proposal is adopted, the alien will be able to obtain judicial review of the immigration officer's decision. But there is no guarantee that a court would permit

In section 212(c) cases, the potential impact is great. The provision operates only on long-term, lawfully admitted, permanent residents, and a denial can either foreclose return or confine a person's movement indefinitely. The provision generates some exceptionally difficult legal issues.[387] Both factors favor continuing BIA review and shifting judicial review to the courts of appeals. The BIA already reviews 212(c) decisions in both exclusion and deportation cases; the courts of appeals already do so in deportation cases, and it was recommended earlier that they be given jurisdiction over exclusion cases as well.[388] Having the same tribunals decide the same issues provides several benefits.[389]

As for judicial review of 212(c) cases, however, there are countervailing factors. One is the extremely low appeal rate noted above. Another

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review. An action for declaratory or injunctive relief might be held unavailable on the ground that the alien is essentially challenging in advance an exclusion order for which habeas corpus is the sole remedy. I. & N. Act § 106(b), 8 U.S.C. § 1105a(b) (1982). It might find habeas unavailable on the ground that the alien's liberty has not been sufficiently restricted. *See supra* note 317. And, even if the court allowed judicial review, relegating the alien to that procedure would defeat not only the stated efficiency goal of the amendment, but also the interests generally served by requirements of exhaustion of remedies.

Nor is it clear that the proposal would significantly enhance efficiency even at the administrative level. Although the consequences to the individuals involved can be staggering, the number of district director denials of 212(c) applications that are appealed to the BIA is miniscule. The figures were felt to be too small to make separate bookkeeping worthwhile, but 212(c) cases and cases arising under section 212(d)(3) together constitute only one percent of the BIA caseload. *See* Appendix.

Moreover, when the BIA does receive a second 212(c) appeal in the same case, it may invoke the principle of collateral estoppel if the issues truly are the same. As pointed out by Gerald Hurwitz, Counsel to the Director of the EOIR, the mere passage of time can prevent the BIA from assuming that the issues in the two appeals are the same. Interview with Gerald S. Hurwitz, Counsel to the Director of the EOIR (July 12, 1985). That will be true, for example, if the first denial was based on a finding that the alien had accumulated less than seven years of lawful domicile and enough time has elapsed to cure that defect, or if relief was denied in the exercise of discretion and the increased length of residence has improved the equities. The point is well taken, but not all 212(c) denials turn on length of time. Thus, the use of collateral estoppel can at least reduce the inefficiency.

The only other rationale offered in the proposed amendment is that the revision would bring the 212(c) procedure "into line with other applications such as asylum and adjustment of status." *See* 50 Fed. Reg. 25,994 (June 24, 1985). The benefits of symmetry are not evident, however, and in any event the proposed amendment would also bring 212(c) procedure out of line with the procedure in district director denials of applications filed under I. & N. Act § 212(d)(3), 8 U.S.C. § 1182(d)(3) (1982). The BIA has jurisdiction over appeals from those decisions, *see* 8 C.F.R. § 3.1(b)(6) (1985), even though those applications may also be renewed in subsequent exclusion proceedings, *id.* § 212.4(b), and thus reviewed again by the BIA, *id.* § 3.1(b)(1). On balance, the advantages of the proposed amendment seem insignificant, and the disadvantages seem serious.

387. *See generally* Hing, *The Ninth Circuit: No Place for Drug Offenders*, 10 GOLDEN GATE U.L. REV. 1 (1980); Comment, *Lawful Domicile Under Section 212(c) of the Immigration and Nationality Act*, 47 U. CHI. L. REV. 771 (1980); Recent Decisions, 12 VAND. J. TRANSNAT'L L. 1009 (1979).

388. *See supra* text accompanying notes 285-327.

389. *See supra* text accompanying note 212.

is that the formality level might fall short of what would be demanded for direct court of appeals review. If courts of appeals prove to be slower than district courts, then the special need for prompt decisions in these cases would be a third countervailing consideration.

The other waiver cases currently allocated to the BIA are cases that arise under section 212(d)(3) of the Act.[390] That provision permits discretionary waivers, for nonimmigrants, of almost any of the grounds of exclusion. Since the aliens seek only temporary admission, the individual interests at stake will generally be at the lower end of the scale. Further, the issues almost invariably rest on discretionary considerations that possess little general applicability. There seems to be no compelling reason for these cases to command the resources of a collegial body. They should be transferred to the AAU.

In contrast, several of the waiver cases now assigned to the AAU frequently implicate important interests and raise difficult issues more suitable for collegial disposition. Under section 212(h) of the Act, an alien who is barred from admission on certain criminal grounds may be admitted for permanent residence in the exercise of the Attorney General's discretion upon findings that the alien bears one of several specified close family relationships to an American citizen or permanent resident, that exclusion would cause "extreme hardship" to the American relative, and that admission would not endanger the national welfare.[391] Section 212(i) empowers the Attorney General to waive certain fraud-related exclusion grounds in the case of an intending immigrant who possesses one of several designated close family relationships to an American citizen or permanent resident.[392] In each of these categories, the immigrant's interests are potentially great. Permanent residence is sought, and a close family relationship is required. For section 212(h), the requirement of extreme hardship further intensifies the harm that would result from an erroneous denial. Moreover, both provisions have rough analogues in deportation law,[393] and thus present issues similar to those resolved by the BIA and the courts of appeals in that context. All these factors favor transferring administrative review to the BIA and judicial review to the courts of appeals, subject to the same offsetting factors for judicial review that arise in the 212(c) cases.

Aliens who have been ordered excluded must generally wait one year, and those ordered deported must wait five years, before they become eligible to reapply for admission. The Attorney General has the discretion, however, to waive those barriers.[394] Refusals to do so are presently appealable to

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390. 8 U.S.C. § 1182(d)(3) (1982). Certain ideological exclusions are the only exceptions. *Id.* § 1182(a)(27), (29), (d)(3).

391. *Id.* § 1182(h).

392. *Id.* § 1182(i).

393. *Compare* I. & N. Act § 212(h)-(i), 8 U.S.C. § 1182(h)-(i) (1982) *with id.* §§ 241(f), 244(a), 8 U.S.C. §§ 1251(f), 1254(a).

394. *Id.* § 212(a)(16)-(17), 8 U.S.C. § 1182(a)(16)-(17).

the AAU,[395] and that is where they should remain. The individual interests are not minimal, but on the scale of immigration cases they are relatively low. The effect of the denial is merely to delay reapplication for whatever is left of the one- or five-year period. Further, the highly individualized discretionary determinations that the cases tend to require are unlikely to be precedential.

Finally, certain nonimmigrants admitted as exchange visitors must return home for two years before becoming eligible to apply for permanent residence or for immigrant or certain nonimmigrant visas.[396] Waivers of that requirement can be requested, and denials of those requests are appealable to the AAU.[397] Here again, a denial ordinarily has only a temporary impact, and the issues tend to be of a highly individualized, discretionary nature. Clouding the forum question, however, is a statutory requirement of "exceptional hardship." The presence of that requirement means that an erroneous denial can be quite serious. Consequently, the potential impact might be great enough to justify BIA review. The considerations that militate against court of appeals review remain present.

Conclusions on the best forum choices for waiver cases are not all clear cut, but several changes are suggested: the 212(d)(3) cases should be shifted from the BIA to the AAU; the 212(h), 212(i), and two-year-foreign-residence-waiver cases should be transferred from the AAU to the BIA; and the other waivers should remain where they are. As for judicial review, the same factors are at work, but, even in cases in which they favor the courts of appeals, the low appeal rate and the lack of a formal record might be enough to dictate preserving the status quo, which is district court review. Much depends, however, on whether exclusion cases are shifted to the courts of appeals, as recommended earlier. Sending waivers of inadmissibility to the same tribunals that decide the basic question of admissibility would avoid bifurcation. Further, if exclusion cases are kept in the district court, the balancing of values that led to that decision would itself suggest a similar decision for waiver cases.

3. Rescission of Adjustment

Certain aliens who were admitted temporarily, but who subsequently satisfy both the quantitative and qualitative requirements for admission as permanent residents, may, in the discretion of the INS, be granted "adjustment of status" to permanent residence.[398] If, within five years after status is adjusted, the Attorney General finds that the person was in fact ineligible for adjustment, the adjustment of status must be rescinded.[399] The Attorney General has delegated the rescission determina-

395. 8 C.F.R. § 103.1(f)(2)(v) (1985).
396. I & N. Act § 212(e), 8 U.S.C. § 1182(e) (1982).
397. 8 C.F.R. § 103.1(f)(2)(vii) (1985).
398. I. & N. Act § 245, 8 U.S.C. § 1255 (1982).
399. *Id.* § 246, 8 U.S.C. § 1256.

tion to immigration judges, who conduct evidentiary hearings.[400] Appeal is to the BIA.[401] Judicial review is in the district court.[402]

The general forum selection factors point unambiguously toward maintaining BIA review of rescission orders and transferring judicial review to the courts of appeals. The impact on the parties is formidable. No longer permanent residents, the aliens lose their opportunity to apply for naturalization at the end of the five-year period,[403] as well as the capacity to bring their immediate families into the country.[404] Most important, the rescission ordinarily leads to deportation, because the original admission period will normally have expired by the time the rescission proceedings have been completed.[405]

Further, since the rescission hinges on whether the alien was eligible for adjustment, and since eligibility in turn depends on whether the alien was excludable, the legal issues tend to resemble those raised in exclusion cases. For similar reasons, they also parallel issues that often surface in deportation cases.[406] As discussed earlier,[407] both exclusion and deportation issues lend themselves to collegial disposition. Moreover, the similarity of issues is itself a reason to have the same tribunals resolve deportation, exclusion, and rescission cases. Both deportation and exclusion cases are already administratively appealable to the BIA, deportation cases are already judicially reviewable in the courts of appeals, and it was recommended earlier that exclusion cases be reviewable directly in the courts of appeals as well.

Another factor favoring BIA and court of appeals review is the extremely low volume of rescission cases. The BIA reviewed only seventeen rescission orders in fiscal year 1984.[408] An exact count of court actions in rescission cases is not available, but it is known that the number is minute.[409]

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400. 8 C.F.R. § 246 (1985).

401. *Id.* §§ 3.1(b)(8), 246.7.

402. I. & N. Act § 279, 8 U.S.C. § 1329 (1982).

403. *See id.* § 316(a), 8 U.S.C. § 1427(a). If the applicant is married to an American citizen, the required period of permanent residence is only three years. *Id.* § 319, 8 U.S.C. § 1430.

404. *See id.* § 203(a)(2), 8 U.S.C. § 1153(a)(2).

405. The alien will become deportable under *id.* § 241(a)(2), 8 U.S.C. § 1251(a)(2), as having overstayed his or her visa.

406. *See supra* text accompanying notes 304-08.

407. *See supra* text accompanying notes 237-327.

408. *See* Appendix.

409. The Office of Immigration Litigation compiles, within each of the major headings of case categories, a subheading entitled "Other." The only major heading within which rescission cases would seem to fit is "Challenges to Denial of Benefits." Under this heading, the subheading for "Other" shows a total figure of 27. *See id.* Since even administrative appeals numbered only 17, it seems almost certain that the number of cases brought to court would be insignificant.

Because the rescission order is preceded by a formal evidentiary hearing, a reviewing tribunal would rarely need to take additional evidence. As discussed earlier, that fact favors BIA and court of appeals review. Also, since the BIA currently performs the task of administrative review, a reasoned written opinion will be available to assist the court of appeals further.[410]

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410. One additional subject of major importance today is asylum. Aliens who are either within United States territory or at the United States border often seek relief from persecution in their home countries through asylum. That process must be distinguished from the process by which refugees located in foreign countries apply for permission to enter the United States. For discussions of the latter, see, for example, T. ALEINIKOFF & D. MARTIN, *supra* note 8, at 620-38; 1 C. GORDON & H. ROSENFIELD, *supra* note 8, §§ 2.24Aa-e; A. LEIBOWITZ, *supra* note 8, at 4-1 to -148.

Two asylum provisions, with differing requirements and consequences, are currently in place. Under section 208 of the Act, an alien may apply to the district director for asylum if neither exclusion nor deportation proceedings have been instituted. *See* 8 U.S.C. § 1158(a) (1982); 8 C.F.R. § 208.1 (1985). No administrative appeal is provided, but the alien may renew the application before an immigration judge if exclusion or deportation proceedings are later begun. 8 C.F.R. §§ 208.8(c), .9 (1985). The asylum decision reached in those proceedings, being part of the exclusion or deportation order, is appealable to the BIA. *Id.* § 3.1(b)(1)-(2). The availability of the renewal option has been held to bar judicial review of the district director's denial of an asylum application, on the theory that the alien failed to exhaust administrative remedies. *See, e.g.*, Chen Chaun-Fa v. Kiley, 459 F. Supp. 762, 765 (S.D.N.Y. 1978). *But see* Haitian Refugee Center v. Smith, 676 F.2d 1023, 1034 (5th Cir. 1982) (recognizing exceptions); Hotel & Restaurant Employees Union v. Smith, 563 F. Supp. 157, 161-62 (D.D.C. 1983) (same).

The other major asylum provision is section 243(h), 8 U.S.C. § 1253(h) (1982). Under its terms, an alien in either exclusion or deportation proceedings may request not to be returned to a country in which his or her life or freedom would be threatened on any of several specified bases. *See id.*, 8 U.S.C. § 1253(h). That decision, also being part of the exclusion or deportation order, is also appealable to the BIA, 8 C.F.R. § 3.1(b)(1)-(2) (1985), and therefore is subject to the usual rules governing judicial review of exclusion and deportation orders, *see* I. & N. Act § 106, 8 U.S.C. § 1105a (1982).

The subject of asylum procedure cannot be meaningfully addressed within the scope of this study, but there is now, fortunately, a vast literature that can be consulted. For a sampling, see Aleinikoff, *Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States*, 17 U. MICH. J.L. REFORM 183 (1984); Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981); Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REFORM 243 (1984); Kurzban, *Restructuring the Asylum Process*, 19 SAN DIEGO L. REV. 91 (1981); Martin, *The Refugee Act of 1980: Its Past and Future*, in TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES, 1982 MICH. Y.B. INT'L LEGAL STUD. 91; Scanlon, *Regulating Refugee Flow: Legal Alternatives and Obligations Under the Refugee Act of 1980*, 56 NOTRE DAME LAW. 618 (1981); Note, *United States Asylum Procedures: Current Status and Proposals for Reform*, 14 CORNELL INT'L L.J. 405 (1981). For more general treatment, see, for example, T. ALEINIKOFF & D. MARTIN, *supra* note 8, at 638-726; 1 C. GORDON & H. ROSENFIELD, *supra* note 8, § 2.24Af; A. LEIBOWITZ, *supra* note 8, at 5-1 to -160; R. STEEL, *supra* note 8, §§ 8:1-:16. The many complex issues raised by asylum procedure have been the subjects of volatile debate stimulated in part by recent legislative proposals. For example, see the summary of the asylum adjudication provisions of the Senate version of the Simpson-Mazzoli bill in Aleinikoff, *supra*, at 185-86 n.15. A separate study aimed at cataloging and evaluating the widely differing options that have been put forward would be useful.

4. After Exclusion or Deportation

The preceding discussion assumed that the alien was seeking independent review of a miscellaneous order. I shall now assume that the alien is also the subject of an exclusion or deportation order. The alien might wish review of both orders, either because the validity of the deportation order rests on that of the miscellaneous order, or because the miscellaneous order retains independent importance.

This new assumption introduces a wrinkle. In addition to all the forum selection factors already applied to the miscellaneous orders, two new ones become relevant: jurisdictional confusion and bifurcation of cases. Those concerns have prompted several other writers to recommend, through varying approaches, that deportation orders and miscellaneous related orders be reviewed by the same courts.[411]

If the miscellaneous order was entered during the course of either exclusion or deportation proceedings, jurisdictional problems do not arise. At the administrative level, the BIA has always assumed that its jurisdiction to review "[d]ecisions of special inquiry officers [immigration judges] in exclusion cases" and "in deportation cases"[412] extends to collateral decisions made during those proceedings.[413] At the judicial level, the Supreme Court has held squarely that the courts of appeals have jurisdiction to review all orders made during the course of deportation proceedings,[414] including denials of motions to reopen.[415] In each of those settings, the assertion of jurisdiction can be bolstered by characterizing the action as a challenge to the exclusion or deportation order itself. The ruling on the miscellaneous order is simply the ground on which the immigration judge or the BIA is alleged to have erred in reaching the decision to order exclusion or deportation. The jurisdictional issue does not seem to have arisen in judicial review of exclusion orders, presumably because

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411. *See, e.g., The Immigration Reform and Control Act of 1983: Hearings on H.R. 1510 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary, 98th Cong., 1st Sess.* 955 (1983) (statement of Maurice A. Roberts) [hereinafter cited as Roberts, *House Hearings*]; K. DAVIS, *supra* note 213, § 23.03, at 798-99; H. FRIENDLY, *supra* note 137, at 175-76; L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 421-22 (1965). *But see* Currie & Goodman, *supra* note 1, at 31-36; F. Goodman, *supra* note 110, at 34-35.

412. 8 C.F.R. § 3.1(b)(1)-(2) (1985).

413. *See, e.g., In re* Duarte, 18 I. & N. Dec. 329, 332 (B.I.A. 1982) (reviewing 212(c) denial in exclusion proceedings); *In re* Lam, 18 I. & N. Dec. 15, 19 (B.I.A. 1981) (reviewing asylum denial in deportation proceedings); *In re* Herrera, 18 I. & N. Dec. 4, 5 (B.I.A. 1981) (reviewing denial of suspension of deportation in deportation proceedings); *In re* Silva, 16 I. & N. Dec. 26, 29-30 (B.I.A. 1976) (reviewing 212(c) denial in deportation proceedings); *In re* Fernandez, 14 I. & N. Dec. 24, 25-26 (B.I.A. 1972) (reviewing 212(h) denial in exclusion proceedings).

414. *See* Foti v. INS, 375 U.S. 217, 232 (1963); *accord* Che-Li Shen v. INS, 749 F.2d 1469, 1472 (10th Cir. 1984).

415. *See* Giova v. Rosenberg, 379 U.S. 18, 18 (1964); *accord* Chudshevid v. INS, 641 F.2d 780, 784 (9th Cir. 1981).

that review takes place in the district courts,[416] where the miscellaneous orders discussed here are already independently reviewable.[417]

But suppose the miscellaneous order is made outside exclusion or deportation proceedings. An order rescinding adjustment of status might be followed by a deportation order. Or a deportation order might be followed by a denial of an application for a temporary stay of deportation. Or a visa petition or an application for an extension of stay might be denied before exclusion or deportation proceedings have been commenced, while they are pending, or after they have been concluded. In these and other cases, the question arises whether the same court should review the miscellaneous order and the exclusion or deportation order. These kinds of jurisdictional issues are already common in deportation cases[418] and will possibly arise in exclusion cases as well if, as recommended above,[419] aliens are given the option of challenging exclusion orders in the courts of appeals.

The law is presently in flux. In 1968 the Supreme Court held in *Cheng Fan Kwok v. INS*[420] that the original jurisdiction of the courts of appeals in deportation cases is confined to orders actually entered in deportation proceedings and orders denying motions to reopen those proceedings.[421] It left open, however, the possibility that a court of appeals could assert pendent jurisdiction over other discretionary orders when the court already had before it a petition for review of the deportation order.[422] At least one court of appeals accepted that invitation. It reviewed an order rescinding adjustment of status when the validity of the rescission order was crucial to the validity of the subsequent deportation order also before the court.[423] Other cases, in contrast, refused jurisdiction over miscellaneous INS orders entered either before[424] or after[425] the deportation orders that were the subjects of the petitions for review.

In 1983, however, the Supreme Court held in *INS v. Chadha*[426] that

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416. I. & N. Act § 106(b), 8 U.S.C. § 1105a(b) (1982).

417. *Id.* § 279, 8 U.S.C. § 1329.

418. *See* T. ALEINIKOFF & D. MARTIN, *supra* note 8, at 569-86; 2 C. GORDON & H. ROSENFIELD, *supra* note 8, § 8.9Ab.

419. *See supra* text accompanying notes 285-327.

420. 392 U.S. 206 (1968).

421. *See id.* at 216.

422. *Id.* at 216 n.16.

423. Bachelier v. INS, 625 F.2d 902, 904 (9th Cir. 1980); *accord* Ferrante v. INS, 399 F.2d 98, 103 (6th Cir. 1968) (decided before *Cheng Fan Kwok*, though rehearing denied after *Cheng*); Waziri v. United States INS, 392 F.2d 55, 56-57 (9th Cir. 1968) (same); *see also* Kuh v. INS, 758 F.2d 370, 371-72 (9th Cir. 1985) (dictum that court of appeals may review rescission order together with deportation order).

424. *E.g.*, Ghorbani v. INS, 686 F.2d 784, 791 (9th Cir. 1982); Kavasji v. INS, 675 F.2d 236, 238-39 (7th Cir. 1982).

425. *E.g.*, Yamada v. INS, 384 F.2d 214, 218 (9th Cir. 1967).

426. 462 U.S. 919 (1983).

the courts of appeals had jurisdiction to review the constitutionality of a one-house congressional veto on which a deportation order rested.[427] Rather than invoke pendent jurisdiction, the Court used sweeping language recognizing court of appeals jurisdiction over "all matters on which the validity of the final [deportation] order is contingent, rather than only those determinations actually made at the hearing."[428]

Reconciling *Chadha* and *Cheng Fan Kwok* has proved difficult. The courts have struggled particularly with the meaning of the word "contingent." One court quoted language in *Chadha* that leaves unclear whether the Supreme Court meant orders that "stand or fall on the validity" of the challenged order, or orders that are "plainly inconsistent with the deportation order."[429] Other courts have held that *Chadha* applies to collateral orders that raise "legal" questions[430] but not to those that raise "factual" questions.[431]

This uncertainty can generate wasteful jurisdictional litigation. Currie and Goodman, writing long before the decision in *Chadha*, were able to suggest that the jurisdictional difficulties had been largely eliminated.[432] The contingent orders doctrine announced in *Chadha* prevents the same assertion today. The magnitude of the problem is not great enough to offset the arguments for retaining direct court of appeals review,[433] but the issues can be troublesome on occasion and, as discussed below, there are some possible legislative solutions that would be relatively cost-free.

Further problems can arise even in those cases in which the law is clear. Since the deportation order is normally reviewable exclusively in the court of appeals, a rule that assigns review of a related order to the district court bifurcates what might essentially be a single case. As discussed earlier, that result will sometimes be disadvantageous.[434]

One possible response to these problems of jurisdictional uncertainty and fragmentation is to do nothing. The courts, if left alone, would even-

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427. *See id.* at 937-39.

428. *See id.* at 938 (quoting the lower court opinion, Chadha v. INS, 634 F.2d 408, 412 (9th Cir. 1980)).

429. *See* Ghaelian v. INS, 717 F.2d 950, 952 (6th Cir. 1983). The court ultimately concluded that the particular decision being challenged did not satisfy either test. *See id.*

430. *See* Adame-Hernandez v. INS, 769 F.2d 1387, 1388 (9th Cir. 1985) (deciding legal sufficiency of alien's claim of selective deportation).

431. In Mohammadi-Motlagh v. INS, 727 F.2d 1450 (9th Cir. 1984), the court of appeals withheld review of the district director's denial of the alien student's predeportation request to transfer schools. *See id.* at 1452. It is not clear what additional fact-finding the court would have had to do, because the court's job is to review the administrative record rather than to make its own findings of fact. *See supra* text accompanying notes 198-99. In Abedi-Tajrishi v. INS, 752 F.2d 441 (9th Cir. 1985), in which the alien's estoppel argument would have required findings not based on the administrative record, *see id.* at 443, the court appears to be on firmer ground.

432. *See* Currie & Goodman, *supra* note 1, at 35.

433. *See supra* notes 254-68 and accompanying text.

434. *See supra* text accompanying note 215.

tually work out the jurisdictional issues on a case-by-case basis. And the occasional inefficiency and delay that can attend the bifurcation of a case could be tolerated. Ad hoc resolution of the jurisdictional issues could take many years, however, and, as will be seen, the bifurcation problem can be eliminated or at least reduced fairly painlessly.

A second option is to place judicial review of all decisions made under the Immigration and Nationality Act in the same courts. Variants of that approach have been suggested by others.[435] Whether the district courts or the courts of appeals are designated as the exclusive reviewers, the benefit would be virtually[436] to eliminate both jurisdictional uncertainty and bifurcation of cases. The price would be the lost opportunity to optimize the efficiency, accuracy, acceptability, and consistency of the administrative process by tailoring the attributes of a class of cases to the attributes of the forum.

A third option is to specify by statute all the orders that, when accompanied by exclusion or deportation orders, would be reviewable in the courts of appeals. In making those determinations, Congress could consider not only the interests in jurisdictional certainty and consolidation of cases, but also the general forum selection factors that affect the independent suitability of a class of cases for court of appeals review. That response is plausible, but it has disadvantages. The list could be underinclusive, because logical candidates for court of appeals review would be easy to overlook in the initial process of sifting through the mass of different miscellaneous orders. More important, the list could quickly become outdated as changes elsewhere in the statute or in the regulations render obsolete the many value judgments reflected in the statutory list. In addition, although permitting greater tailoring than would a scheme that sends all immigration cases to the same courts, this approach of identifying subcategories of immigration cases would allow less tailoring than a forum selection process that considers the attributes of the individual case. It was assumed earlier that a categorical approach would be the only workable way to determine the proper forum for independent review of a miscellaneous order.[437] As discussion of the next option will show, however, considering an individual case is feasible when the question is whether a court should be empowered to review an order related to one already within its jurisdiction.

A fourth option, then, is pendent jurisdiction. A court with subject matter jurisdiction over one claim may, in its discretion, assert pendent jurisdiction over another claim "deriv[ing] from a common nucleus of

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435. *See, e.g.*, K. DAVIS, *supra* note 213, § 23.03, at 798-99; H. FRIENDLY, *supra* note 137, at 175-76; Roberts, *House Hearings*, *supra* note 411, at 955.

436. Uncertainty would not be wholly eradicated, because issues might occasionally arise as to whether the Immigration and Nationality Act is the statute that authorizes the particular order.

437. *See supra* text accompanying note 236.

operative fact."[438] The doctrine is ordinarily invoked to establish federal court jurisdiction over a state claim that is related to a federal claim over which the court has independent jurisdiction. It has also been applied, however, when a federal court with jurisdiction over one federal claim wishes to decide also a related federal claim for which no independent source of jurisdiction exists.[439]

Several others have raised the possibility of pendent court of appeals jurisdiction over INS orders that are related to final deportation orders.[440] The suggestion is a worthy one; in fact, the principle can be extended to exclusion cases and rescission cases if, as recommended above, they also become reviewable in the courts of appeals.

Use of pendent jurisdiction would have several advantages. Since the decision whether to assert jurisdiction would be discretionary, courts of appeals would be able to decide on a case-by-case basis whether, on balance, consolidation of the two related orders is beneficial. Instead of someone having to predict whether cases of a particular class are likely to possess specified attributes, the courts would be able to ask whether a given case actually possesses those attributes. Thus, the attributes of the case could be matched with those of the forum far more precisely than would be possible under the categorical approaches of the second and third options. Moreover, there need be no concern, as there would be under the third option, that Congress might overlook a particular category of INS orders, or that changes in substantive rules or in administrative procedures will render obsolete a detailed statutory catalog of orders reviewable in the courts of appeals. There would be no less jurisdictional certainty than there is at present, because the alien will still be able to elect the safety of district court review of the collateral order if, in the particular case, he or she preferred that course. Finally, this procedure would speed some cases without delaying others, because it applies only when there is also a peti-

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438. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

439. *See, e.g.*, Rosado v. Wyman, 397 U.S. 397, 402-05 (1970).

440. At least two Supreme Court opinions have explicitly left that question open. *See Cheng Fan Kwok*, 392 U.S. at 216 n.16; Foti v. INS, 375 U.S. 217, 227 n.14 (1963). In Mohammadi-Motlagh v. INS, 727 F.2d 1450 (9th Cir. 1984), the court read both its own opinion in Chadha v. INS, 634 F.2d 408, 413 (9th Cir. 1980), and the Supreme Court's opinion, 462 U.S. at 938-39 & n.11, as resting on pendent jurisdiction. *See Mohammadi-Motlagh*, 727 F.2d at 1452. Aleinikoff and Martin have observed, however, that neither *Chadha* decision ever invoked the principle of pendent jurisdiction. *See* T. ALEINIKOFF & D. MARTIN, *supra* note 8, at 584. In fact, the Ninth Circuit opinion in *Chadha* expressly disavowed any reliance on pendent jurisdiction. *See* 634 F.2d at 414 n.2. But the court in *Mohammadi-Motlagh* did assume that pendent jurisdiction is now available, though not when factual issues are presented. *See* 727 F.2d at 1452; *see also* Martinez de Mendoza v. INS, 567 F.2d 1222, 1224-25 & n.5 (3d Cir. 1977) (argument that court could assert pendent jurisdiction is "persuasive," though not necessary to assert it here). For commentary suggesting that pendent jurisdiction be made available in the deportation context, see Currie & Goodman, *supra* note 1, at 35 & n.127; Note, *Prior Orders*, *supra* note 110, at 418-20.

tion for review of the principal order. Thus, at least in deportation cases, the alien will already have a stay of the principal order whether or not the court of appeals reviews the collateral order.

Pendent jurisdiction could be adopted by statute. Congress could simply provide that any alien who files a petition for review of an order of deportation, exclusion, or rescission, and who is aggrieved by any other administrative decision made under the Immigration and Nationality Act, may request the court of appeals to assert pendent jurisdiction over the latter. The court would have discretion whether to grant the request. If it declines to exercise jurisdiction over the collateral order, it could invoke the existing statutory provision authorizing transfer to the district court.[441]

The statute could also provide that, if the alien has sought review of the principal order in the court of appeals and review of the collateral order in the district court, the Attorney General may apply to the court of appeals to consolidate the two cases in that court. Invocation of that procedure would eliminate the need for two tiers of review of the collateral order, thus possibly reducing the time needed for decision. The disadvantage would be that, if the court of appeals denies the Attorney General's request, the effect will have been to delay the outcome of the district court decision. But the Attorney General will be able to factor in that possibility when deciding whether to request a transfer.

In assessing the suitability of a case for pendent jurisdiction, the courts of appeals would have several factors to consider, including the general forum selection factors developed in Part II.[442] Chief among these might be whether judicial fact-finding will be necessary. Another crucial factor will be the relationship of the two orders. If they turn on common questions of law or fact, bifurcation can produce both inefficiency and inconsistency. If the decision whether to uphold one order will affect either the mootness or the merits of the other, consolidation might again improve judicial efficiency.

D. Adjustments to BIA Structure and Procedure

The preceding section recommended the transfer of several case categories from the AAU to the BIA. In fiscal year 1984 these recommendations would have increased the BIA caseload from 3131 cases to at least 4527 cases.[443] Can the BIA withstand that kind of assault?

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441. *See* 28 U.S.C. § 1631 (1982).

442. *See supra* text accompanying notes 169-236.

443. AAU and BIA data are not completely segregable by jurisdictional category. But the two major items that the previous discussion recommended transferring from the AAU to the BIA are the nonimmigrant and immigrant preference petitions, for which the numbers of decided cases were 803 and 625, respectively. *See* Appendix. Those transfers would have added 1428 cases. Also recommended for transfer were the fiancé(e) petitions, the orphan petitions, and the 212(h) and 212(i) waivers. For those categories, the numbers

1. Panel System

The five-member BIA currently decides every case en banc.[444] In my opinion, a panel system is long overdue.[445] Other administrative review boards and the federal courts of appeals use panels.[446] Frank Goodman specifically suggested in 1973 that the BIA adopt a panel system,[447] and several congressional bills proposing a statutory body analogous to the BIA have recently resurrected the idea.[448]

Breaking up into randomly selected three-member panels would stretch the ability of the BIA to decide large numbers of cases conscientiously. In a given case, only three of the five members would review the record, briefs, and any bench memoranda prepared by staff. Only three would hear oral argument.[449] Only three would consult. And only three would have to review and, if necessary, alter the per curiam opinion drafted by the staff attorney. In theory, with some increase in the size of the support staff, the BIA should thus be almost five-thirds as productive. Even if the new productivity falls short of five-thirds in practice, the added efficiency would be substantial.

A panel system will become essential if the BIA's jurisdiction is expanded, or if case filings in existing jurisdictional categories increase significantly. But a panel system should be adopted even if the total BIA caseload remains constant. Under those conditions, adopting a panel system would permit each member who is deciding a case to delve more deeply

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are unavailable but small. Interview with Lawrence J. Weinig, *supra* note 86. The BIA has no separate figures for the 212(d)(3) cases, which this Article recommends be transferred from the BIA to the AAU. But even when those cases are combined with the 212(c) cases, the total is only 32. Thus, if the BIA jurisdiction in fiscal year 1984 had been what this Article recommends, the minimum figure by which its caseload would have increased is 1428 less 32, or 1396.

444. Interview with David B. Holmes and Gerald S. Hurwitz, *supra* note 78.

445. The Administrative Conference has previously recommended that multimember agencies consider delegating review powers to panels of their own members, particularly when the volume is great and there is no apparent means of reducing either the number or the significance of the policy issues those cases present. *See* ACUS Recommendation No. 83-3, 1 C.F.R. § 305.83-3, recommendation 3(c) (1985). The Conference recommendations were based on Cass, *supra* note 1. The Conference was addressing only the subject of formal agency adjudication, but, as discussed below, its conclusion also seems sound for the many informal decisions the BIA reviews.

446. *See, e.g.*, 28 U.S.C. § 46 (1982) (courts of appeals); Strauss, *supra* note 166, at 1255-56 (Bureau of Land Appeals).

447. *See* F. Goodman, *supra* note 10, at 19-21.

448. *See, e.g.*, H.R. 3187, 99th Cong., 1st Sess. sec. 2(a)(2), § 112(c) (1985); H.R. 30, 99th Cong., 1st Sess. sec. 112(a), § 107(b)(3) (1985); H.R. 1510, 98th Cong., 2d Sess. sec. 122(a), § 107(b)(3), 130 CONG. REC. H6166, H6171 (daily ed. June 20, 1984); S. 529, 98th Cong., 1st Sess. sec. 122(a), § 107(b)(3), 129 CONG. REC. S6970, S6974 (daily ed. May 18, 1983).

449. Oral argument is already consigned to three-member panels under current practice. *See* Letter from W. Leiden, Executive Director of the American Immigration Lawyers Association, to M. Fowler of the ACUS (Nov. 6, 1985).

into the issues. Moreover, the reduction in personal caseloads should reduce processing time and thus dampen the incentive for frivolous appeals. In addition, the members' smaller caseloads would permit them to draft greater numbers of publishable precedent decisions. The guidance that these decisions would impart to the INS, to immigration judges, and to the immigration bar hopefully would stem further the number of cases in which appeal is necessary. All these benefits can be accomplished without sacrificing collegial deliberation. If anything, the reduced caseloads should increase the proportion of cases in which true collegial decisionmaking is possible.

To be sure, the practice of reviewing all cases en banc has advantages. Requiring all cases to be decided by the same group of people can enhance the coherent development of the law. Like the federal courts of appeals,[450] however, the BIA could, and should, adopt a rule that requires panels to follow precedent. To overrule a previous decision, the BIA would be required to go en banc.

Another objection to a panel system might be that the composition of the particular panel can affect the outcome of the case. That possibility is clearest when the panel is split, for the two BIA members not serving on the panel might have sided with the dissenting panelist. Even when the panel is unanimous, it cannot be assumed that en banc consideration would have produced the same result. A member of a collegial body can influence a decision not only by voting, but also by persuading his or her colleagues. With a panel system, the two members who are not on the panel lose any opportunity to do so. That objection is difficult to satisfy, except to note that decision by less than the full membership of an adjudicative tribunal is a well-tolerated fact of our legal system. In the federal courts of appeals, cases are routinely decided by panels composed of even smaller proportions of the courts' membership. Indeed, the impact of judge selection is the most extreme at the trial level, where only one judge among many will decide the case.

These competing considerations can be largely accommodated by a panel system that permits en banc decision in selected cases. But which cases should qualify?

One possibility is to permit either party, whenever aggrieved by a panel decision, to petition for rehearing en banc. If those petitions became routine, however, the very purpose of a panel system would be undermined. Further, at least in deportation cases, a petition for rehearing en banc would be futile unless it triggered some kind of stay—either a full stay pending the decision whether to rehear the case, or a temporary stay until the BIA could decide whether to grant a full stay. The petition for

450. *See* Ford v. General Motors Corp., 656 F.2d 117, 119-20 (5th Cir. 1981); *In re* Jaylaw Drug, Inc., 621 F.2d 524, 527 (2d Cir. 1980); Timmreck v. United States, 577 F.2d 372, 376 n.15 (6th Cir. 1978), *rev'd on other grounds*, 441 U.S. 780 (1979); *see also* FED. R. APP. P. 35(a).

rehearing would thus add another layer of review and another delay at a time when concerns over delays have prompted searches for ways to reduce the number of layers. If the panel decision is unanimous, as it normally is,[451] then an additional consideration is that the chance of reversal will be minimal, at least if the size of the BIA remains at five. Unless one of the original panel members undergoes a change of mind, en banc review will not alter the result.

A better alternative is to allow the aggrieved "individual"[452] to petition for rehearing en banc if and only if the panel is split. The filing of the petition should automatically stay the panel's order until the BIA either disposes finally of the case or dissolves the stay. Since split panels are infrequent,[453] the number of petitions will be low. Further, the split demonstrates that the issue is a close one; the frivolous petition filed solely to achieve delay will therefore not be a problem. And the two-to-one vote means that the probability of the other two BIA members changing the outcome of the case can no longer be dismissed as minimal.

The INS Commissioner and the Attorney General should be permitted to petition for rehearing en banc even when the panel decision is unanimous. Like the individual, they have interests in the outcome of the particular dispute. In addition, however, they have institutional interests in the prospective effect of the decision. Further, when the INS Commissioner or the Attorney General demonstrates a willingness to invest the resources that en banc review would require, the petitions can be assumed to reflect those officials' assessments that the issues are of sufficient institutional importance, and the probability of reversal sufficiently great, to warrant the investment.

Restricting en banc petitions to split panels when the aggrieved party is the individual, while imposing no comparable limitations on the government, might seem unfair. But the distinction is rationally based for the reasons just discussed. Moreover, the individual who is aggrieved by a panel decision has the remedy of judicial review.

Any member of the BIA should also be permitted to request en banc review, even when the panel is unanimous. Like an appellate court, the BIA has an institutional interest in maintaining the quality of its decisions. Further, because panel decisions would be binding on future panels, the full BIA would have no opportunity to overrule a precedent favorable to the government unless individual members were authorized to request en banc consideration. Neither the INS nor the Attorney General is likely

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451. *See infra* text accompanying notes 455-57.

452. In most cases, the "individual" will be the alien. In visa petition cases, however, the individual who is petitioning to classify the alien can be a United States citizen. *See* I.& N. Act §§ 201(b), 203(a)(1), (4)-(5), 8 U.S.C. §§ 1151(b), 1153(a)(1), (4)-(5) (1982). The Board also has jurisdiction over decisions imposing administrative fines on individuals and corporations that similarly might not be aliens.

453. *See infra* text accompanying notes 455-57.

to petition for en banc review in such a case since the precedent favors their positions. The aggrieved individual, under the preceding recommendation, will be unable to do so because the binding precedent will produce a unanimous panel decision. Even if the panel, or for that matter the entire BIA, wished to overrule the decision, the opportunity would not arise. In theory, without an amendment to the statute or regulations, a precedent favorable to the government would remain on the books forever. Allowing individual members to request en banc review would eliminate the problem.

One might assume that this last concern can be met through less drastic means. The panel could be authorized to refer the case to the full BIA, *before* reaching a decision, whenever the panel concludes that the case is controlled by a precedent that the panel would like the full BIA to reexamine. I would favor such a rule because it would avoid the need for two sets of oral arguments, two sets of briefs, and two opinions. But it should be adopted in addition to, not as a substitute for, a rule allowing an individual member of the BIA to request en banc rehearing. If two of the three panelists favor retaining the old rule, the panel is unlikely to refer the case to the full BIA. Without a rule allowing a single member[454] to request en banc consideration, the BIA would be powerless to overrule the precedent, even if a majority of its members—one panelist and two nonpanelists—favor overruling.

There remains the question whether en banc review, once requested, should be automatic or at the discretion of the BIA. The choice is not likely to affect the outcome of a case because, if a majority of the BIA believes the case does not deserve even reconsideration, mandatory reconsideration is unlikely to produce a reversal. I say unlikely rather than impossible, because a member who was originally unwilling even to reconsider might have changed his or her thinking in response to either oral argument or collegial deliberation. But the probability does seem low. The discretionary route is preferable nonetheless for reasons of administrative efficiency. If it is clear to the majority that the reversal of a particular case will be nearly impossible, refusing en banc review will save both individual and governmental resources.

One last objection to a panel system requires mention. During the course of the Administrative Conference proceedings from which this Article

454. A middle position is also possible. A single panelist, rather than any individual BIA member, could be authorized to request en banc consideration. The theory would be that, unless at least one panelist wants to overrule the old decision, en banc consideration by the five-member BIA is likely to be futile. Again, however, one of the two nonpanelists might change the thinking of one of the three panelists. Given the BIA's strong institutional interest in the quality of its decisions, and given the conclusion below that en banc consideration should in any event require a majority vote of the full BIA, there seems little to lose and a fair amount to gain by permitting even nonpanelists to request en banc consideration.

originated, the Department of Justice resisted the adoption of a panel system on the ground that the en banc hearing a panel system would require in selected cases would be an additional layer of review and thus an additional vehicle for delay.[455] The Department pressed its concern quite earnestly, but, with all due respect, I believe its objection overlooks one crucial fact: the number of cases in which en banc rehearing will be necessary is almost certainly minute. The aggrieved individuals, whom the Department assumes will be the principal source of delay, would not be permitted even to request en banc rehearing unless the panel were split. The most recent bound volume of published BIA opinions reveals two split decisions in the two-and-one-half-year period covered by the volume.[456] The proportion of splits in unpublished decisions is similarly low.[457] The numbers could, of course, rise or fall with changes in the composition of the BIA, whose members vary in personality, ideology, and conception of their role. But the low numbers illustrate, at least roughly, how infrequently even the full BIA tends to split. Presumably, splits within three-member panels would be even fewer. Finally, even if the panel does split, and the aggrieved individual requests rehearing, the rehearing still will not take place under the present proposal unless a majority of the BIA members vote to go en banc. To require all five members to decide all of the more than 3000 cases adjudicated by the BIA each year, solely because the alternative would require en banc rehearing in a handful of cases, would be a grotesque example of the tail wagging the dog.

To summarize: the BIA should adopt a panel system, with discretion for the full BIA to review a panel decision en banc whenever en banc review is requested by the INS Commissioner, the Attorney General, any member of the BIA, or, in the case of a split panel, the aggrieved individual.

2. *Expansion of BIA Membership*

Adding more members to the BIA will not enhance its productivity if every case continues to be decided en banc. If the BIA adopts a panel system, however, an additional response to the increased caseload could be to expand the size of the BIA.[458] There is indeed, as noted earlier, a point at which a tribunal can become too large to function collegially. But the BIA, with only five members, is far smaller than most federal courts of appeals. Impairment of collegiality is not an immediate danger.

Whether or not the BIA's membership is enlarged, a significant case

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455. Presentation of T. Kenneth Cribb, Counselor to the Attorney General, at meeting of Council of ACUS (Nov. 26, 1985).

456. 18 I. & N. Dec. (Mar. 1981-Sept. 1983); *see In re* Salim, 18 I. & N. Dec. 311, 317 (B.I.A. 1982) (Vacca, concurring and dissenting); *In re* Lam, 18 I. & N. Dec. 15, 20 (B.I.A. 1981) (Appleman, concurring and dissenting).

457. Telephone interview with David B. Holmes, Chief Attorney Examiner of BIA (Dec. 10, 1985).

458. *See* F. Goodman, *supra* note 10, at 30-32.

transfer would almost certainly require some increase in the size of the support staff. Even apart from clerical resources, additional staff attorneys will be needed to screen cases for possible summary decision, to make recommendations on oral argument, and to prepare bench memoranda and opinion drafts.

The chief disadvantage of increasing either the membership or the support staff would be the increased cost. A case transfer of the magnitude contemplated here, however, would permit a reduction in the staffing needs of the AAU. The tradeoff would not be dollar for dollar because, as discussed earlier,[459] the BIA expends more resources per case than does the AAU. But some offsetting reduction in the size of the AAU would be possible.

A final comment is that, instead of transferring cases from the AAU to the BIA, it would be possible to change the character of the AAU. Lawyers, collegiality, publication of precedent, and higher pay could all be introduced. To choose that course, however, would be to create a second BIA. There would be no apparent benefit in having two such similar tribunals, and their two sets of published decisions might even conflict. The present scheme provides one high-powered tribunal to review cases of great importance to the parties, cases that present legal and other issues of widespread impact, and cases that for still other reasons benefit from the attributes that make the BIA what it is. A second, less expensive tribunal is provided for cases that do not demand those resources. That scheme is rational in its structure. Altering the present jurisdiction will make the scheme rational in its operation.

E. The Attorney General and the BIA

Created by the Attorney General's regulations, the Board of Immigration Appeals is now located within the Justice Department's Executive Office for Immigration Review.[460] BIA members serve at the pleasure of the Attorney General, who defines the BIA's jurisdiction and retains the power to review its decisions.[461] Over the years, a steady chorus of commentators and officials have called for statutory recognition of the BIA.[462] Several legislators have recently introduced bills to convert the

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459. *See supra* note 164 and accompanying text.

460. *See generally supra* notes 75-84 and accompanying text.

461. *See* 8 C.F.R. § 3.1(b), (h) (1985); *see also* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 269-70 (1954) (Jackson, J., dissenting).

462. *See, e.g.*, PRESIDENT'S COMM'N ON IMMIGRATION AND NATURALIZATION, WHOM WE SHALL WELCOME 160 (1953) [hereinafter cited as PRESIDENT'S COMM'N]; Gordon, *The Need to Modernize Our Immigration Laws*, 13 SAN DIEGO L. REV. 1, 27 (1975); Levinson, *supra* note 57, at 650 (quoting David Milhollan, Chair of BIA and now also Director of EOIR); Orlow, *Comments on "A Specialized Statutory Immigration Court,"* 18 SAN DIEGO L. REV. 47, 50-51 (1980); Roberts, *supra* note 75, at 30; Wildes, *The Need for a Specialized Immigration Court: A Practical Response*, 18 SAN DIEGO L. REV. 53, 62 (1980). In addition, several have proposed a statutory, article I, immigration court. *See infra* text accompanying notes 517, 522.

BIA into a statutory "United States Immigration Board,"[463] located within the Department of Justice.[464]

These proposals make relevant an examination of what the relationship between the BIA and the Attorney General ought to be. Should the BIA be statutorily based? Should it be part of the Justice Department? Who should name, and who should be empowered to remove, its members? Who should define the BIA's jurisdiction? Should the Attorney General have the power to review its decisions?

All these questions require judgments as to the desirable level of BIA independence. Those judgments, in turn, are driven by general personal preferences for either the political or the judicial model of agency decisionmaking,[465] by perceptions about the kinds of issues likely to confront the BIA, and, most importantly, by the specific aspect of independence that is being debated. Subject to those generalizations, several observations can be made.

1. Statutory Recognition for the BIA

One argument sometimes advanced for according statutory recognition to the BIA is that, since its continued existence is at the unfettered discretion of the Attorney General, it must operate under a perpetual fear of executive intervention.[466] Depending on the precise form that that intervention is expected to take—dissolution of the BIA, removal of particular members, narrowing of jurisdiction, or reversal of individual decisions—a statute might be enacted to eliminate the threat.

But even assuming that those kinds of apprehensions truly affect BIA decisionmaking, not all would agree that the influences are negative. Those who generally favor political models of agency decisionmaking might welcome political intrusion as a way of improving the coherence of agency policy. Further, as noted above, views about the propriety of executive intervention depend on perceptions about the types of issues the cases tend to present. Maximum Attorney General control is likely to be favored

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463. Why change the name? Adding the phrase "United States" is unnecessary, and dropping the word "Appeals" obscures the exclusively appellate nature of the BIA's jurisdiction.

464. *See, e.g.*, H.R. 30, 99th Cong., 1st Sess. sec. 211(a), § 107(a)(1) (1985); H.R. 1510, 98th Cong., 2d Sess. sec. 122(a), § 107(a)(1), 130 CONG. REC. H6166, H6171 (daily ed. June 20, 1984); S. 529, 98th Cong., 1st Sess. sec. 122(a), § 107(a)(1), 129 CONG. REC. S6970, S6974 (daily ed. May 18, 1983); *see also infra* text accompanying notes 517, 522 (proposals for specialized immigration court).

465. *See supra* note 166; *supra* text accompanying note 186.

466. *See, e.g.*, PRESIDENT'S COMM'N, *supra* note 462, at 160-61; Levinson, *supra* note 57, at 650; *cf.* SELECT COMM'N ON IMMIGRATION AND REFUGEE POL'Y, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, FINAL REPORT 246 (1981) (some commissioners recommend statutory creation of United States Immigration Board; majority would go further by establishing statutory, article I, immigration court) [hereinafter cited as SCIRP FINAL REPORT].

over cases perceived as having widespread impact and significant policy components.

Other arguments for statutory recognition seem more compelling. It has generally been assumed that a statutory BIA would possess upgraded stature and therefore would command greater prestige.[467] If that assumption is correct, then the improved stature, combined with the heightened security of statutory moorings, would make membership on the BIA more attractive. In addition, statutory recognition might enhance the appearance of independence.[468] It might even strengthen the BIA's capacity to compete for resources[469] that some believe the BIA sorely needs.[470]

A final benefit of statutory recognition would be to eliminate an unnecessary problem. The present BIA, being a creature of administrative regulations, has held itself powerless to address aliens' claims that the Attorney General's regulations exceed the authority conferred by the enabling statutes.[471] That conclusion is not inevitable. The BIA is subordinate to the Attorney General, but it is also subordinate to Congress. If the BIA finds a conflict between the regulations and the statute, and the conflict affects the validity of an order that the BIA has jurisdiction to review, then a case can be made for permitting the BIA to hold the statute violated. In any event, the objection would disappear entirely if the BIA were a statutory body.[472]

The only apparent disadvantage of making the BIA statutory is that the Attorney General would lose the flexibility to dissolve it if he or she concluded that a different type of body could perform the review function more effectively.[473] In the present context, however, that type of flexibility seems unimportant. The BIA is now so well entrenched[474] that the likelihood of the Attorney General dismantling it is remote. Further, a statute recognizing the BIA could quite easily leave the Attorney General with broad discretion to make decisions concerning personnel, jurisdic-

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467. Gordon, *supra* note 462, at 27; Levinson, *supra* note 57, at 650; Roberts, *supra* note 75, at 44 (especially if scheme requires Presidential appointment and Senate confirmation).

468. SCIRP FINAL REPORT, *supra* note 466, at 246; Gordon, *supra* note 462, at 27; Verkuil, *supra* note 9, at 1196-97.

469. Roberts, *supra* note 75, at 30.

470. *See* SCIRP FINAL REPORT, *supra* note 466, at 250; Roberts, *supra* note 75, at 39-41.

471. *See, e.g.*, *In re* Bilbao-Bastida, 11 I. & N. Dec. 615, 616-17 (B.I.A. 1966); *In re* Tzimas, 10 I. & N. Dec. 101, 102 (B.I.A. 1962).

472. The BIA is also not permitted to address constitutional claims. *See, e.g.*, Dastmalchi v. INS, 660 F.2d 880, 886 (3d Cir. 1981); Chadha v. INS, 634 F.2d 408, 414 (9th Cir. 1980), *aff'd on other grounds*, 462 U.S. 919 (1983); *In re* Cortez, 16 I. & N. Dec. 289, 291 n.2 (B.I.A. 1977); *In re* Lennon, 15 I. & N. Dec. 9, 27 (B.I.A. 1974). Codifying the BIA would not alter that principle.

473. The Administrative Conference generally favors allowing the agency head to prescribe the form of administrative review. *See* ACUS Recommendation No. 83-3, 1 C.F.R. § 305.83-3, recommendation 1(a) (1985).

474. *See* Roberts, *supra* note 75, at 30.

tion, and even the merits of individual cases. Those options can now be considered.

2. *A Statutory BIA Within the Justice Department*

The BIA is now, and always has been, independent of the INS.[475] That independence is crucial to both the reality and the perception of fairness, because the INS is one of the two adversarial parties appearing before the BIA in a given case. No proposals to alter that relationship have been advanced.

The question presented here, however, is whether the BIA, like the INS, should remain within the Department of Justice. Some commentators have argued that it should not.[476] Making the BIA independent of the Justice Department would render it analogous to an article I court.[477] The resulting tribunal would also be analogous to the United Kingdom's Immigration Appeal Tribunal, which is independent of the Home Office.[478] In other substantive areas, Congress has also created appellate tribunals outside the departments whose decisions they review.[479] Thus far, however, except for one proposal for an article I court, all the recent bills introduced in Congress would keep the BIA within the Justice Department.[480]

This issue, like the others that concern BIA independence, is heavily influenced by general philosophies as to the proper degree of political control over administrative tribunals. But the analysis turns principally on precisely what powers the Attorney General will have if the BIA remains where it is. If the Attorney General retains the power to define the BIA's jurisdiction and to review its decisions, as is recommended below, then the BIA should remain within the Department of Justice. If the Attorney General does not retain those powers, then there is no reason to keep the BIA in that department.

3. *Appointment and Removal of BIA Members*

Two views on who should appoint the members of a statutory BIA have recently engaged. One position is that BIA members should be

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475. *See id.* at 29-30.

476. *See* Orlow, *supra* note 462, at 50-51; Wildes, *supra* note 462, at 62.

477. *See infra* text accompanying note 517.

478. *See* Immigration Act, 1971, ch. 77, § 12-23.

479. Examples are the Occupational Safety and Health Review Commission, 29 U.S.C. § 661 (1982), and the Federal Mine Safety and Health Review Commission, 30 U.S.C. § 823 (1982). *See* Cass, *supra* note 1, at 123 n.37; Levinson, *supra* note 57, at 649 n.39.

480. *See* H.R. 30, 99th Cong., 1st Sess. sec. 211(a), § 107(a)(1) (1985); H.R. 1510, 98th Cong., 2d Sess. sec. 122(a), § 107(a)(1), 130 CONG. REC. H6166, H6171 (daily ed. June 20, 1984); S. 529, 98th Cong., 1st Sess. sec. 122(a), § 107(a)(1), 129 CONG. REC. S6970, S6974 (daily ed. May 18, 1983). *But see* H.R. 3187, 99th Cong., 1st Sess. § 2(a)(2) (1985).

appointed by the President and confirmed by the Senate.[481] The BIA would then occupy a position much like that of the United States Parole Commission.[482] Others prefer the current practice of Attorney General nominations.[483]

Since the President would presumably consult the Attorney General before naming a member of the BIA, it has been asked what switching to a system of Presidential nominations would accomplish.[484] Perhaps the most significant gain would be Senate confirmation, a safety feature to which one experienced commentator attaches substantial importance.[485] Further, the combination of Presidential nomination and Senate consent might help to elevate the stature of the positions. Finally, one of the reasons commonly advanced for strict political control over the immigration process is that individual immigration decisions frequently require foreign policy judgments. The extent of the connection is sometimes exaggerated,[486] but those who view the foreign affairs element as prominent might prefer that appointments be made by the President, who can select a person with a compatible perspective on matters of foreign policy.

There are advantages to a system of Attorney General nominations as well. Without the need for presidential and senatorial action, new members could be installed more quickly. In addition many Board decisions require the exercise of discretion and, therefore, the making of policy. Even if the Attorney General retains the power to review decisions of the BIA, practical time constraints assure that the vast majority of BIA decisions will be administratively final. Thus, the Attorney General has a legitimate interest in choosing personnel who share his or her philosophical views on immigration, and whose policy decisions are likely to blend coherently with those implemented at the political levels. The response

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481. That approach has been urged by Roberts, *supra* note 75, at 44, who now recommends the more sweeping remedy of an article I court, *see* Roberts, *supra* note 57, at 18-20. The American Immigration Lawyers Association also favors a BIA whose members are independent of the Attorney General. *See Immigration Reform and Control Act of 1982: Joint Hearings on H.R. 5872 and S. 2222 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, and the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 687 (1982) (statement of Warren Leiden) [hereinafter cited as *Joint Hearings*]. At least two bills have proposed a system of Presidential nomination and Senate confirmation. *See* H.R. 30, 99th Cong., 1st Sess. sec. 211(a), § 107(a)(1) (1985); H.R. 1510, 98th Cong., 2d Sess. sec. 211(a), § 107(a)(1), 130 CONG. REC. H6166, H6171 (daily ed. June 20, 1984).

482. The comparison is more fully developed by Levinson, *supra* note 57, at 650-51.

483. Not surprisingly, official statements of the Attorney General and the INS Commissioner reflect this position. *See Joint Hearings*, *supra* note 481, at 324, 329, 340-41 (statement of Hon. W.F. Smith); *id.* at 396 (statement of Hon. A. Nelson). One bill has also proposed continuation of Attorney General nominations. *See* S. 529, 98th Cong., 1st Sess. sec. 122(a), § 107(a)(1), 129 CONG. REC. S6970, S6974 (daily ed. May 18, 1983).

484. *See* Verkuil, *supra* note 9, at 1196 n.324.

485. Roberts, *supra* note 75, at 44.

486. *See* Legomsky, *supra* note 283, at 261-69.

to this argument might be that the President has an analogous interest, though in any event an Attorney General would be unlikely to nominate individuals whom the President finds objectionable.

The balance is a close one, but the presidential route is recommended. The additional stature created by that process and the additional safeguard of Senate confirmation are significant advantages. The benefits of Attorney General control can be attained in substantial part by other features described below.

The other side of the coin is removal from office. Tenure options range widely. Possibilities include life tenure, fixed renewable terms, and service at will. Either of the first two options would almost certainly provide for removal for cause.[487] The advantage of permitting removal at will is the same as the advantage of Attorney General nominations: it would enable the Attorney General to conform the membership of the BIA to his or her policy preferences. This advantage is important, but I believe that the advantages of providing a high degree of security would be greater. Security enhances the attractiveness of the positions. It bolsters the integrity of the adjudicative process by eliminating influences extraneous to findings of descriptive fact and, at least in some cases, irrelevant to interpretations of statutes or administrative regulations. Security should also improve the public perception of fair procedure. Finally, making membership independent of one particular administration maintains the continuity of interpretation from one administration to the next.

This Article, therefore, recommends a middle ground. The BIA should remain within the Department of Justice, but its members should be appointed by the President subject to Senate confirmation, and they should enjoy a high level of job security.[488]

4. Defining the Jurisdiction of the BIA

Several options are available for deciding who should define the BIA's jurisdiction. The statute could enumerate all the categories of BIA jurisdiction. Or the statute could authorize the Attorney General to specify the BIA's jurisdiction. An intermediate option, which I favor, is for Congress to specify certain nonexclusive categories of BIA jurisdiction and

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487. The recent congressional bills all provide for fixed terms and removal only for cause. *See* H.R. 3187, 99th Cong., 1st Sess. sec. 2(a)(2), § 111(c), (f) (1985); H.R. 30, 99th Cong., 1st Sess. sec. 211(a), § 107(a)(2)-(3) (1985); H.R. 1510, 98th Cong., 2d Sess. sec. 122(a), § 107(a)(2)-(3), 130 CONG. REC. H6166, H6171 (daily ed. June 20, 1984); S. 529, 98th Cong., 1st Sess. sec. 122(a), § 107(a)(2)-(3), 129 CONG. REC. S6970, S6974 (daily ed. May 18, 1983).

488. Precisely what form the job security should take is another question. In theory, the Attorney General may currently dismiss a BIA member at will, but in practice no BIA member has ever been removed involuntarily. If a system of fixed terms were adopted, the fear that a term will not be renewed might be a greater threat to independence than is the present theoretical possibility of removal.

to authorize the Attorney General to expand the BIA's jurisdiction by regulation.[489]

That approach would accommodate several competing interests. For reasons developed earlier,[490] certain decisions already appealable to the BIA seem so clearly suited to BIA disposition that statutory codification appears sensible. Orders of deportation, exclusion, and rescission fit that description. The enormous potential impact on the parties, the prevalence of complex legal issues, the similarity of the issues among these three types of proceedings, and the formality of the initial hearings all favor continuing BIA jurisdiction.

At the same time, there is much to commend the view that Congress should not ordinarily prescribe highly detailed review structures.[491] Agency heads will generally be best able to allocate appellate responsibilities within their own agencies. Flexibility will be particularly important if the jurisdictional changes recommended here are adopted. Many of those changes would represent significant departures from past practice. Implementation might well reveal the need for future adjustments, especially if the volumes of particular case categories change unexpectedly. Conferring on the Attorney General the power to alter the BIA's jurisdiction over cases not specified in the statute would be faster and more workable than the lengthy process of amending the statute.[492]

There is, admittedly, a danger in the recommended course. If the preceding recommendations concerning statutory codification and presidential appointments are adopted, the Attorney General would have less control over the BIA than over the AAU. That greater control might give the Attorney General an incentive to assign to the AAU case categories whose attributes would otherwise favor BIA review. This incentive can be diminished, though not eliminated, by having the Attorney General retain the power to review individual BIA decisions. That question will now be discussed.

5. *Attorney General Power to Review Decisions of the BIA*

At present, the Attorney General has the power, rarely exercised, to review any decision rendered by the BIA.[493] The principal purpose of secretarial review is to facilitate the coherent formulation of agency policy.[494]

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489. That option has been suggested by INS Commissioner Alan Nelson. *See Joint Hearings*, *supra* note 481, at 247.

490. *See supra* text accompanying notes 237-327, 398-410.

491. *See* ACUS Recommendation No. 83-3, 1 C.F.R. § 305.83-3, recommendation 1(a) (1985).

492. *Cf.* Freedman, *supra* note 154, at 560 (Federal Communications Commission expanded jurisdiction of its review board to reflect performance and changing circumstances).

493. 8 C.F.R. § 3.1(h) (1985). Attorney General review can be initiated by the Attorney General, the Chair or a majority of the BIA, or the Commissioner of the INS. *Id.*

494. *See generally* Strauss, *supra* note 166, at 1253-64; *supra* text accompanying note 186.

There are, it is true, other devices by which an agency head might unify departmental policy. When a review board makes a significant policy decision with which the agency head disagrees, he or she could supersede the decision, at least prospectively, through rulemaking. Various hybrid procedures, suggested elsewhere, also offer promise.[495] Perhaps those alternatives to agency head review should be employed more frequently, but, at least in the immigration context, the Attorney General should nonetheless retain the power to review BIA decisions. The BIA is often required to apply to individual fact situations such broadly worded statutory expressions as "extreme hardship," "good moral character," and "moral turpitude."[496] In doing so, the BIA cannot help but make policy judgments that, for reasons given earlier, might well be of a precedential nature.[497] Yet, despite the potentially widespread impact, embodying the holding in a generalized form suitable for an administrative regulation might be impossible.

Another alternative to Attorney General review is simply to authorize the Attorney General to do precisely what aliens may do when they are aggrieved by BIA decisions—go to court. But if the BIA decision required the exercise of discretion, as it would in the examples just given, judicial review will not solve the problem. Unless the court finds an abuse of discretion, the BIA's decision will stand. When the issue is one on which reasonable people might disagree, judicial review will still result in a fracturing of the power to formulate agency policy.

In cases not presenting policy issues, however, Attorney General review might be unnecessary or even inappropriate. Questions of descriptive fact seem ideally suited to the judicial model of decisionmaking. The Attorney General's need to promote uniform policy has no application in those cases. The same might be said of BIA interpretations of statutory provisions couched in highly specific language. Separating law from policy is never easy, but highly refined statutory language leaves less room for the application of personal values. For those questions, the judicial model might also be preferable.

The same considerations would seem to apply to BIA interpretations of administrative regulations, but in those cases there is an additional twist.

For precisely that reason, the Administrative Conference has generally favored the retention, by agency heads, of the power to review the decisions of intermediate review boards. *See* ACUS Recommendation No. 83-3, 1 C.F.R. § 305.83-3, recommendation 1(b)(ii) (1985) (Congress should authorize agency heads to retain authority to review decisions of review boards); ACUS Recommendation No. 68-6, 1 C.F.R. § 305.68-6, recommendations 1, 2(a) (1985); *see also* 5 U.S.C. § 557(b) (1982) (Secretary may review administrative law judge decisions).

495. *See* Strauss, *supra* note 166, at 1262-64.

496. *See, e.g.*, I. & N. Act §§ 212(a)(9), 241(a)(4), 244(a), (e), 8 U.S.C. §§ 1182(a)(9), 1251(a)(4), 1254(a), (e) (1982).

497. That can occur either because the fact situation is common or because the decision has a potential a fortiori effect. *See supra* note 184 and accompanying text.

Now the Attorney General is seeking only to interpret his or her own past pronouncements of policy. In theory, the Attorney General should be the best judge of their meanings. Even though the regulations might have been issued by a predecessor, the Attorney General's staff might have internal documents that clarify the intent, or a current staff member might even have been present when the disputed regulation was issued. This additional consideration still does not justify Attorney General review, however, because the Attorney General's subjective intent should not be controlling even when it can be conclusively ascertained. Individuals should, consistent with the principle of the rule of law, be able to rely on objective interpretations of the laws that govern their behavior.

Thus, although some issues demand the availability of Attorney General review, others do not. Further, Attorney General review has affirmative costs. Peter Levinson has argued, among other things, that Attorney General review detracts from the appearance of independence, reduces the general stature of the BIA, and "reverses a sound principle of appellate scrutiny: that the decision of one judge is best reviewed by a collegial body."[498] The Attorney General might also lack the specialized expertise of the BIA, although his or her staff, which will ordinarily perform the review function in practice,[499] can supply some of the necessary knowledge.

Reconciling these competing concerns is troublesome. One approach would be to provide by statute that the Attorney General may review BIA decisions on questions of policy, but not on questions of law or fact. But it is not difficult to imagine the jurisdictional skirmishes that such a separation would set off.[500]

A better approach, although not an ideal solution, is to codify the status quo. A statute recognizing the BIA should authorize the Attorney General to review any BIA decision. The Administrative Conference has recommended for efficiency reasons that the power of secretarial review be exercised sparingly,[501] and past practice makes it a safe bet that this advice will be heeded. This power is capable of being abused, but the ultimate safeguards include not only the good faith of the Attorney General but also the availability of judicial review.

The structure recommended in this section is a mixed bag. It would embody certain features of what is commonly perceived as "independence," but would exclude others. I am not bothered by the strangeness of that

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498. *See* Levinson, *supra* note 57, at 650. He also argues that a law enforcement official should not preside over a quasi-judicial proceeding. *See id.* That argument hinges on whether one in fact views the proceeding as quasi-judicial, rather than political.

499. *Cf.* Gladstone, *supra* note 166, at 238-39 (review by FCC).

500. *See* Freedman, *supra* note 154, at 563-64.

501. ACUS Recommendation No. 83-3, 1 C.F.R. § 305.83-3, recommendation 2(b) (1985).

product because I do not regard independence as an all-or-nothing proposition. But I do admit to having less than complete confidence in my conclusion that the BIA should remain within the Department of Justice. Certainly there are strong arguments on both sides of that question. Moreover, my personal biases tend to favor a judicial model of agency decisionmaking and a high priority on protection of the individual interests at stake in immigration cases by a body both actually and perceptibly insulated from political pressures. In addition, the analysis here assumes that the orders over which the BIA has jurisdiction all originate in the Justice Department. If it is some day decided to provide for administrative review of State Department consular officers' decisions denying visa applications,[502] the BIA might well be the ideal forum. In that event, independence from the Justice Department might be desirable or even necessary. Until that happens, however, I tentatively conclude that the benefits of permitting the Attorney General to adjust the Board's jurisdiction and to review its decisions in exceptional cases are great enough to warrant keeping the BIA within the Department of Justice.

F. Adjustments to Jurisdiction of Courts

Certain of the recommendations made in preceding sections would require statutory changes. These include clarification of the habeas corpus provisions applicable to deportation and exclusion, creation of concurrent district court and court of appeals jurisdiction over exclusion orders, and adoption of exclusive court of appeals jurisdiction over rescission orders. Pendent court of appeals jurisdiction over other immigration decisions related to either exclusion or deportation could also be accomplished legislatively, although that reform could be effected judicially as well.

In addition to those changes, Congress should remedy two problems associated with section 279 of the Act.[503] That section bestows on the district courts "jurisdiction of all causes, civil and criminal, arising under any of the provisions of *this* [*title*]."[504] The highlighted phrase refers to title II of the Immigration and Nationality Act, which encompasses almost all the important immigration-related decisions.[505]

Occasionally, however, an administrative decision is made either under one of the other titles or under regulations authorized by one of the other titles. In those cases, section 279 is unavailable[506] and the alien must resort to "nonstatutory" review by invoking general federal question jurisdic-

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502. *See supra* note 74.
503. 8 U.S.C. § 1329 (1982).
504. *See id.* (emphasis added).
505. *See supra* note 123 and accompanying text.
506. Ubiera v. Bell, 463 F. Supp. 181, 184 (S.D.N.Y. 1978); Chen Chaun-Fa v. Kiley, 459 F. Supp. 762, 764 (S.D.N.Y. 1978).

tion.[507] But the latter is subject to specific preclusion statutes.[508] Whether section 279 has such preclusive effect is not yet clear, as discussed carefully elsewhere.[509]

When section 279 was enacted, general federal question jurisdiction required a minimum amount in controversy.[510] Under those circumstances, section 279 conferred a jurisdiction that might not otherwise have existed. Now that the amount in controversy requirement has been eliminated,[511] section 279 does not confer any civil jurisdiction beyond that already provided generally for federal questions: every question arising under title II of the Immigration and Nationality Act is by definition a federal question. And another statutory provision already grants jurisdiction over criminal cases.[512] The only remaining effect of section 279 is to raise questions about whether the section implicitly precludes review of immigration decisions that cannot be tied to title II of the Act. Because no reason to preclude that review is apparent, section 279 should be repealed.[513]

A second potential difficulty with section 279 is that, if interpreted literally, it would extend to exclusion and deportation orders. At least one court has held that Congress intended to make section 279 subject to the more specific provision for exclusive review of deportation orders in the courts of appeals.[514] A contrary holding would destroy any significance that the exclusivity clause would otherwise have. Presumably, an analogous result would be reached if an alien were to invoke section 279 to seek review of an exclusion order. Repeal of section 279 would eliminate these

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507. *See* 28 U.S.C. § 1331 (1982). When no specific substantive regulatory statute makes an agency action reviewable, an aggrieved party may seek "nonstatutory" review in district court. The term "nonstatutory" is commonly used, but it is misleading because there is in fact a statutory basis: 28 U.S.C. § 1331 provides jurisdiction, and the Administrative Procedure Act, 5 U.S.C. § 703 (1982), provides a right of action. *See* W. GELLHORN, C. BYSE & P. STRAUSS, ADMINISTRATIVE LAW CASES AND COMMENTS 917-18 (7th ed. 1979); *see also* Chrysler Corp. v. Brown, 441 U.S. 281, 288 (1979); Hameetman v. City of Chicago, 776 F.2d 636, 640 (7th Cir. 1985).

508. *See* 4 K. DAVIS, *supra* note 137, § 23:3 at 128-29.

509. T. ALEINIKOFF & D. MARTIN, *supra* note 8, at 586-90.

510. Section 279 was part of the original Immigration and Nationality Act, passed in 1952. *See* Pub. L. No. 82-414, 66 Stat. 163, 230 (1952). Elimination of the amount-in-controversy requirement for general federal question jurisdiction, 28 U.S.C. § 1331 (1982), did not begin to occur until 1976, *see* Act of Oct. 21, 1976, Pub. L. No. 94-574, § 2, 90 Stat. 2721, 2721 (requirement eliminated for actions against federal government or official), and was not complete until 1980, *see* Act of Dec. 1, 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369, 2369 (requirement eliminated for all cases presenting federal questions).

511. *See supra* note 510.

512. 18 U.S.C. § 3231 (1982).

513. An alternative response would be to amend section 279 by changing the phrase "this title" to "this Act." So worded, however, section 279 would add nothing to general federal question jurisdiction.

514. *See* Daneshvar v. Chauvin, 644 F.2d 1248, 1250 (8th Cir. 1981).

issues as well. If the section is retained, however, it should be amended to provide explicitly that it is subject to the specific provisions for review of deportation and exclusion.[515] The amendment should also extend to rescission orders if, as recommended earlier,[516] they are transferred to the courts of appeals.

IV. A Specialized Immigration Court

Up to now, I have been operating on three assumptions: first, immigration judges and district directors make, and should continue to make, all the initial Justice Department adjudicative decisions in immigration matters; second, all administrative appeals lie, and should lie, to either the BIA or the AAU; third, all judicial review is, and should be, in the courts of general jurisdiction.

Several recent proposals, varying only slightly, would alter that broad adjudication structure. They would replace the immigration judges, the BIA, and the courts of general jurisdiction with a single court that specializes in immigration.[517] To the extent that the proposals would substitute specialized trial judges for the present corps of immigration judges, evaluation is beyond the scope of this Article.[518] The substitution of specialized appellate judges for the BIA and the general courts of appeals does, however, raise questions relevant here.

One alternative is to replace the BIA with a specialized article I appellate court but to leave intact the role played by the courts of general jurisdiction. Under that approach, the resulting specialized court would

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515. Some of the recent legislative proposals have included such a provision. *See, e.g.*, H.R. 3187, 99th Cong., 1st Sess. § 3(a)(2) (1985); H.R. 1510, 98th Cong., 2d Sess. § 123(a)(2), 130 Cong. Rec. H6166, H6172 (daily ed. June 20, 1984); S. 529, 98th Cong., 1st Sess. § 123(a)(1)(A), 129 Cong. Rec. S6970, S6974 (daily ed. May 18, 1983).

516. *See supra* text accompanying notes 398-410.

517. The leading proponents have been Levinson, *supra* note 57, at 651-54, and Roberts, *supra* note 57, at 18-20. *Accord* H.R. 5649, 97th Cong., 2d Sess. § 2 (1982), *reintroduced as modified* H.R. 3187, 99th Cong., 1st Sess. §§ 2-3 (1985) (adding provision authorizing certiorari to the United States Court of Appeals for the Federal Circuit); SCIRP Final Report, *supra* note 466, at 245-50; Fuchs, *The Search for a Sound Immigration Policy: A Personal View*, in Clamor at the Gates: The New American Immigration 17, 44-45 (N. Glazer ed. 1985).

518. One overriding practical problem should nonetheless be noted. If the trial division of the proposed specialized court is to be staffed by individuals of the same rank as the present immigration judges, and if it uses equivalent procedures, then the substitution would probably have little effect. But if the new judges are to be of higher rank, or if the procedure is to resemble more closely that used in the general courts, then adjudication will become more expensive per case. The volumes make this consideration critically important. In fiscal year 1984 immigration judges decided 102,736 cases, including 72,614 deportation cases and 7531 exclusion cases. Letter from Hon. William R. Robie, Chief Immigration Judge, to Stephen H. Legomsky (Aug. 6, 1985). The same letter projected, for fiscal year 1985, an even higher total of 129,445 decisions. The economic consequences of channeling that volume of cases to a tribunal resembling a court would be overwhelming.

resemble an administrative tribunal independent of the Justice Department. Since the pros and cons of that arrangement have already been discussed,[519] the analysis that follows will assume that the appellate division of any specialized immigration court would replace both the BIA and the general courts.

Even when that assumption is made, the evaluation of any proposal for a specialized immigration court turns on several variables. The desirability of such a court hinges, for example, on what its jurisdiction would be. The court could be designated to review only deportation orders; deportation, exclusion, and possibly rescission, orders; all orders currently issued by the BIA; or, conceivably, all decisions arising under the Immigration and Nationality Act. Evaluation might also depend on the contemplated standard of review. Review could be de novo, or it could be something less.

I shall assume a "pure" model of specialized court: a tribunal staffed by a permanent cadre of specialist judges who decide all the designated immigration cases and no other cases. That is the model put forward by all the recent proposals for specialized immigration courts.[520] It is a model analogous to those either adopted or proposed in several other contexts as well.[521]

But it is not the only model of specialized adjudication. Others have been suggested. One kind of specialized court, like the pure model, would decide cases within the designated specialty and no other cases, but, unlike the pure model, would be staffed by generalist judges who rotate to the specialized court on temporary assignments.[522] Other specialization arrangements would also concentrate all the cases of the designated specialty in a single court, but would give that court additional responsibilities as well. One such arrangement would be a court that combines several selected specialties and nothing else.[523] Another would be an administrative law

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519. *See supra* text accompanying notes 475-80, 493-502.

520. *See* H.R. 3187, 99th Cong., 1st Sess. § 2 (1985); SCIRP FINAL REPORT, *supra* note 466, at 248-49; Fuchs, *supra* note 517, at 44-45; Levinson, *supra* note 57, at 651-54; Roberts, *supra* note 57, at 18-20.

521. *See, e.g.*, Craig, *Federal Income Tax and the Supreme Court: The Case Against a National Court of Tax Appeals*, 1983 UTAH L. REV. 679, 680-85, 703-11; Currie & Goodman, *supra* note 1, at 62-63; Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153, 1164-66, 1183-84 (1944); Levinson, *supra* note 57, at 654 & n.62; Miller, *A Court of Tax Appeals Revisited*, 85 YALE L.J. 228, 248-52 (1975); Nathanson, *The Administrative Court Proposal*, 57 VA. L. REV. 996, 997-1001 (1971); Re, *Litigation Before the United States Court of International Trade*, 26 N.Y.L. SCH. L. REV. 437, 440-44 (1981); Rodino, *The Customs Courts Act of 1980*, 26 N.Y.L. SCH. L. REV. 459, 463-67 (1981); Vance, *Judicial Review of Antidumping Orders in the United States and European Economic Community*, 26 N.Y.L. SCH. L. REV. 577, 590-602 (1981).

522. *See, e.g.*, P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 134, at 169-72; Levinson, *supra* note 57, at 654 n.62.

523. *See ACUS Views on Ash Council Report*, *supra* note 145, at 931-32 (opposing Ash Council recommendation that new court be created to hear appeals from transportation,

court patterned on the French *Conseil d'Etat.*[524] And a third possibility would be to select one of the existing federal courts as the exclusive repository for review of cases within a particular specialty.[525] Finally, even if existing jurisdictional lines are left unaltered, an individual court could designate certain of its judges, for fixed time periods, to adjudicate all the cases that fall within a given area of the law.[526] As discussed below, the degree to which a model deviates from the pure specialized form will affect both the validity and the weight of the various policy arguments to be examined.

The dominant feature of a specialized court is the specialized subject matter of its cases. Most of the debate, predictably, has thus focused on the relative merits of specialist and generalist decisionmaking. The same will be true here. But proposals for specialized courts require other policy decisions as well. One is whether to create a single, centralized forum or a network of tribunals geographically dispersed. Another is whether the proposed court should be of article III stature. These questions will be considered in turn.

A. Specialist Versus Generalist

1. Quality

Central to the argument for any specialized court are the benefits of specialized expertise.[527] The judges are expected to bring to the court, or at least to acquire, a deeper command of the subject matter than would be possible for legal generalists. The staff would supply additional expertise.[528] That expertise is especially valuable when the subject matter is technical but nonlegal, as when scientific or other typically unfamiliar concepts must be understood.

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power, and securities agencies); Currie & Goodman, *supra* note 1, at 78-82; *cf.* 28 U.S.C. § 1295 (1982) (defining jurisdiction of United States Court of Appeals for the Federal Circuit).

524. *See generally* L. BROWN & J. GARNER, FRENCH ADMINISTRATIVE LAW (2d ed. 1973); H. WADE, ADMINISTRATIVE LAW 14-15 (5th ed. 1982); Caldwell, *A Federal Administrative Court*, 84 U. PA. L. REV. 966 (1936).

525. The Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction to review certain administrative orders. *See* P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 134, at 172-73; Currie & Goodman, *supra* note 1, at 75.

526. *See* P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 134, at 174-84; COUNCIL ON THE ROLE OF COURTS, THE ROLE OF COURTS IN AMERICAN SOCIETY 140 (1984); Carrington, *Substantive Division of the Circuits*, in 2 APPELLATE JUSTICE: 1975, at 271-76 (P. Carrington, W. Christian, D. Karlen & B. Witkin eds.); Pound, *Specialized Courts or Specialized Judges*, in 2 APPELLATE JUSTICE: 1975, at 265-66 (P. Carrington, W. Christian, D. Karlen & B. Witkin eds.).

527. Agency expertise is also cited frequently as a reason for judicial deference. *See, e.g.*, P. WEILER, IN THE LAST RESORT 134 (1974); Pearce, *Judicial Review of Tribunal Decisions—The Need for Restraint*, 12 FED. L. REV. 167, 174-75 (1981); Woodward & Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 AD. L. REV. 329, 332 (1979).

528. Many have observed that the real agency expertise tends to lie in the staff. *See, e.g.*, 3 K. DAVIS, *supra* note 137, § 17:1; H. FRIENDLY, *supra* note 137, at 179-80; Freedman, *Expertise and the Administrative Process*, 28 AD. L. REV. 363, 376 (1976).

Nathaniel Nathanson has observed, however, that specialized expertise is not an obvious virtue for a reviewing court. When the court reviews findings of fact or the exercise of agency discretion, its role is to search for substantial evidence or for rationality, tasks that require judgment more than expertise.[529] Nathanson also argues that even statutory interpretation requires "skills which are not significantly enhanced by concentration upon a single statute."[530]

That last suggestion probably overstates the case. Practice in interpreting a complex statute might itself enhance significantly the development of general statutory interpretation skills. Moreover, as others have persuasively pointed out, the expertise of a specialized tribunal can derive both from frequent contact with the statute and from the tribunal's opportunity to observe the practical consequences of its decisions.[531] The latter source of expertise is of greatest significance when the same tribunal also has regulatory responsibilities, but the point applies to solely adjudicative bodies as well. A general principle announced in one case might, for example, trigger subsequent litigation to iron out the specifics. A tribunal that repeatedly observes those kinds of patterns within a narrowly defined substantive sphere might be better able to predict the practical consequences of a contemplated holding.

When a statute is as intricate as the Immigration and Nationality Act, those kinds of expertise can also strengthen the tribunal's capacity to synthesize related cases. A particular interpretation, when combined with the holding of a previous case, might create an anomaly that Congress could not have intended and that a legal generalist unaware of the previous case might not have spotted. Or a requested interpretation might lead to other practical consequences that are a proper subject of judicial consideration. The benefits of expertise in aiding the thoughtful resolution of a difficult legal question in a highly specialized area of the law should not be too casually dismissed.

All else being equal, therefore, specialized expertise can be a positive attribute even for a reviewing court. Nonetheless, two arguments strongly cut against the creation of a specialized immigration court. The first, emphasized by numerous commentators, is the enormous advantage of a generalist perspective.[532] A legal generalist brings to the bench a greater ability to analogize to other areas of the law, to find solutions in those areas, and to approach specific problems with fewer preconceptions.[533]

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529. *See* Nathanson, *supra* note 521, at 999-1000.

530. *See id.* at 1000.

531. *See* Woodward & Levin, *supra* note 527, at 332.

532. *See, e.g.*, P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 134, at 168; COUNCIL ON THE ROLE OF COURTS, *supra* note 526, at 139; *ACUS Views on Ash Council Report*, *supra* note 145, at 931; Currie & Goodman, *supra* note 1, at 68-69.

533. *See* COUNCIL ON THE ROLE OF COURTS, *supra* note 526, at 139; Currie & Goodman, *supra* note 1, at 68-69.

In immigration cases, that is not an academic point.[534] The cases frequently require application of principles drawn from administrative law,[535] constitutional law,[536] criminal law,[537] and family law.[538] The generalist perspective that would be valuable in resolving those problems would be lost if the courts of general jurisdiction were replaced by a specialized immigration court of the pure variety. Generalism would survive, however, under some of the modified models discussed earlier.[539]

Nor does generalist review waste the knowledge of the specialist. Perhaps the most valuable property of specialized expertise is its capacity to be transmitted. Expert witnesses in judicial trials assist lay jurors in performing their fact-finding mission. Expert witnesses testify before legislative committees to help lawmakers discharge their policymaking functions. Expert consultants make recommendations to governmental agencies and commissions.

Expert administrative tribunals are no different. By drafting carefully reasoned opinions, they can communicate to the reviewing court any special insights that will aid the resolution of an individual case. Generalist review can thus be seen as an instrument for combining the joint thinking of generalists and specialists.

2. *Efficiency*

Proponents of a specialized immigration court have also stressed its potential efficiency. Even apart from any time savings that would result from the expert's familiarity with the law, a specialized court would eliminate one step in the process.[540] Instead of an administrative appeal

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534. Several opponents of a specialized immigration court have stressed this loss of generalist perspective. *See* Barker, *A Critique of the Establishment of a Specialized Immigration Court*, 18 SAN DIEGO L. REV. 25, 27 (1980); Orlow, *supra* note 462, at 50; Wildes, *supra* note 462, at 57.

535. See especially the cases concerned with rulemaking, such as Patel v. INS, 638 F.2d 1199, 1203 (9th Cir. 1980); Yassini v. Crosland, 618 F.2d 1356, 1361 (9th Cir. 1980), and the cases defining the judicial role in reviewing agency discretion, such as INS v. Rios-Pineda, 105 S. Ct. 2098, 2102-03 (1985); INS v. Jong Ha Wang, 450 U.S. 139, 144-46 (1981).

536. *See* Legomsky, *supra* note 283, at 255-60.

537. *See generally* NATIONAL LAWYERS GUILD, IMMIGRATION LAW AND CRIMES (1985).

538. *See* T. ALEINIKOFF & D. MARTIN, *supra* note 8, at 125-54.

539. The modified models that would retain a generalist perspective include a specialist court staffed by rotating generalist judges, a general court of appeals designated as the sole repository of all immigration cases, and a specialized rotation system within a general court.

540. *See Joint Hearings*, *supra* note 481, at 110 (testimony of Hon. B. Graham, Governor of Florida); *id.* at 339 (testimony of Hon. B. McCollum); SCIRP FINAL REPORT, *supra* note 466, at 249; Levinson, *supra* note 57, at 653. Attorney General Smith, testifying at the same hearings, stated that illegal aliens have some seven steps from the initial administrative decision to the courts. *Joint Hearings*, *supra* note 481, at 340. It is not clear how he arrived at that figure or which steps other than the deportation hearing, the BIA appeal, and the petition for review he was counting.

followed by judicial review, there would be only one appellate round.[541] The result, it is argued, would save money, reduce delay, and ease the burden on the federal courts of general jurisdiction. As a way of easing the burden on the federal judiciary, a new specialized court might be thought preferable to adding new circuits, which would aggravate the number of intercircuit conflicts, or to expanding the sizes of the existing courts, an approach that would strain the process of collegial decision-making.[542]

In the immigration context, however, those arguments are not weighty. Although the new court would indeed eliminate a step, it is a step that, as discussed above, is worth preserving. Further, the low present volume of immigration cases in the federal courts[543] would make the savings minimal. Most important of all, defining the stature of the new judges would present a Catch 22. If the new judges are paid appreciably less than the article III judges they replace,[544] judges of article III caliber will be difficult to attract. In an area in which important individual interests are at stake, serious questions as to both the actual and the perceived quality of justice would arise. Conversely, if the salary levels of the new judges approach those of their article III counterparts, the costs of the new system would be astronomical. In fiscal year 1984, in the deportation area alone, the Justice Department's immigration judges disposed of 73,614 cases[545] and the BIA disposed of 1909 appeals.[546] To assign a case volume of that magnitude to high-level federal judges would require staggering expenditures. The new structure would, it is true, eliminate some of the costs incurred in those deportation cases in which aliens would otherwise have sought judicial review of BIA decisions. But those cases constitute only a tiny proportion of the cases that a specialized immigration court would hear.[547] More sensible, it seems, is to use the less expensive administrative machinery to process the vast bulk of the cases, and to preserve the right of judicial review for the relatively few aliens who seek it.

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541. *Cf.* H.R. 3187, 99th Cong., 1st Sess. § 3(b)(2)(C) (1985) (permitting review by certiorari in the United States Court of Appeals for the Federal Circuit). None of the legislative proposals for a specialized immigration court would remove the certiorari jurisdiction of the Supreme Court.

542. *See* Currie & Goodman, *supra* note 1, at 63-65; *see also* Roberts, *supra* note 57, at 20; Robinson, *supra* note 145, at 971-74 (answering arguments made by Ash Council).

543. *See* Appendix.

544. Representative McCollum originally proposed that the trial judges and the appellate judges of a new, article I immigration court be paid the same salaries as United States district judges and circuit judges, respectively. *See* H.R. 5649, 97th Cong., 2d Sess. sec. 2(a)(1)(B), § 111(b) (1982). His most recent bill, however, would rank the new judges as GS-16 and GS-17, respectively. *See* H.R. 3187, 99th Cong., 1st Sess. sec. 2(a)(2), § 111(d) (1985).

545. *See supra* note 518.

546. *See* Appendix.

547. Only 418 deportation orders were the subjects of judicial review in fiscal year 1984. *See id.* That figure represented only 0.6% of the 73,614 deportation orders issued by immigration judges. *See* supra note 518.

3. *Side Effects of Specialized Jurisdiction*

A court that hears only immigration cases would raise other concerns as well. A specialized court can become too sympathetic to the agency whose decisions it reviews.[548] The specialized nature of the work might prevent the recruiting of individuals as talented as those who currently occupy the federal bench.[549] Appointments to the court are more likely to be influenced by intensive lobbying because of the greater impact that the judges will have on narrow issues that affect special interest groups.[550] Postappointment biases might develop more easily than in generalist courts because of the concentrated exposure to a narrow area.[551] And the public might be more likely to perceive, rightly or wrongly, a bias in the court's disposition of a case.[552] These problems can be mitigated by deviating from the pure model of specialized court in any of the ways described earlier.[553]

B. Centralized Versus Dispersed

A specialized court need not be a single, centralized entity. A system of geographically dispersed courts that specialize in the same subject matter would be possible. But if the volume of appellate cases is small and collegial review is desirable, as is true in immigration cases, constructing a system of pure specialized courts in which the judges are not frequently idle would be difficult. The modified models offer greater promise. The subject matter could, for example, be defined to include other selected areas as well. Or, if more than one of the general courts of appeals were to assign rotating panels of judges to decide the immigration cases those courts receive,[554] the result would be another form of dispersed specialization.

The most significant advantage of centralized appellate adjudication is uniformity.[555] Intercircuit conflicts can produce instability and inequal-

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548. *See* COUNCIL ON THE ROLE OF COURTS, *supra* note 526, at 136; *ACUS Views on Ash Council Report*, *supra* note 145, at 932; Currie & Goodman, *supra* note 1, at 71; Robinson, *supra* note 145, at 959.

549. P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 134, at 168; Currie & Goodman, *supra* note 1, at 70.

550. P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 134, at 168; Currie & Goodman, *supra* note 1, at 70-71.

551. Currie & Goodman, *supra* note 1, at 71-72.

552. *Id.* at 72.

553. *See supra* text accompanying notes 522-26; *see also* P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 134, at 169-76; COUNCIL ON THE ROLE OF COURTS, *supra* note 526, at 136; Carrington, *supra* note 526, at 271-72; Currie & Goodman, *supra* note 1, at 72-73.

554. *See supra* text accompanying note 526.

555. *See* SCIRP FINAL REPORT, *supra* note 466, at 249; Levinson, *supra* note 57, at 653; Roberts, *supra* note 57, at 13-14, 19-20; *see also* H. FRIENDLY, *supra* note 137, at 183 (national administrative court would enhance uniformity); Robinson, *supra* note 145, at 971-73 (evaluating Ash Council argument that new specialized court would promote uniformity).

ity.[556] They are the kinds of conflicts that the Supreme Court frequently harmonizes,[557] but the process can take years[558] and in the meantime the instability persists. Moreover, a conflict between circuits can invite forum-shopping.[559]

But the importance of uniformity should not be exaggerated. Intercircuit conflicts, at least in immigration cases, have not been unusually frequent.[560] The explanation might be partly geographic. As noted earlier, over sixty percent of all petitions for review of deportation orders are filed in one court, the Ninth Circuit.[561] That observation might simply mean that, as a practical reality, immigration cases *are* at present centralized to a significant degree. In addition, the Supreme Court's enthusiastic displays of deference to BIA interpretations[562] have also had a unifying effect. And, even when intercircuit conflicts do give aliens an incentive to forum-shop, statutory limitations on venue[563] normally restrict the opportunities.

A second advantage of centralization is that it can contribute further to expertise.[564] The more cases of a given type a court receives, the more specialized expertise that court is likely to develop. As an argument for a specialized immigration court, however, that advantage of centralization is also less weighty than might first be thought. As just noted, a majority of the cases are already being decided by a single court in which substantial expertise has begun to accumulate. Further, to the extent that a single specialized court would make that process complete, it becomes relevant to repeat that specialized expertise is not wholly beneficial.

A third advantage of centralized review is increased efficiency. The fewer courts that need to struggle with the same issues, the less time will be consumed deciding them. But that very strength is also a weakness. As courts adopt varying approaches to similar problems, new insights emerge and analyses mature. This process of gradual evolution has been applauded by many others.[565]

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556. Currie & Goodman, *supra* note 1, at 65-66. It was primarily in the interests of certainty that the Administrative Conference recommended channeling to the District of Columbia Circuit all review of national standards set by the EPA under the Federal Water Pollution and Control Act. *See* ACUS Recommendation No. 76-4, 1 C.F.R. § 305.76-4, item 1, recommendation A.1 (1985). Conflicts can also be evidence of inefficiency. *See infra* text accompanying note 565.

557. Barker, *supra* note 534, at 26.

558. *See* Craig, *supra* note 521, at 680-85 (addressing arguments for national court of tax appeals).

559. Currie & Goodman, *supra* note 1, at 65.

560. *See* Wildes, *supra* note 462, at 63.

561. *See supra* note 261.

562. *See, e.g.*, INS v. Rios-Pineda, 105 S. Ct. 2098, 2103 (1985); INS v. Jong Ha Wang, 450 U.S. 139, 145 (1981).

563. A petition for review of a deportation order may be filed only in the circuit in which the deportation hearing was held or the circuit in which the alien resides. I. & N. Act § 106(a)(2), 8 U.S.C. § 1105a(a)(2) (1982).

564. Currie, *supra* note 189, at 1262.

565. *See, e.g.*, United States v. Mendoza, 464 U.S. 154, 160 (1984); H. FRIENDLY, *supra* note 137, at 186-87; Currie & Goodman, *supra* note 1, at 69-70.

Centralized review has other affirmative shortcomings. One is the dangerous concentration of power in a small group of people.[566] The previous section noted ways in which both the appointment process and the day-to-day work of a specialized court can produce biases.[567] Centralization prevents the diffusion of those biases. It increases the probability that the judges who decide a given legal issue will have values that are not representative of society or even of the judiciary. That factor is relevant to a discussion of almost any proposal for a specialized court, but it is particularly compelling in immigration law, in which decisions are highly sensitive to personal values and philosophies. The ongoing battles between the Ninth Circuit and the Supreme Court are nowhere more evident than in immigration cases, and they attest to the close connection between ideology and adjudication in this field of law.[568] That consideration alone seems a convincing reason to reject a pure model of specialized immigration court. The modified versions lessen this problem, but even they would permit a handful of individuals to wield enormous power in an area in which personal values are often dispositive.

A final consideration is that a single centralized court would drastically increase the costs of oral argument.[569] The immigration bar is clustered in many large urban centers spread throughout the country.[570] In addition to the political turmoil that the process of choosing a site would generate, any site chosen would pose serious problems for a majority of the immigration bar, and therefore for the aliens to whom the costs would be passed on. Not a wealthy group, aliens might often be forced to forgo oral argument solely for economic reasons. The judges of the specialized court could ameliorate the problem by riding circuit,[571] but that option too would entail a monetary cost to the public.

C. Article I Versus Article III

Article III, section 1 of the United States Constitution authorizes Congress to establish inferior courts whose judges must be given life tenure

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566. Currie, *supra* note 189, at 1262; Currie & Goodman, *supra* note 1, at 69-70.

567. *See supra* text accompanying notes 548-52.

568. *See, e.g.*, INS v. Lopez-Mendoza, 104 S. Ct. 3479 (1934), *rev'g* 705 F.2d 1059 (9th Cir. 1983); INS v. Delgado, 104 S. Ct. 1758 (1984), *rev'g* 681 F.2d 624 (9th Cir. 1982); INS v. Phinpathya, 104 S. Ct. 584 (1984), *rev'g* 673 F.2d 1013 (9th Cir. 1981); INS v. Miranda, 459 U.S. 14 (1982) (per curiam), *rev'g* 673 F.2d 1105 (9th Cir. 1982); INS v. Jong Ha Wang, 450 U.S. 139 (1981), *rev'g* 622 F.2d 1341 (9th Cir. 1980). A more detailed account of the battles can be found in Loue, *Alien Rights and Government Authority: An Examination of the Conflicting Views of the Ninth Circuit Court of Appeals and the United States Supreme Court*, 22 SAN DIEGO L. REV. 1021 (1985).

569. *See generally* Currie, *supra* note 189, at 1262; Currie & Goodman, *supra* note 1, at 74. Roberts, in proposing a specialized immigration court, acknowledges the problem. *See* Roberts, *supra* note 57, at 13. *But see infra* text accompanying note 571.

570. *See supra* note 268 and accompanying text.

571. *See* H. FRIENDLY, *supra* note 137, at 169; Currie & Goodman, *supra* note 1, at

and a guarantee against salary reductions. In certain circumstances, however, Congress may constitutionally create adjudicative tribunals that are not subject to the limitations contained in article III.[572] It is customary to call these bodies "legislative" or "article I" courts.

Advocates of a specialized immigration court have uniformly recommended that the new tribunal be of article I stature.[573] Opponents of an exclusive, specialized immigration court either explicitly object,[574] or can be assumed to object,[575] to the article I feature.[576]

Whether an immigration court whose judges lack life tenure and protection against diminutions in pay would violate article III is not entirely free from doubt. Both the language and the rationales of leading Supreme Court decisions suggest, however, that there would be no constitutional bar. The Court has consistently recognized a "public rights" exception to the requirements of article III.[577] The Supreme Court recently summarized the law in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*:[578] legislative courts may be used to adjudicate cases arising " 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments' [when these cases] . . . could have been determined exclusively by those departments."[579] The clear rationale for the exception is that, when no judicial review at all is constitutionally mandated, the less drastic approach of adjudication by article I courts must also be permissible.[580]

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74 & n.331 (also observing that need for travel could reduce attractiveness of job); Roberts, *supra* note 57, at 19.

572. *See infra* notes 577-83 and accompanying text.

573. *See* SCIRP FINAL REPORT, *supra* note 466, at 248-49; Levinson, *supra* note 57, at 653; Roberts, *supra* note 57, at 18; *see also Joint Hearings*, *supra* note 481, at 100 (testimony of Hon. B. Civiletti); *id.* at 110 (testimony of Hon. B. Graham); *id.* at 113 (testimony of Hon. B. McCollum). The legislation introduced by Representative McCollum would also make the new immigration court an article I tribunal. *See* H.R. 3187, 99th Cong., 1st Sess. § 2 (1985).

574. *See, e.g.*, Juceam & Jacobs, *supra* note 244, at 43-44.

575. Those who oppose eliminating the role of the general article III courts, and whose opposition is based in part on the loss of either actual or perceived independence, would be expected to maintain that, if a specialized court is nonetheless given exclusive jurisdiction over immigration cases, the court should at least have article III independence. Those whose opposition is grounded solely on the loss of the generalist perspective or on the concentration of power cannot be assumed to prefer article III courts. *See generally* Barker, *supra* note 534; Juceam & Jacobs, *supra* note 244; Orlow, *supra* note 462; Wildes, *supra* note 462.

576. *See ACUS Views on Ash Council Report*, *supra* note 145, at 931-32 (opposing replacement of certain regulatory commissions with single specialized court, and objecting particularly to article I feature).

577. *See, e.g.*, Crowell v. Benson, 285 U.S. 22, 50 (1932); *Ex parte* Bakelite Corp., 279 U.S. 438, 458 (1929).

578. 458 U.S. 50 (1982).

579. *Id.* at 67-68 (quoting Crowell v. Benson, 285 U.S. 22, 50 (1932)).

580. *Id.* at 68. In its most recent discussion of this subject, the Supreme Court seemed

In *Crowell v. Benson*[581] the Court in dictum expressly listed immigration as one of the subject areas that would appear to qualify for the public rights exception.[582] That dictum seems correct, since the Court has long emphasized the political nature of Congress' decisions to define the categories of excludable and deportable aliens and has long held that those decisions may constitutionally be committed to the executive branch.[583]

Assuming constitutionality, what would be the policy advantages of an article I immigration court? One benefit would be to maximize congressional flexibility. Free of the constraints imposed by article III, Congress could dissolve the court entirely if the arrangement were later found unworkable, or reduce the size of the court if case volume were to fall. In theory, those options would be open to Congress even if the court were of article III stature, but in that event Congress would face the difficult task of reassigning highly specialized judges to courts of general jurisdiction. Further, with an article I court, Congress would be able to reduce the judges' salaries if budgetary problems arose. Finally, apart from flexibility, creating an article I tribunal might smooth the transition to a specialized court by making politically more feasible the initial appointments of those present immigration judges and BIA members who do not meet the standards for article III judges.

But each of those "advantages" is dubious. What proponents call flexibility, opponents would call insecurity. If the new court is to discharge the functions currently served by the article III courts of general jurisdiction, independence would seem vital. At some point in the process there must be judges who are free of, and who are perceived to be free of, the temptation to succumb to political or economic pressure. Moreover, when such important interests are at stake, attracting judges of the highest caliber is critical. The lesser prestige and the lesser security of an article I judgeship would hamper achievement of that goal. And if the point of the article I feature is to permit the transfer of those current immigration judges and BIA members who would lack the qualifications for article III appointments, the short answer is that individuals who do not meet the usual high standards should not be selected.

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less confident about the precise boundaries of the "public rights" exception but nonetheless reluctant to apply article III constraints to the adjudications of federal administrative agencies. *See* Thomas v. Union Carbide Agricultural Prods. Co., 105 S. Ct. 3325, 3334-39 (1985).

581. 285 U.S. 22 (1932).

582. *See id.* at 51; *see also Northern Pipeline*, 458 U.S. at 69 n.22 (quoting *Crowell*, 285 U.S. at 51).

583. *See* Legomsky, *supra* note 283, at 261-69. *But cf. id.* at 299-303 (decision in INS v. Chadha, 462 U.S. 919 (1983), might suggest willingness to recede from strict application of principle of plenary congressional power); Memorandum from Leland E. Beck, *supra* note 282, at 11-20 (open question whether Congress may constitutionally invest article I courts with exclusive power to grant habeas corpus).

CONCLUSION[584]

The goal of this Article has been to develop, with an eye toward immigration cases, an approach for selecting the forum in which administrative adjudication can most effectively be reviewed. The central thesis has been that administrative review and judicial review are best examined together.

To evaluate a given structure for the review of administrative adjudication, a three-step process is recommended. One should first isolate the relevant properties that distinguish district courts from courts of appeals and those that distinguish from each other the administrative review bodies potentially available in the particular substantive area. Forum attributes are relevant to the extent they either advance or impede the accuracy, efficiency, acceptability, or consistency of the administrative process. In identifying the relevant properties, it is convenient to begin with the primary, objective, distinguishing attributes and then to ascertain what secondary, subjective attributes flow from them. The latter will be the strengths and weaknesses of the tribunals as reviewing bodies. A chart has been prepared to summarize the primary and secondary attributes that distinguish the district courts from the courts of appeals and those that distinguish the two principal administrative reviewers available in immigration—the Board of Immigration Appeals and the Administrative Appeals Unit.[585] As the chart illustrates, most of the secondary distinctions between district courts and courts of appeals parallel those between the BIA and the AAU. Analogous correlations will often be found in other areas of administrative law, except that in some other fields the administrative tribunals might differ in degree of political accountability.

The next step is to identify the attributes of cases that will affect the importance to be placed on the various strengths and weaknesses of the available forums. For the forum choices available in immigration law, eleven such case attributes were identified.[586] If, in another subject area, the possible administrative review bodies differ in respects analogous to those that distinguish the BIA from the AAU, then the case attributes developed here should carry over. If the competing administrative review forums differ also in degree of political accountability, then an additional case attribute influencing forum choice should be the frequency with which the cases raise questions of policy.

The third and final step is to determine which of these case attributes

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584. With some modifications, the recommendations on administrative review forum were adopted by the plenary session of the Administrative Conference of the United States on December 12, 1985. The same is true of the recommendations concerning the structure and independence of the BIA. For the reasons discussed *supra* text accompanying notes 319-27, the conference declined to take a position on the recommendations pertaining to judicial review. *See* 50 Fed. Reg. 52,894 (1985).

585. *See supra* text following note 168.

586. *See supra* text accompanying notes 169-236.

tend to be present in the class of cases being studied. Applying the eleven case attributes to illustrative categories of immigration cases leads to a number of more specific recommendations.

At the administrative level, orders of deportation and exclusion should remain appealable to the BIA. But the current regulations governing administrative review of the many miscellaneous orders made under the Immigration and Nationality Act should be completely redone. Patterns reflected in the choices between the BIA and the AAU are not evident.

More specifically, all visa petitions should be appealable to the BIA; the orphan petitions, the fiancé(e) petitions, and the occupational petitions (both immigrant and nonimmigrant) should therefore be transferred from the AAU to the BIA. Appeals from district directors' denials of 212(d)(3) waivers should be transferred from the BIA to the AAU. Appeals from district directors' denials of 212(h) and 212(i) waivers, and from their denials of applications to waive the two-year foreign residence requirement for exchange visitors, should be transferred from the AAU to the BIA. Appeals from orders rescinding adjustment of status should remain with the BIA.

Those are only a few of the eight categories of BIA jurisdiction and twenty-six categories of AAU jurisdiction. The Justice Department should systematically reexamine each of those forum choices in the light of the case attributes developed in this Article.

The recommended case transfers will necessitate changes in the structures and operations of the administrative review forums. The BIA, which at present decides all cases en banc, should adopt a panel system. En banc review should be available, at the discretion of the BIA, only upon request of the Attorney General, the INS Commissioner, a BIA member, or, in the case of a split panel, the aggrieved individual. That change, together with any necessary increase in support staff, would probably accommodate the recommended transfer from the AAU to the BIA of a large volume of cases. If necessary, however, the size of the Board could be expanded slightly without undue expense or the loss of collegial deliberation. A case transfer of the scale recommended here would also permit a reduction in the size of the AAU. The AAU should be retained, nonetheless, for cases that do not require the more sophisticated resources possessed by the BIA.

Views about the proper relationship between the BIA and the Attorney General turn largely on general preferences for the political or judicial models of agency decisionmaking. They hinge also on perceptions about the types of issues likely to arise in immigration cases. The BIA, now a creature only of administrative regulation, should be made a statutory body, although it should probably remain within the Department of Justice. Its members should be appointed by the President and confirmed by the Senate. They should be given a high degree of job security. The Act should give the BIA jurisdiction over appeals from deportation, exclusion, and rescission orders, and the Attorney General should be authorized to expand

the BIA's jurisdiction further. The Attorney General should retain the power to review individual BIA decisions, but should exercise that power only in extraordinary cases.

At the judicial level, deportation orders should continue to be reviewable exclusively in the courts of appeals, subject to existing exceptions for habeas corpus and for nonfrivolous claims of United States nationality. The original rationale of inhibiting delay is not a convincing reason for direct court of appeals review, but other arguments do seem persuasive. Congress should make conscious policy decisions as to both availability of habeas corpus and the scope of habeas review in deportation cases. The habeas provision should be clarified to reflect those policy judgments.

Exclusion orders are currently reviewable only by habeas corpus in the district courts. Congress should vest concurrent jurisdiction in the courts of appeals.

Absent an accompanying order of deportation or exclusion, most of the miscellaneous orders should continue to be reviewable in the district courts. One order that should be shifted to the courts of appeals, however, is rescission. If the courts of appeals are given concurrent jurisdiction over exclusion orders, then it might also be beneficial to give the courts of appeals jurisdiction over district directors' denials of various waivers of inadmissibility. Certain of the visa petitions might be suitable also for direct court of appeals review, but that decision should be deferred until more complete numerical information becomes available.

To prevent litigation over jurisdictional issues and to avoid unnecessary bifurcation of individual cases, courts of appeals should be granted the discretion to assert pendent jurisdiction over miscellaneous immigration orders when review of deportation, exclusion, or rescission orders is also being sought. That approach would permit the courts to evaluate the merits of consolidation on a case-by-case basis.

Section 279 of the Immigration and Nationality Act gives the district courts jurisdiction over all cases arising under the main title of the Act. Now that general federal question jurisdiction no longer requires a minimum amount in controversy, section 279 is superfluous. Moreover, it has generated unnecessary issues as to preclusive effect. Section 279 should therefore be repealed. If it is retained, however, it should at least be amended to clarify that it is subject to those statutory provisions that define exclusive procedures for review of orders of deportation, exclusion, and, if the previous recommendations are adopted, rescission.

Finally, this Article considered various proposals for a specialized immigration court. A pure variety of specialized court, intended to replace the roles of the courts of general jurisdiction, is not recommended. Several considerations seem paramount. The application of a generalist perspective is unusually valuable in immigration law. The present scheme does not waste the benefits of specialized expertise because the BIA communicates its insights through reasoned written opinions. Either the new judges would be paid less than current federal judges, in which case the

quality of justice would suffer on several counts, or the new judges would be paid the same as current federal judges, in which case the costs would be prohibitive for reasons discussed earlier. Finally, in a field in which adjudication is so profoundly influenced by personal values, a specialized court with exclusive jurisdiction would represent an unhealthy concentration of power. Several modified versions of specialized courts would mitigate many of these objections, but on balance the adoption of even the modified models is not recommended.

Apart from the comparative merits of specialists and generalists, courts reviewing immigration cases should remain geographically dispersed. Centralization would cause numerous problems.

Finally, if a specialized immigration court is created, the court should be of article III stature. An article I immigration court would probably be constitutional, and it would have certain advantages, but the magnitude of the interests at stake renders the disadvantages greater.

Appendix

Immigration Caseloads for Fiscal Year 1984

I. Board of Immigration Appeals*

Type	Cases Decided	Percent of Total
Deportation	1909	61.0%
Exclusion	307	9.8%
Bond	185	5.9%
Rescission	17	0.5%
Visa petitions	635	20.3%
Fines	46	1.5%
212(c) and 212(d)(3) waivers	32	1.0%
Total	3131	100.0%

II. Administrative Appeals Unit**

Type	Cases Decided	Percent of Total
Nonimmigrant visa petitions (L and H)	803	30.3%
Immigrant occupational preference visa petitions (3d and 6th preferences)	625	23.6%
Breaches of bond conditions	822	31.0%
Waivers of excludability	191	7.2%
Other	208	7.9%
Total	2649	100.0%

*Sources: Letter from David B. Holmes, Chief Attorney Examiner of the BIA, to Stephen H. Legomsky (July 3, 1985); Follow-up telephone conversation with David B. Holmes (July 12, 1985).

**Source: Letter from Lawrence J. Weinig, Chief of the Administrative Appeals Unit, to Andrew J. Carmichael, then Associate Commissioner for Examinations (Nov. 13, 1984).

III. Judicial Review***

A. Petitions for Review of Deportation Orders Filed Directly in Courts of Appeals

	Cases Filed
Asylum claimed	85
Asylum not claimed	333
Total	418

B. Cases Originating in District Court

	District Court Cases Filed	Appeals to Courts of Appeals from District Court Decisions
Deportation (habeas)		
Asylum claimed	15	6
Asylum not claimed	51	5
Total deportation (habeas)	66	11
Exclusion (habeas)		
Asylum claimed	17	1
Asylum not claimed	10	1
Total exclusion (habeas)	27	2
Miscellaneous challenges to deportation and exclusion orders	22	8
Adjustment of status	81	2
Nonimmigrant visa petitions	16	3
Immigrant visa petitions	152	5
Labor certification	9	4
Waivers of inadmissibility	18	1

***Source: Interview with Robert L. Bombaugh, Director of the Office of Immigration Litigation of the Department of Justice (June 13, 1985). These figures have been excerpted from the data provided orally at the interview.

Miscellaneous asylum and refugee matters	8	0
Other challenges to denials of benefits	27	5
Citizenship matters (excluding uncontested naturalization petitions)	53	4
Challenges to State Department action	7	3