

# DEPORTATION AND THE WAR ON INDEPENDENCE

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## INTRODUCTION

Debates over judicial independence have been with us for centuries and are not likely to go away soon. A vast literature on the subject has accumulated, largely in discrete clumps segregated by type of judgeship. In the United States, for example, separate bodies of writing examine the independence of federal Article III judges, the judges of Article I courts, federal administrative law judges (ALJs), and state court judges.<sup>1</sup> Writings have also proliferated on the degrees of inde-

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<sup>1</sup> An excellent bibliography is Amy B. Atchison et al., *Judicial Independence and Judicial Accountability: A Selected Bibliography*, 72 S. CAL. L. REV. 723 (1999) (listing selected books, papers, reports and articles written over the last forty years related to judicial independence and accountability).

pendence possessed by judges of foreign domestic courts and judges of international courts and tribunals.<sup>2</sup>

In immigration law in particular, judicial review has long been a sensitive subject; in the past few years, however, a series of events has pushed the broader issue of adjudicative independence front and center. While most of the recent developments have individually caught the attention of both the academy and the general public, this Article suggests that the whole has been worse than the sum of its parts. As hyperbolic as the title of this Article might sound, I submit it is accurate to depict the sum of these various measures as an all-out war on the very notion of decisional independence in the adjudication of immigration cases.

As Part I will show, the Attorney General in 2002 and 2003 took concrete steps that collectively sent unmistakable signals to both the immigration judges who preside over deportation hearings and the appellate adjudicators who review them. The message was simple: "You rule against the government at your personal peril." I argue here that the practical effect of these actions was to drain the administrative phase of the deportation process of all meaningful decisional independence.

As Part I further describes, Congress in 1996 stripped the federal courts of jurisdiction to review several categories of deportation orders. In a number of cases discussed below, the Supreme Court responded by construing the 1996 legislation as not precluding statutory habeas corpus. The Court's actions did not deter Congress for long; in the REAL ID Act of 2005, Congress made the bar on habeas corpus review clear and explicit.

Part I argues that the combined effect of the Attorney General's reformation of the administrative adjudication process and Congress's restrictions on judicial review is lethal to decisional independence. For those categories of deportation cases affected by these measures, there is no point anywhere in the process at which a deportation decision will be either made or reviewed by a body that enjoys decisional independence. The situation might be less intolerable if the relevant actors had the time to handle each case with the degree of care that the great individual interests frequently at stake warrant. But they do not. As described below, the same reforms that eliminated meaningful decisional independence at the administrative level also shortened the timetable for deciding cases and imposed other procedural shortcuts. Courts have noted egregious errors as a result and have scolded

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<sup>2</sup> See *id.* at 787–810.

the Board of Immigration Appeals (BIA) in unusually sharp language.<sup>3</sup>

The conclusion that decisional independence is now lacking for the affected classes of deportation cases generates another, more fundamental question: What is so great about decisional independence? This question transcends immigration law and is the subject of Part II, which examines both the English and early American history of judicial independence and otherwise attempts to glean some theories of decisional independence as well as the political costs of guaranteeing it. Part II posits two propositions. First, it argues that in every adjudicative context the law, at a minimum, should insist on decisional independence at *some* point in the process, unless a particular case presents a compelling need for political accountability or the interests at stake are trivial. This claim applies to interpretations of law as well as fact-finding and the exercise of discretion. From a normative standpoint this proposition might sound quite modest; in actual practice, as will be seen, it is a principle that current U.S. law frequently rejects. Second, Part II asserts that fidelity to the rule of law is the principle that unites the most persuasive theories of decisional independence in the adjudicative setting.

Part III considers possible solutions. It recommends both reinstating decisional independence to the administrative phase of the deportation process and restoring the right to judicial review in all deportation cases. This Part does not offer a detailed model of the optimal administrative and judicial decision-making structures. Rather, it sketches some of the specific forms that the process could possibly take, and it briefly surveys the relevant variables and the pros and cons of some alternative strategies.

## I

### THE BACKGROUND: EVISCERATING DECISIONAL INDEPENDENCE

A proceeding to “remove”<sup>4</sup> a non-U.S. citizen from the United States is initiated and prosecuted by the U.S. Department of Homeland Security (DHS). There is an evidentiary hearing before an “immigration judge.” Based in various cities, the immigration judges are part of the Executive Office for Immigration Review (EOIR), an adju-

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<sup>3</sup> See cases cited *infra* note 33.

<sup>4</sup> Before 1996, noncitizens who were turned away at ports of entry while trying to enter the United States were said to be “excluded,” while those who were evicted from the interior of the United States after having made “entries” were said to be “deported.” See STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 410 (4th ed. 2005). Legislation enacted in 1996 abolished that terminology and replaced both “exclusion” and “deportation” with the single word “removal.” See *id.* at 411. Since my main concern in this Article is with the forcible removal of noncitizens from the interior of the country, I will use the terms “remove” and “deport” (and “removal” and “deportation”) interchangeably.

dicative agency within the Department of Justice. The immigration judge first determines whether the noncitizen falls within any of the specific statutory grounds for removal charged by the DHS. If so, the immigration judge then decides whether the noncitizen is statutorily eligible for asylum or any other affirmative grounds for discretionary relief and, if so, whether to exercise that statutory discretion favorably. Either the noncitizen or the DHS may appeal the immigration judge's decision as of right to the BIA, which is also part of the EOIR.<sup>5</sup> Subject to some gaping exceptions described in Part I.C below, the noncitizen has the statutory right to judicial review of an administratively final removal order.<sup>6</sup>

This removal process, then, can be thought of as comprising two administrative stages—an evidentiary hearing before an immigration judge and an appeal to the BIA—and a third, judicial stage. In recent years, however, the decisional independence of both the immigration judges and the BIA has been steadily whittled down, while Congress has chipped away at the jurisdiction of the federal courts to review the BIA's removal orders. The first three subparts below describe, respectively, the relevant developments that affect the immigration judges, the BIA, and the reviewing courts. The fourth subpart briefly considers the combined effects of these developments.

### A. The Immigration Judges

Until 1983, immigration judges (formerly known as “special inquiry officers”) were part of the Immigration and Naturalization Service (INS), a now-defunct enforcement agency.<sup>7</sup> In that year, they were transferred to the newly created EOIR.<sup>8</sup> Immigration judges are appointed by the Attorney General<sup>9</sup> and are part of the federal “excepted service.”<sup>10</sup>

In recent years, immigration judges have increasingly complained about Justice Department actions that have preempted decisions for-

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<sup>5</sup> These and other details of the administrative phase of the removal process are laid out in DAVID WEISSBRODT & LAURA DANIELSON, *IMMIGRATION LAW IN A NUTSHELL* 269–311 (5th ed. 2005).

<sup>6</sup> See 8 U.S.C.A. § 1252(a)(1) (West, Westlaw through May 2005 amendments).

<sup>7</sup> See Board of Immigration Appeals; Immigration Review Function; Editorial Amendments, 48 Fed. Reg. 8056, 8056 (Feb. 25, 1983) (codified at 28 C.F.R. pt. 0) (reorganizing the Department of Justice).

<sup>8</sup> See Board of Immigration Appeals; Immigration Review Function; Editorial Amendments, 48 Fed. Reg. 8038, 8039 (Feb. 25, 1983) (codified at 8 C.F.R. pts. 1, 3 & 100). See generally Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 65 INTERPRETER RELEASES 453 (1988) (relating the historical development of the position of immigration judge).

<sup>9</sup> 8 U.S.C.A. § 1101(b)(4).

<sup>10</sup> Memorandum from Elaine Komis, EOIR, to Christopher W. Goddard, Wash. Univ. Sch. of Law 1 (Mar. 16, 2005) (on file with author) [hereinafter Komis Memorandum]. This term covers all federal employees who are not part of the “competitive service.” *Id.*

merly entrusted to them.<sup>11</sup> Some such actions substituted generalized Justice Department policy or the policies of law-enforcement personnel for individualized immigration-judge decisions on such matters as whether to close a removal hearing to the public and the press for national security reasons, whether an individual may safely be released on bond, whether to discontinue a hearing because of the former INS's failure to process a critical application in a timely manner, and whether to implement a congressionally mandated contempt power for immigration judges.<sup>12</sup>

On at least one occasion, however, Justice Department intervention went far beyond exercising the power to set departmental policy. An INS prosecuting official was displeased with the decision of an immigration judge in an individual case. Rather than appeal the decision to the BIA in the usual manner, the INS official made an *ex parte* telephone call to the Chief Immigration Judge, an administrator who supervises the corps of immigration judges, and persuaded him to order the immigration judge to change his decision.<sup>13</sup>

The National Association of Immigration Judges (NAIJ), citing these and other instances of *ex parte* pressure on immigration judges, has formally proposed the establishment of a new immigration court that would be independent of the Justice Department.<sup>14</sup> The NAIJ believes that keeping immigration judges within the Department inevitably creates a "conflict of interest" that is "insidious and pervasive."<sup>15</sup>

Potentially more chilling than direct interference in individual cases, however, is the emerging fear that ruling against the government in a deportation case can be hazardous to one's job. Immigration judges, like other employees in the excepted service, "can be disciplined for misconduct, including a penalty of removal under appropriate circumstances."<sup>16</sup> So far, so good; a mechanism to fire even an adjudicative officer for affirmative misconduct is necessary and appropriate. Even in the absence of misconduct, however, the EOIR maintains that immigration judges may be "reassigned."<sup>17</sup> The EOIR takes the position that "normally, a reassignment to another position, even one involving a different job title, job series, or duties, is a matter of management discretion and is not considered to be disciplinary in

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<sup>11</sup> See Nat'l Ass'n of Immigration Judges, *An Independent Immigration Court* 7-11 (Jan. 2002) (unpublished position paper, on file with author) [hereinafter NAIJ Proposal].

<sup>12</sup> See *id.* at 8-10.

<sup>13</sup> See *id.* at 18 n.33. This case is described more fully in LEGOMSKY, *supra* note 4, at 651-53; see also Eric Schmitt, *2 Judges Do Battle in an Immigration Case*, N.Y. TIMES, June 21, 2001, at A20.

<sup>14</sup> See NAIJ Proposal, *supra* note 11, at 11-13.

<sup>15</sup> *Id.* at 8.

<sup>16</sup> Komis Memorandum, *supra* note 10.

<sup>17</sup> See *id.*

nature if there is no loss of pay or grade.”<sup>18</sup> The EOIR bases that conclusion on judicial decisions holding that reassignment without loss of pay or grade is not appealable to the Merit Systems Protection Board.<sup>19</sup>

The official position of the Attorney General assumes even greater Justice Department control over immigration judges. As discussed more fully in the next subpart, Attorney General Ashcroft in 2002—shortly after the NAIJ issued its proposal for an independent court—published a final rule that, among other things, reduced the size of the BIA and promised the future reassignments of some of its then-existing members.<sup>20</sup> The accompanying commentary contained sweeping language that caught the attention of the immigration judges as well. Responding to concerns that the selective reassignments of BIA members might be perceived as a way for the Attorney General to eliminate those members with whom he disagrees, the Justice Department commentary stated:

Each Board member is a Department of Justice attorney who is appointed by, and may be removed or reassigned by, the Attorney General. *All attorneys* in the Department are excepted employees, subject to *removal* by the Attorney General, *and* may be transferred from and to assignments as necessary to fulfill the Department’s mission.<sup>21</sup>

The Attorney General’s reference to “all attorneys” (not just BIA members), coupled with his explicit claim of power not only to reassign but also to “remove”—a term of art that connotes dismissal<sup>22</sup>—implies that immigration judges too could be either reassigned or even removed at any time. Unlike the EOIR position, however, the Attorney General’s statement concerning removal contains no qualifying language that would require a finding of misconduct. Whether or not the Attorney General thought such a qualification implicit in his statement, his clear message was that reassignment, at least, could be ordered without any allegation of misconduct. Coming on the heels of the other actions noted in the immigration judges’ plea for an independent court, and given the subsequent selective reassignments of BIA members with relatively pro-immigrant views (discussed in the

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<sup>18</sup> *Id.*

<sup>19</sup> See E-mail from Elaine Komis, EOIR, to Stephen Legomsky (Mar. 17, 2005) (on file with author) (citing *Pierce v. Merit Sys. Prot. Bd.*, 242 F.2d 1373, 1375 (Fed. Cir. 2001)).

<sup>20</sup> See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,893 (Aug. 26, 2002) (codified at 8 C.F.R. pt. 3).

<sup>21</sup> *Id.* (emphasis added).

<sup>22</sup> See Komis Memorandum, *supra* note 10.

next subpart), the Attorney General's actions have further heightened the apprehensions of the immigration judges.<sup>23</sup>

## B. The BIA

The BIA, created by the Attorney General in 1940,<sup>24</sup> was moved to the EOIR in 1983.<sup>25</sup> Among other things, the BIA has the jurisdiction to review all removal orders issued by immigration judges.<sup>26</sup> The Attorney General has reserved the power to review BIA decisions<sup>27</sup> but in practice exercises that power sparingly.<sup>28</sup>

In 2002 and 2003, then-Attorney General John Ashcroft announced a series of measures that altered the size, character, and day-to-day operations of the BIA.<sup>29</sup> Some of these changes were intended to reduce the BIA's large backlog of cases.<sup>30</sup> Before 2002, for example, the standard BIA practice had been to decide cases in three-member panels with reasoned opinions, except for a small fraction of the cases that were deemed suitable for one-member affirmances without reasoned opinions.<sup>31</sup> The new regulations prescribe the one-member affirmance without opinion (AWO) procedure as the norm; only in a few narrow categories of cases are three-member panel decisions and stated reasons for those decisions now permitted.<sup>32</sup> Both the changes themselves and the quality of the resulting decisions have been harshly criticized; the judicial criticisms of the general quality of BIA decisions have been scalding.<sup>33</sup>

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<sup>23</sup> The possibility of pay cuts could be an additional way to keep immigration judges "in line," but at least for the moment that possibility does not exist. Their salaries are governed by a statutory formula in which both starting pay and raises depend solely on number of years of service. See *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, Div. C, § 371(c), 110 Stat. 3009-546, 3009-645-46.

<sup>24</sup> See *Regulations Governing Departmental Organization and Authority*, 5 Fed. Reg. 3502, 3503 (Sept. 4, 1940).

<sup>25</sup> See *supra* notes 7-8 and accompanying text.

<sup>26</sup> 8 C.F.R. § 1003.1(b)(3) (2005).

<sup>27</sup> 8 C.F.R. § 1003.1(h) (2005).

<sup>28</sup> See Margaret H. Taylor, *Behind the Scenes of St. Cyr and Zadvydas: Making Policy in the Midst of Litigation*, 16 GEO. IMMIG. L.J. 271, 290 & n.104 (2002).

<sup>29</sup> See *Board of Immigration Appeals: Procedural Reforms to Improve Case Management*, 67 Fed. Reg. 54,878 (Aug. 26, 2002) (codified at 8 C.F.R. pt. 3).

<sup>30</sup> See *id.* at 54,878-79.

<sup>31</sup> *Id.* at 54,879.

<sup>32</sup> *Id.*

<sup>33</sup> See, e.g., *Recinos de Leon v. Gonzales*, 400 F.3d 1185, 1187 (9th Cir. 2005) (describing an immigration judge's opinion as "literally incomprehensible" and the BIA's explanation of its final decision as "incoherent"); *lao v. Gonzales*, 400 F.3d 530, 533 (7th Cir. 2005) (vacating the BIA's decision to affirm without opinion the decision of an immigration judge to deport the petitioner where the "immigration judge's opinion cannot be regarded as reasoned"); Statement on the Operations of the Exec. Office for Immigration Review (EOIR) Before the H. Comm. on the Judiciary Subcomm. on Immigration and Claims (Feb. 6, 2002) (statement of Stephen Yale-Loehr, American Immigration Lawyers Association), <http://judiciary.house.gov/legacy/yaleloehr020602.htm>; DORSEY & WHITNEY LLP,

In 2002, just as Ashcroft was proclaiming the importance of attacking the BIA backlog, he announced his intention to *reduce* the number of authorized BIA member positions from twenty-three to eleven.<sup>34</sup> When the final regulations were published about six months later, Ashcroft declined to elaborate on the criteria he would use to decide which members to remove, other than to refer vaguely to “traditional” factors, to the Attorney General’s “discretion,” and to such considerations as “integrity . . . , professional competence, and adjudicatorial temperament.”<sup>35</sup> Seniority, he added, might be an “experience indicator” but would not be “a presumptive factor” in reassignment decisions.<sup>36</sup>

In March 2003, approximately a year after the original announcement, Ashcroft announced which members would be removed from the BIA.<sup>37</sup> Data compiled by Peter Levinson, a long-time member of the legal staff of the House Judiciary Committee,<sup>38</sup> show that the axe fell entirely on the most “liberal” members of the BIA, as measured by the percentages of their rulings in favor of noncitizens.<sup>39</sup> As Levinson demonstrates, the selections cannot be explained by the general criteria that the Attorney General previously announced—integrity, professional competence, and temperament.<sup>40</sup> The five members<sup>41</sup> who were involuntarily removed from the Board included the former Acting General Counsel of the INS (and former Chair of the BIA), two former full-time law professors who had taught immigration law, and other experienced and highly respected BIA members with substantial seniority.<sup>42</sup> These BIA members were “reassigned” to lower-level im-

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STUDY CONDUCTED FOR: THE AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION POLICY, PRACTICE AND PRO BONO, RE: BOARD OF IMMIGRATION APPEALS: PROCEDURAL REFORMS TO IMPROVE CASE MANAGEMENT 41–47 (2003), available at [http://www.dorsey.com/files/upload/DorseyStudy\\_ABA\\_8mgPDF.pdf](http://www.dorsey.com/files/upload/DorseyStudy_ABA_8mgPDF.pdf) (discussing a number of cases in which the federal courts have criticized BIA decisions); Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportation Rulings Assailed*, L.A. TIMES, Jan. 5, 2003, at A1.

<sup>34</sup> See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 7309, 7310 (proposed Feb. 19, 2002).

<sup>35</sup> Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,893, 54,878 (Aug. 26, 2002) (codified at 8 C.F.R. pt. 3).

<sup>36</sup> *Id.*

<sup>37</sup> See Ricardo Alonso-Zaldivar & Jonathan Peterson, *5 on Immigration Board Asked to Leave; Critics Call It a ‘Purge,’* L.A. TIMES, Mar. 12, 2003, at A16.

<sup>38</sup> See Peter J. Levinson, *The Facade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9 BENDER’S IMMIGR. BULL. 1154, 1164 (2004).

<sup>39</sup> See *id.* at 1159–60.

<sup>40</sup> See *id.* at 1155–56.

<sup>41</sup> Four of the twenty-three authorized BIA positions were vacant at the time of the original 2002 announcement, and three BIA members left voluntarily before the names of the removed members were announced in 2003. *Id.* at 1155. It was therefore necessary to remove only five additional members. *Id.*

<sup>42</sup> See *id.*; see also 22 I. & N. Dec., title page (identifying Paul W. Schmidt as Chair of the BIA).



migration judge positions or to nonadjudicative positions on the EOIR staff.<sup>43</sup>

Apart from the permanent impact of these measures on the composition, adjudication process, and ultimate decisions of the BIA, the original Ashcroft announcement had noticeable effects during the one-year interval between the announcement and the actual reassignments. During that transition period, BIA members were predictably reticent to render decisions in favor of noncitizens and against the government.<sup>44</sup> Levinson's empirical data show that, to no one's surprise, several BIA members began to rule in favor of noncitizens much less frequently than those same members had before the original announcement.<sup>45</sup> Some others who had been among those more favorable to noncitizens in their pre-announcement rulings continued that pattern after the announcement; none of them survived the purge.<sup>46</sup>

Interestingly, a similar purge had taken place in 1997 in Australia.<sup>47</sup> Two women had applied separately for asylum based on claims of domestic violence that their home governments had been unable or unwilling to prevent.<sup>48</sup> The legal issue was a close one; courts and tribunals around the world have struggled with the question whether domestic violence can constitute "being persecuted for reasons of" either "political opinion" or "membership of a particular social group," the elements required for refugee status in international law.<sup>49</sup> The Australian Immigration Department rejected both claims.<sup>50</sup> The women appealed as of right to the Refugee Review Tribunal (RRT), a supposedly independent tribunal that hears appeals from the Immigration Department's denials of asylum.<sup>51</sup> In each case, the RRT granted asylum.<sup>52</sup>

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<sup>43</sup> See Levinson, *supra* note 38, at 1155.

<sup>44</sup> See *id.* at 1159-60.

<sup>45</sup> See *id.*

<sup>46</sup> See *id.*

<sup>47</sup> See Stephen H. Legomsky, *Refugees, Administrative Tribunals, and Real Independence: Dangers Ahead for Australia*, 76 WASH. U. L.Q. 243, 247-50 (1998) [hereinafter Legomsky, *Refugees*].

<sup>48</sup> *Id.* at 248.

<sup>49</sup> For the general definition of refugee, see Convention Relating to the Status of Refugees art. 1(A), *adopted* July 28, 1951, 189 U.N.T.S. 150. For discussions of how courts and tribunals around the world have applied the refugee definition to claims based on domestic violence, see, e.g., DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 252-66 (3d ed. 1999); HEAVEN CRAWLEY, *REFUGEES AND GENDER: LAW AND PROCESS* (2001); LEGOMSKY, *supra* note 4, at 995-1036; SUSAN FORBES MARTIN, *REFUGEE WOMEN* 25-27 (2d ed. 2004); KAREN MUSALO ET AL., *REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH* 621-98 (2d ed. 2002); Pamela Goldberg, *Women and Refugee Status: A Review Essay*, 7 INT'L J. REFUGEE L. 756 (1995).

<sup>50</sup> See Legomsky, *Refugees*, *supra* note 47, at 248.

<sup>51</sup> See *id.*

<sup>52</sup> *Id.*

RRT members are appointed by the Minister of Immigration for fixed, staggered terms that are normally renewed as a matter of course.<sup>53</sup> In response to these cases, the Minister of Immigration and Multicultural and Indigenous Affairs, Philip Ruddock, issued an angry public statement that it was “highly unlikely” that RRT members who issued rulings “‘outside the international law’” would be reappointed.<sup>54</sup> Although Ruddock denied that the statement was aimed at particular RRT members, a spokesman subsequently “‘made it clear that members of the RRT would not be reappointed if they made decisions that went beyond the law.’”<sup>55</sup>

At the time of Ruddock’s statement, the terms of about one-half of the RRT members were due to expire in approximately six months.<sup>56</sup> In the eighteen-month period prior to the Minister’s remarks, the RRT granted asylum in approximately seventeen percent of the cases it heard.<sup>57</sup> However, when reappointment interviews for the RRT were held four months after Ruddock’s remarks, asylum approval rates had fallen to 2.7%.<sup>58</sup> Even so, when the terms of thirty-five RRT members expired six months later, Ruddock refused to renew sixteen of the appointments, filling the positions with people of his own choosing.<sup>59</sup>

Of course, executive branch dismissals of judges who rule against the executive branch are not a new phenomenon. In 1616, King James I fired Sir Edward Coke as Chief Justice after Coke had famously said that the King is “under God and the law.”<sup>60</sup> In modern America, however, Ashcroft’s actions are anomalous. Since the creation of the BIA in 1940,<sup>61</sup> the Attorneys General have been an ideologically diverse lot. One can assume they held widely varying views on immigration. One can further assume that from time to time a BIA

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<sup>53</sup> *Id.* at 248, 250.

<sup>54</sup> *Id.* at 248 (quoting Mike Steketee, *Ruddock Flags Tougher Line on Refugee Bids*, AUSTRALIAN, Dec. 26, 1996, at 1).

<sup>55</sup> *Id.* at 248–49 (quoting CANBERRA TIMES, Dec. 27, 1996, at 1).

<sup>56</sup> *See id.* at 250 (noting that thirty-five members’ terms were about to expire); Refugee Review Tribunal, Aust’l Gov’t, *The Refugee Review Tribunal—An Overview 2* (2005), <http://www.rrt.gov.au/factsheets/R8.pdf>.

<sup>57</sup> Legomsky, *Refugees*, *supra* note 47, at 249 n.21.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Coke’s full reply was, “*Quod Rex non debet esse sub homine sed sub Deo et Lege*—The King should not be under man, but under God and the Law.” Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 569 (1996) (citing *Prohibition Del Roy*, 77 (1607) Eng. Rep. 1342, 1343 (K.B.)). For more discussion of the argument between King James I and Sir Edward Coke, see Dorean Marguerite Koenig, *Independence of the Judiciary in Civil Cases & Executive Branch Interference in the United States: Violations of International Standards Involving Prisoners and Other Despised Groups*, 21 U. DAYTON L. REV. 720, 736 (1996).

<sup>61</sup> *See* Regulations Governing Departmental Organization and Authority, 5 Fed. Reg. 3502, 3503 (Sept. 4, 1940).

decision must have rankled them. Yet no other Attorney General had ever removed a member of the BIA.<sup>62</sup> While they are not Article III judges, BIA members might logically have assumed that they could safely render the decisions they felt the evidence and the law required without fear that displeasing the Attorney General could jeopardize their jobs. Obviously, that assumption is no longer safe.

Like immigration judges,<sup>63</sup> BIA members are appointed by the Attorney General<sup>64</sup> and are part of the federal “excepted service.”<sup>65</sup> Just as both the EOIR and former Attorney General Ashcroft have said that immigration judges may be reassigned to other jobs (and, under Ashcroft’s published view, even removed entirely), so too were the same claims made with respect to BIA members.<sup>66</sup>

It is now clear that the ideologically selective reassignments ordered by Aschroft in 2002 and 2003 reflected his broader philosophy regarding the role of the BIA members. Peter Levinson has identified a subtle change in their degree of independence, ushered in by the same final rule that reduced the size of the BIA and facilitated the reassignments:

Until recently [with the issuance of the 2002 final rule], the regulations relating to the Board clearly affirmed the decisional independence of Board Members in the very first paragraph by stating unequivocally that “Board Members shall exercise their independent judgment and discretion in the cases coming before the Board.” With the promulgation of the new rule, however, the Board regulations gave top billing to a sentence with a very different emphasis: “The Board members shall be attorneys appointed by the Attorney General to act as the Attorney General’s delegates in the cases that come before them.” A somewhat diluted version of decisional independence language came much later.<sup>67</sup>

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<sup>62</sup> See Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1380 n.488 (1986) [hereinafter Legomsky, *Forum Choices*].

<sup>63</sup> See 8 U.S.C.A. § 1101(b)(4) (West, Westlaw through May 2005 amendments).

<sup>64</sup> 8 C.F.R. § 1003.1(a)(1) (2005).

<sup>65</sup> Komis Memorandum, *supra* note 10, at 1. This term covers all federal employees who are not part of the “competitive service.” *Id.*

<sup>66</sup> See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,893 (Aug. 26, 2002) (codified at 8 CFR pt. 3) (relating Ashcroft’s statement that all attorneys in the Justice Department are excepted employees who may be transferred as necessary). As is true of immigration judges, compensation does not seem to be an issue with respect to the decisional independence of BIA members. The BIA pay formula is under review, but at this writing the pay level is generally the same for all members. See Komis Memorandum, *supra* note 10, at 1.

<sup>67</sup> Levinson, *supra* note 38, at 1161 (citations omitted). The omitted citations contrast the pre-final rule version, 8 C.F.R. § 3.1(a)(1) (2002), with the post-final rule version, 8 C.F.R. §§ 3.1(a)(1), 3.1(d)(1)(ii) (2003). The latter version is still in place at this writing. See 8 C.F.R. §§ 1003.1(a)(1), 1003.1(d)(1)(ii) (2005).

### C. The Courts

Over the years, Congress from time to time has voiced its misgivings about judicial review of deportation orders and the delays that such judicial review can entail.<sup>68</sup> As noted earlier, the general rule is that an administratively final order of removal is reviewable as of right by petition for review in the court of appeals.<sup>69</sup> In 1996, however, Congress carved out several gaping exceptions to the availability of judicial review. As discussed below, these provisions bar judicial review of entire classes of removal orders, preclude judicial review of most discretionary decisions, specifically prohibit the use of particular judicial remedies and forms of action, and otherwise inhibit judicial review.<sup>70</sup> As also noted below, the courts have construed some of these restrictions narrowly, both to preserve courts' jurisdiction to decide their own jurisdiction and to avoid serious constitutional questions.<sup>71</sup> The REAL ID Act, passed by Congress in 2005, supersedes some of the recent court decisions, codifies certain others, and leaves still others untouched.<sup>72</sup>

One of the judicial review restrictions is 8 U.S.C. § 1252(a)(2)(C).<sup>73</sup> It bars judicial review of any removal order if the person "is removable" on almost any of the crime-related removal grounds.<sup>74</sup> That restriction is significant; in fiscal year 2003 (the most recent year for which data are available at this writing), almost 80,000 people were removed from the United States on crime-related grounds.<sup>75</sup> The Supreme Court construed this provision as limiting only petitions for review in the courts of appeals—not statutory habeas corpus applications under 28 U.S.C. § 2241.<sup>76</sup> Believing that a contrary interpretation would raise serious constitutional questions

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<sup>68</sup> See generally 8 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 104.01[2] (2005) (noting that Congress shared the Department of Justice's belief that judicial review processes were being abused).

<sup>69</sup> See 8 U.S.C.A. § 1252 (West, Westlaw through May 2005 amendments). Venue lies in the circuit in which the removal hearing was held. *Id.* § 1252(b)(2).

<sup>70</sup> See *infra* notes 73–97 and accompanying text.

<sup>71</sup> See, e.g., *Penuliar v. Ashcroft*, 395 F.3d 1037, 1040 (9th Cir. 2005); *Dalton v. Ashcroft*, 257 F.3d 200, 203 (2d Cir. 2001); cf. *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (agreeing *sub silentio*).

<sup>72</sup> REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (2005).

<sup>73</sup> 8 U.S.C.A. § 1252(a)(2)(C).

<sup>74</sup> The referenced removal grounds include, among others, convictions of crimes "involving moral turpitude," crimes "relating to a controlled substance," and "aggravated felonies." *Id.* (referencing *id.* §§ 1182(a)(2), 1227(a)(2)). "Aggravated felonies," in turn, are defined broadly to encompass a long list of crimes, some of which are neither aggravated nor felonies. See *id.* § 1101(a)(43).

<sup>75</sup> See OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS 165 tbl. 43 (2004), available at <http://uscis.gov/graphics/shared/aboutus/statistics/2003Yearbook.pdf>.

<sup>76</sup> See *INS v. St. Cyr*, 533 U.S. 289, 311–13 (2001); *infra* note 184 and accompanying text.

and recognizing that implied repeals of habeas corpus are not favored, the Court preserved the option of habeas review.<sup>77</sup> That opening, however, was short-lived. In the REAL ID Act of 2005, Congress amended § 1252(a)(2)(C) and several other immigration-related court-stripping provisions to expressly bar the use of 28 U.S.C. § 2241, all other statutory habeas provisions, and all other provisions of law in immigration cases.<sup>78</sup>

Because a court always has jurisdiction to determine its own jurisdiction, and because § 1252(a)(2)(C) eliminates jurisdiction only when the noncitizen “is removable” on the specified criminal grounds, the courts of appeals have uniformly interpreted the provision as not barring review of whether the person is in fact removable. If the alleged removal ground is conviction of an aggravated felony, for example, the courts have been willing to decide the legal question whether the particular crime meets the definition of “aggravated felony.”<sup>79</sup> In addition, in *Calcano-Martinez v. INS* the Supreme Court acknowledged the government’s concession that Congress did not mean to bar review of “substantial constitutional challenges.”<sup>80</sup> The REAL ID Act effectively codified those decisions by adding a provision that exempts “constitutional claims or questions of law” from the bar on judicial review of crime-related removal orders.<sup>81</sup> Indeed, the amendment goes beyond the government’s concession in *Calcano-Martinez*, since the new statutory language does not require even that the question of law be of constitutional stature, much less that it be “substantial.”<sup>82</sup> At a minimum, the express language of the exemption covers all questions of statutory interpretation.

Still, uncertainties remain. Courts will need to decide whether the exemption for “questions of law” covers the application of broadly worded statutory phrases—like “exceptional and extremely unusual

<sup>77</sup> See *St. Cyr*, 533 U.S. at 309–13.

<sup>78</sup> See REAL ID Act of 2005, Pub. Law. No. 109-13, § 106, 119 Stat. 302, 310–11 (2005).

<sup>79</sup> See, e.g., *Penuliar v. Ashcroft*, 395 F.3d 1037, 1040 (9th Cir. 2005) (“[B]ecause we have jurisdiction to determine our own jurisdiction, the jurisdictional question and the merits collapse into one.” (quoting *Ye v. INS*, 214 F.3d 1128, 1131 (9th Cir. 2000))); *Dalton v. Ashcroft*, 257 F.3d 200, 203 (2d Cir. 2001) (noting that if the stated ground for removal was the commission of an aggravated felony, the courts retain jurisdiction to determine whether as a matter of law the noncitizen committed an aggravated felony); cf. *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (agreeing *sub silentio* and holding that offenses that either do not have a mens rea requirement or require only a showing of negligence are not aggravated felonies). The same is true when the question is whether the crime in question involves “moral turpitude.” See *Carty v. Ashcroft*, 395 F.3d 1081, 1082–83 (9th Cir. 2005).

<sup>80</sup> 533 U.S. 348, 350 n.2 (2001). The Court concluded that “Congress has not spoken with sufficient clarity to strip the district courts of jurisdiction to hear habeas petitions.” *Id.* at 352.

<sup>81</sup> REAL ID Act § 106(a)(1)(A)(iii) (codified at 8 U.S.C. § 1252(a)(2)(D)).

<sup>82</sup> See *id.*

hardship”<sup>83</sup> or “good moral character”<sup>84</sup>—to specific facts. They will also have to decide whether the sufficiency of the evidence to support a finding of fact constitutes a question of law for purposes of the exemption. Even the question of whether the BIA abused its discretion in denying an application for discretionary relief from removal is arguably one of law. The courts, however, are highly unlikely to view it as such for purposes of the exemption, because to do so would drain a second court-stripping provision, discussed next, of all practical significance.

That second 1996 restriction on judicial review of removal orders is of even greater importance. In practice, deciding whether the noncitizen is “removable”—i.e., whether he or she fits the elements of the alleged removal ground—is ordinarily straightforward; a dispute as to whether a person has been convicted of a particular crime, for example, is usually settled easily by examining the record of conviction. Much more frequently contested are whether the person meets all the statutory requirements for a particular form of affirmative relief and, if so, whether the applicant deserves the favorable exercise of discretion. Of great import, therefore, is another of the 1996 court-stripping provisions, 8 U.S.C. § 1252(a)(2)(B). It bars judicial review of two groups of discretionary decisions, subject to the same REAL ID Act exemption for “constitutional claims or questions of law.”<sup>85</sup>

The first prong of this provision, § 1252(a)(2)(B)(i), precludes judicial review of “any judgment regarding the granting of relief under” any of a number of specified statutory provisions.<sup>86</sup> The list includes virtually all of the common affirmative remedies in removal cases except asylum.<sup>87</sup> The second prong, § 1252(a)(2)(B)(ii), is more generic. It bars judicial review of “any other decision or action of the Attorney General . . . the authority for which is specified under this subchapter<sup>88</sup> to be in the discretion of the Attorney General,” again with an express exception for asylum.<sup>89</sup>

Section 1252(a)(2)(B) clearly bars judicial review of the discretionary *components* of the particular BIA decisions that it reaches.<sup>90</sup> Less obvious is whether it also bars review of the BIA’s determination

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<sup>83</sup> This showing is required for one prong of a remedy known as “cancellation of removal.” See 8 U.S.C. § 1229b(b)(1)(D) (2000).

<sup>84</sup> See, e.g., *id.* §§ 1229b(b)(1)(B) (cancellation of removal), 1229c(b)(1)(B) (voluntary departure), 1259(C) (record of admission for permanent residence).

<sup>85</sup> See 8 U.S.C.A. § 1252(a)(2)(D) (West, Westlaw through May 2005 amendments).

<sup>86</sup> *Id.* § 1252(a)(2)(B)(i).

<sup>87</sup> See *id.*

<sup>88</sup> 8 U.S.C. § 1252 is part of Subchapter II of chapter 12 of Title 8 of the United States Code, which codifies Title II of the Immigration and Nationality Act. Title II covers almost all of the provisions that relate to removal.

<sup>89</sup> 8 U.S.C.A. § 1252(a)(2)(B)(ii).

<sup>90</sup> See *id.* § 1252(a)(2)(B).

that the applicant failed to meet the statutory eligibility requirements for the particular remedy. That determination, in turn, might entail interpretations of law, findings of fact, or even the exercise of discretion (such as whether enough hardship has been demonstrated). If the applicant challenges the BIA's interpretations of the statutory prerequisites to relief, judicial review is now clearly available, because both prongs of § 1252(a)(2)(B) are subject to the new exemption for "constitutional claims or questions of law."<sup>91</sup> As for challenges to BIA findings of fact concerning the statutory requirements (for example, the timing of the applicant's arrival in the United States), the statute is not explicit. Pre-REAL ID Act court decisions, however, generally construed § 1252(a)(2)(B) as not barring judicial review of the sufficiency of the evidence to support such BIA findings.<sup>92</sup> Nothing in the REAL ID Act purports to supersede those decisions.

A number of other miscellaneous restrictions on judicial review in removal cases have not yet received the benefit of the courts' limiting constructions. They include a bar on judicial review of so-called "expedited removal" orders (certain removal orders issued after abbreviated administrative procedures),<sup>93</sup> a bar on review of the legality of regulations issued by the Secretary of Homeland Security concerning a remedy known as "voluntary departure,"<sup>94</sup> a bar on review of the government's decision to institute removal proceedings in the first place (i.e., prosecutorial discretion),<sup>95</sup> and, in most cases, a bar on class actions seeking injunctive relief.<sup>96</sup> None of these restrictions exempts questions of law.<sup>97</sup>

Thus, the 1996 congressional incursions into petitions for review combined with Congress's all-out assault on statutory habeas corpus in the REAL ID Act to create entire categories of removal orders that Congress has at least attempted to insulate entirely from judicial re-

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<sup>91</sup> See *id.* § 1252(a)(2)(D).

<sup>92</sup> See, e.g., *Reyes-Vasquez v. Ashcroft*, 395 F.3d 903, 906 (8th Cir. 2005) ("[W]e may consider the predicate legal question whether the IJ properly applied the law to the facts in determining an individual's eligibility to be considered for the relief."); *Gomez-Lopez v. Ashcroft*, 393 F.3d 882, 884 (9th Cir. 2005) (noting that determinations of whether noncitizens fall into "per se exclusion categories" are not questions of the Attorney General's discretion and therefore fall within the courts' jurisdiction); *Morales-Morales v. Ashcroft*, 384 F.3d 418, 421–23 (7th Cir. 2004) (holding the meaning of the term "continuous physical presence" to be a question of statutory interpretation to be decided by the courts).

<sup>93</sup> See 8 U.S.C.A. § 1252(a)(2)(A).

<sup>94</sup> 8 U.S.C. § 1229c(e) (2000).

<sup>95</sup> 8 U.S.C.A. § 1252(g).

<sup>96</sup> *Id.* § 1252(f)(1). See generally Jill E. Family, *Another Limit on Federal Court Jurisdiction? Immigrant Access to Class-Wide Injunctive Relief*, 53 CLEV. ST. L. REV. 11 (2005) (discussing the background and potential interpretation of § 1252(f)(1)).

<sup>97</sup> That exemption, 8 U.S.C.A. § 1252(a)(2)(D), is expressly confined to the review bars established by § 1252(a)(2)(B) (discretionary relief) and § 1252(a)(2)(C) (crime-related removal orders).

view. Despite several judicial decisions construing the various court-stripping provisions narrowly, and despite the “question of law” exemption contained in the REAL ID Act, large gaps in judicial review remain. Probably the most significant are the bar on review of discretionary decisions for abuse of discretion and, possibly, review of the sufficiency of the evidence to support findings of fact in cases involving statutory eligibility for discretionary relief. These and other gaps might well require the Supreme Court to decide both the intended scope of the congressional restrictions and the extent to which the Constitution permits Congress to preclude judicial review in any or all of these cases. The Supreme Court in *INS v. St. Cyr* concluded that the applicability of the constitutional provision prohibiting the suspension of habeas corpus<sup>98</sup> was a serious enough question to warrant a saving interpretation of the statute;<sup>99</sup> additional constitutional challenges might invoke either due process or separation of powers concerns. Whether the Court will ultimately find a constitutional right to judicial review for the particular categories of cases for which Congress has now barred review remains to be seen.

#### D. The Whole is Worse than the Sum of its Parts

The discussion thus far illustrates the threats to the job security of immigration judges and BIA members, the two levels of adjudicators in removal cases. Federal Article III judges, of course, enjoy a very high degree of job security; assuming “good Behaviour,” they hold office for life and their salaries cannot be reduced.<sup>100</sup> The decisional independence that this job security brings is of no value, however, in those cases in which federal court jurisdiction has been foreclosed, as has happened in certain whole categories of deportation cases.

Even taken in isolation, the diminished decisional independence of the immigration judges, the diminished decisional independence of BIA members, and the stripped-down jurisdiction of the federal courts in removal cases are matters of concern. But the whole is worse than the sum of its parts. At the very least, the combination of destroying the decisional independence of the BIA members *and* eliminating judicial review for entire categories of cases means that, for those cases, there is no longer *any* point in the process at which the lawfulness of the immigration judge’s removal order will be reviewed by anyone with decisional independence. Moreover, if one takes seriously

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<sup>98</sup> See U.S. CONST. art. I, § 9, cl. 2.

<sup>99</sup> See 533 U.S. 289, 299–300 (2001) (“[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, we are obligated to construe the statute to avoid such problems.” (quotation and citation omitted)).

<sup>100</sup> U.S. CONST. art. III, § 1.



the additional threats to the decisional independence of the immigration judges themselves, then for the affected cases there is no actor with decisional independence at any stage of the process—not at the original hearing and not at any review stage. Given the potential magnitude of the interests at stake in deportation cases and the value of decisional independence, discussed in the next section, this gap is serious.

## II

### WHAT'S SO GREAT ABOUT DECISIONAL INDEPENDENCE?

Part I describes a striking, comprehensive assault on decisional independence in one particular regulatory context. This phenomenon is not new; in the United States, attacks on the independence of adjudicators—typically the courts—have been common since the early days of the republic. These attacks have occurred in response to *Marbury v. Madison*,<sup>101</sup> perceived partisanship by specific judges in the early nineteenth century, judicial rejection of states' rights claims during the Jackson Administration, the *Dred Scott* decision,<sup>102</sup> invalidations of New Deal legislation, invalidations of McCarthy Era laws, and a range of other unpopular judicial decisions. The attacks have taken various forms, ranging from intense public criticism to impeachment efforts, attempts to eliminate judgeships, legislation to strip the courts of jurisdiction over particular subject matter, and even a proposal to subject judges to recall elections. Most of these attempts failed, ultimately because the values of constitutionalism and judicial independence were felt to be worth preserving.<sup>103</sup>

Nor are threats to judicial independence confined to the United States. Several scholars have described the intimidation of judges in many Latin American countries through threats of consequences that range from dismissal and other professional sanctions to physical violence.<sup>104</sup> As recently as April 2005, the President of Ecuador dissolved his country's supreme court—only four months after his supporters in Congress had fired twenty-seven of the court's thirty-one members for backing a failed effort to impeach the President.<sup>105</sup> The European

<sup>101</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>102</sup> *Dred Scott v. Sandford*, 60 U.S. (1 How.) 393 (1856).

<sup>103</sup> See Cox, *supra* note 60, at 574–80.

<sup>104</sup> See, e.g., Maria Dakolias & Kim Thachuk, *Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform*, 18 WIS. INT'L L.J. 353, 362 (Chile), 376 n.134 (Bolivia), 388 (Peru and Argentina) (2000). See generally Keith S. Rosenn, *The Protection of Judicial Independence in Latin America*, 19 U. MIAMI INTER-AM. L. REV. 1 (1987) (discussing ineffective attempts to develop an independent judiciary in Latin America and suggesting that only a greater commitment to the rule of law will produce judicial independence).

<sup>105</sup> See Juan Forero, *Ecuador's President Vows to Ride Out Crisis Over Judges*, N.Y. TIMES, Apr. 18, 2005, at A12.

Court of Human Rights held that Turkey's military tribunals violated the European Convention on Human Rights, in part because the judges served only four-year renewable terms.<sup>106</sup> The dangers faced by the members of Australia's Refugee Review Tribunal were described above.<sup>107</sup>

This Part asserts two normative propositions: First, in *all* forms of adjudication, the law should insist on decisional independence at least at some point in the process, unless the particular case presents a compelling need for political accountability or the interests at stake are trivial. This normative claim applies regardless of whether the adjudicators are interpreting the law, finding facts, or exercising statutory discretion. Second, fidelity to the rule of law is the principle that unites the most convincing theories of decisional independence in the adjudicative setting.

Before I can make those arguments, some definitions and explanations are necessary. The first subpart below considers the meaning of decisional independence. The second sets out some qualifications and limitations to the thesis that the rule of law demands decisional independence in adjudication.

#### A. What Is Decisional Independence?

Initially, it is common to distinguish *decisional* independence from *institutional* and other components of judicial independence.<sup>108</sup> The former focuses on the adjudicators' insulation from attempts by the legislative or executive branches or the general public to influence the outcomes of individual cases.<sup>109</sup> Such attempts might include explicit or subtle threats to the adjudicators' job security or compensation. Institutional independence, in contrast, focuses on the independence of the entire judiciary from the political branches.<sup>110</sup> Examples of actions that raise issues of institutional independence include court-stripping legislation and congressional decisions to appropriate money for the courts. Lying somewhere between decisional independence and institutional independence are issues that relate to

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<sup>106</sup> See *Incal v. Turkey*, 1998-IV Eur. Ct. H.R. 1547, 1573 (Grand Chamber) (finding that the Turkish İzmir National Security Court violated Article 6 of the European Convention on Human Rights because the court was neither independent nor impartial).

<sup>107</sup> See *supra* notes 47-59 and accompanying text.

<sup>108</sup> See, e.g., Am. Bar Ass'n, *Overview*, in AN INDEPENDENT JUDICIARY: REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE (1997), available at [hereinafter ABA REPORT] (discussing decisional and institutional judicial independence and making recommendations to protect and improve independence in U.S. courts).

<sup>109</sup> See *The History and Evolution of Judicial Independence*, in ABA REPORT, *supra* note 108.

<sup>110</sup> See *id.*

the independence of a particular court or tribunal, as distinguished from both the entire judiciary and individual decisions.<sup>111</sup>

While this Article is concerned solely with decisional independence, it cannot always be separated neatly from institutional independence. Court-stripping statutes, which are usually assumed to implicate institutional independence, remove from the process the federal Article III judges, who have decisional independence. Conversely, as is the case with deportation,<sup>112</sup> if other measures threaten the decisional independence of the relevant administrative tribunals, the court-stripping legislation may leave the whole process bereft of decisional independence for those affected categories of cases.

Moreover, even the rationales for the two types of judicial independence can be intertwined. As discussed below, decisional independence is usually associated with concerns about procedural fairness. Institutional independence, in contrast, is usually associated with concerns about separation of powers. In reality, both decisional and institutional independence implicate both kinds of concerns. For example, when an executive branch official like the Attorney General pressures a subordinate adjudicator to reach a particular result, the direct threat is to decisional independence, with all its implications for fair process. In addition, however, the same people who perform the law-enforcement functions—arresting, detaining, and prosecuting—also influence the outcome of the adjudication, thereby neutralizing the checks and balances that separation-of-powers principles are meant to protect. Conversely, if a congressional committee expresses displeasure with the liberal tone of judicial or administrative tribunal decisions and subtly threatens to narrow the court's jurisdiction or reduce its resources, we are prone to perceive a threat to institutional independence and worry about separation of powers. If judges succumb to that threat, however, there are additional concerns for the fairness of the process.

Within the realm of what some *might* think of as decisional independence are at least three different kinds of constraints that executive or legislative actors can impose on the authority of an adjudicator. The first type entails the substitution of a general legislative rule for

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<sup>111</sup> See Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 573 n.196 (2003) (“[J]udicial independence embraces many different ideas, including decisional independence; institutional independence; the independence of the court as [a] whole and the independence of individual judges; and psychological and professional orientations to independence.”). See generally JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH (Stephen B. Burbank & Barry Friedman eds., 2002) (providing interdisciplinary essays on the issue of judicial independence from the perspectives of economics, history, law, and political science).

<sup>112</sup> See *supra* Part I.

individualized adjudication or judgment. Congress might accomplish this by passing a statute, or an executive official might invoke rulemaking or other legislative powers conferred by Congress. For example, the discretionary decision of an immigration judge to order a person released on bond pending disposition of a deportation case is appealable to the BIA. Until shortly after the terrorist attacks of September 11, 2001, upon request of the former INS the BIA had the discretion whether to stay the release order until it had reached a decision in the case.<sup>113</sup> In exercising that discretion, the BIA normally considered whether the applicant was likely to abscond or to threaten public safety.<sup>114</sup> Under a regulation issued by the Attorney General in late 2001, a stay of release will now occur automatically when the INS (or successor agency) appeals the release order to the BIA.<sup>115</sup> Individualized BIA discretion has been replaced by a general rule requiring detention until the BIA reaches a final decision in the case.<sup>116</sup>

Determining the legality of substituting a general norm for individualized fact-finding, interpretation, or discretion is ordinarily a matter of interpreting the relevant statute or regulation. From a policy standpoint, the debate is the familiar one of fixed rules versus individualized judgments. Insofar as Congress or the executive is transferring the decision-making power from an adjudicative body to a political body, any independence issues seem most easily classifiable as institutional rather than decisional. Whatever the label, they are beyond the scope of this Article.

The second type of constraint on judicial independence is a decision by an executive or administrative official to intervene in a pending case. The official might instruct the adjudicator to reach a particular result,<sup>117</sup> or an agency head might invoke his or her power to review and reverse the adjudicator's decision directly.<sup>118</sup> If the legality of the intervention is questioned, any legal issues would normally be a matter of interpreting the legal sources upon which the actor based his or her power to intervene. Thus, even though the intervention affects the decision in the individual case, the policy questions are akin to those that arise with respect to institutional independence. Consequently, they too are beyond the scope of this Article.

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<sup>113</sup> See LEGOMSKY, *supra* note 4, at 845.

<sup>114</sup> See *id.*

<sup>115</sup> See *id.*

<sup>116</sup> See *id.*

<sup>117</sup> See the example of the Chief Immigration Judge directing an immigration judge to reach a particular result in a deportation case, *supra* note 13 and accompanying text.

<sup>118</sup> See, e.g., 8 C.F.R. § 1003.1(h) (2005) (authorizing the Attorney General to review BIA decisions).

The third type of constraint on judicial independence, the threat of personal consequences for the adjudicator, is explored in this Article. Under this constraint, the case is presumed to be one that the law clearly allows the adjudicator to decide, and there is no attempt by a superior to directly dictate the outcome of that case, but there are general threats, real or perceived, that decisions which displease an executive official could pose professional risks for the adjudicator. Those risks might include dismissal, reassignment to a less desirable position, nonrenewal of the appointment at the expiration of a fixed term, or loss of compensation.<sup>119</sup> When this Article refers to impediments to decisional independence, the reference should be understood as relating to this third type of constraint.

Because threats to decisional independence can take any of these forms, decisional independence becomes a question of degree. In the United States, federal Article III judges possess the highest degree of decisional independence. They may be impeached,<sup>120</sup> but the Constitution guarantees their life tenure “during good Behaviour” and their compensation may not be reduced while they are in office.<sup>121</sup> Federal Article I judges enjoy slightly less, but still considerable, job security.<sup>122</sup> Also enjoying substantial job security, though again not as much as Article III judges, are the administrative law judges (ALJs) who adjudicate cases for various specialized federal government agencies.<sup>123</sup> As demonstrated in Part I of this Article, immigration judges and members of the BIA have less job security than ALJs. Judges on most state courts are perhaps the most vulnerable of all; many are initially elected rather than appointed, and in the vast majority of

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<sup>119</sup> See *supra* Part I.A, B.

<sup>120</sup> See U.S. CONST. art. II, § 4.

<sup>121</sup> *Id.* art. III, § 1.

<sup>122</sup> For example, judges of the Article I bankruptcy courts are appointed for fourteen-year terms by the courts of appeals for the circuits in which they sit. See 28 U.S.C. § 152(a)(1) (2000). There is no statutory bar to reappointment. The Judicial Council may remove a bankruptcy judge, after a hearing, but only for “incompetence, misconduct, neglect of duty, or physical or mental disability.” *Id.* § 152(e). By statute, their salaries are ninety-two percent of those of district judges. *Id.* § 153(a).

Similarly, judges of the Article I United States Tax Court are appointed by the President for fifteen-year terms. 26 U.S.C. § 7443(b), (e) (2000). There is no statutory bar to reappointment. The President may remove a Tax Court judge, after a public hearing, “for inefficiency, neglect of duty, or malfeasance in office, but for no other cause.” *Id.* § 7443(f). By statute, their salaries are the same as those of district judges. *Id.* § 7443(c)(1).

<sup>123</sup> For a good summary of the statutory provisions that guarantee the ALJs a high level of decisional independence, see Jeffrey Scott Wolfe, *Are You Willing to Make the Commitment in Writing? The APA, ALJs, and SSA*, 55 OKLA. L. REV. 203, 226 (2002) (observing that ALJs are exempt from performance evaluations, can be removed only for cause and only by the Office of Personnel Management (OPM), cannot be assigned non-ALJ duties, and receive salaries and periodic step increases without the need for agency approval).

states the judges must stand for periodic reelection.<sup>124</sup> Both the sources of the donations to judicial campaigns and the reelection campaigns themselves have raised serious concerns about the actual and the perceived degree of decisional independence.<sup>125</sup>

## B. The Limits to the Claim

At the risk of qualifying my basic thesis into insignificance, several limitations on the claim that the rule of law requires decisional independence in adjudication deserve emphasis. First, the flip side of decisional independence, of course, is political accountability, a point examined more fully below.<sup>126</sup> Generally, the more a governmental function resembles legislation or other policymaking, the more a representative democracy values political accountability over decisional independence. For that reason, it is only in the adjudication context—not in the legislative or implementation contexts—that I claim a normative link between decisional independence and the rule of law.<sup>127</sup> I acknowledge that the traditional functions of lawmaking, implementation, and adjudication are not the exclusive provinces of Congress, the executive branch, and the judiciary, respectively; in practice each branch has multiple functions.<sup>128</sup> I also acknowledge that, for this purpose, whether a given function constitutes “adjudication” in the first place can give rise to line-drawing problems. In the present context, the Attorney General might assert that the immigration judge and BIA functions are part of the Department’s policymaking process, rather than purely “adjudicatory.”

Nevertheless, the decisions that immigration judges and BIA members make—and certainly those that reviewing courts make—constitute adjudication under *any* reasonable definition one might de-

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<sup>124</sup> See *State Judicial Independence: A Review of Recent Issues and Arguments*, in ABA REPORT, *supra* note 108.

<sup>125</sup> See *id.*

<sup>126</sup> See *infra* notes 133–36 and accompanying text.

<sup>127</sup> Some of the arguments for decisional independence examined in this Article apply to legislative and administrative functions as well. In a constitutional democracy, members of Congress should respect constitutional limits when they legislate, and executive branch officials should respect constitutional and statutory limits when they issue regulations or otherwise administer statutory schemes. When issues arise as to how best to interpret those legal constraints, the decision makers should base their interpretations on their honest readings of the relevant sources, not on which outcomes they believe will please or displease their superiors. The benefits of decisional independence, therefore, cannot be dismissed even in the legislative and administrative contexts. In those latter contexts, however, the benefits of independence must be balanced against the political accountability that democratic values demand (and, in the administrative agency context, against the need for internal policy coherence).

<sup>128</sup> A single executive department, for example, will commonly have enforcement, rulemaking, and adjudication responsibilities; Congress enacts legislation but also impeaches; courts decide cases but also “make law” and issue rules of court.

wise. Each case involves a single dispute between two parties: an individual and a government agency. Each case involves the interpretation or application of law, findings of fact based on the evidence in the record, and/or the exercise of a specific statutory discretion. At every stage of the process, each of these decision makers is bound by specific rules, and procedures are carefully laid out in the statute and regulations. It is hard to think of *any* definition of adjudication that this process would not satisfy.

Second, the claim here is solely one of policy. The extent to which the U.S. Constitution requires review by an Article III court, or at least some alternative guarantee of decisional independence, is beyond the scope of this Article.<sup>129</sup>

Third, the rule-of-law principle is not being asserted here as an argument for *judicial* review. The claim is merely that the rule-of-law principle demands an opportunity for decision, at least at some point in the process, by *some* body that enjoys decisional independence. Whether that body should be an administrative tribunal or a court raises other competing values summarized in Part III below.<sup>130</sup>

Fourth, decisional independence is not the only benefit of judicial or other review. Appellate and other review processes serve both a retrospective “error-correcting” function with respect to the specific dispute and a prospective “guidance” function for future use.<sup>131</sup> Decisional independence might well facilitate both functions, but so too does the opportunity for a second look at a case in light of the reasoning of the first decision maker. If the first decision maker had specialized expertise and the second is able to bring a generalist perspective to the process, the combination might produce insights not available to a single adjudicator. Moreover, the mere prospect of review might encourage the original decision maker to exercise greater care. Decisional independence, then, is only one of the *raisons d’être* of appellate review.

Fifth, decisional independence is not claimed to be either a necessary or a sufficient condition for a fair outcome in a given case. A genuinely independent adjudicator might be biased, incompetent, overworked, misled by poor lawyering, or just plain mistaken. Moreo-

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<sup>129</sup> Much of the case law on that subject concerns the debate over the use of Article I courts. See, e.g., *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60–61, 76 (1982) (finding that Congress does not have the power to remove the essential attributes of judicial power from Article III courts and give those attributes to Article I courts); *Crowell v. Benson*, 285 U.S. 22, 48–49 (1932) (holding that a congressionally created workman’s compensation system for longshoremen does not violate the grant of judicial power over admiralty in Article III).

<sup>130</sup> See *infra* Part III.

<sup>131</sup> See, e.g., PAUL D. CARRINGTON ET AL., *JUSTICE ON APPEAL* 2–3 (1976); David P. Leonard, *The Correctness Function of Appellate Decision-Making: Judicial Obligation in an Era of Fragmentation*, 17 *LOY. L.A. L. REV.* 299, 299 (1984).

ver, even an independent adjudicator can be influenced by public opinion; the judge, being human, is as subject as anyone to the environment and the news coverage that shape public opinion in the first place—particularly during wartime or at other times of national anxiety.<sup>132</sup> Public opinion itself might also influence the views of an independent adjudicator on the merits of the issue. Additionally, even an adjudicator who personally disagrees with the prevailing public sentiment might be too timid or think it inappropriate to defy it. In any of these cases, independence does not guarantee a fair outcome.

Conversely, an adjudicator who lacks independence will nonetheless reach fair outcomes in a certain number of cases. The adjudicator might decide that any outside pressure is minimal or nonexistent in a given case and simply ignore it. Alternatively, an adjudicator might have such high standards of integrity, courage, or pride that he or she will truly disregard pressure from above. Further, even if a decision maker succumbs to such pressure and decides in favor of the government when he or she actually believes the law dictates a contrary outcome, the decision maker's belief might be wrong; in that event, the two blemishes (one of interpretation and one of integrity) cancel each other out, resulting in a correct outcome.

Finally, although this Article argues for it strenuously, it must be acknowledged that decisional independence has costs. The costs stem from the fact that decisional independence boils down to the absence of political accountability. Since many adjudicative bodies—including the BIA<sup>133</sup> and, of course, the courts—publish precedential decisions, there *is* the issue of lawmaking by unelected officials who are accountable to neither the public at large nor other public officials. When decisions are the kind that are typically thought of as “legislative” in the sense that they create prospective norms governing the general population, democratic principles are usually paramount. Those decisions should be made by elected representatives or at least by officials who are otherwise accountable through the democratic political process.

Yet we routinely allow courts to interpret statutes and even counter-majoritarian constitutional provisions in ways that invariably generate new, prospective, general legal rules. Furthermore, our common law system permits courts to formulate law when statutes and other positive law leave gaps that the facts of particular cases require the

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<sup>132</sup> See generally Geoffrey R. Stone, *Free Speech in World War II: “When Are You Going to Indict the Seditious?”*, 2 INT’L J. CONST. L. 334 (2004) (discussing free speech cases during World War II); Vicki C. Jackson, *Proconstitutional Behavior, Political Actors, and Independent Courts: A Comment on Geoffrey Stone’s Paper*, 2 INT’L J. CONST. L. 368, 369 (2004) (“[J]udges and their staff live in the same universe of fear as others in the country at a time of perceived national crisis.”).

<sup>133</sup> See 8 C.F.R. § 1003.1(d)(1) (2005).



courts to fill. We allow these actions for all the familiar reasons: the desire to prevent the majority from tyrannizing the minority, the recognition that democracy does not require pure majoritarianism, the value of stare decisis, and so forth.

There is the related issue of judicial activism. Charges of judicial lawmaking and usurpation of legislative powers are common.<sup>134</sup> In anxious times, aggressive judicial recognition of human rights that conflict with the government's asserted national security objectives might be either obeyed by the executive, in which case security could be weakened, or disobeyed, in which case the courts could be weakened.<sup>135</sup>

Vigorous judicial decision making can also ignite backlash. It is easy to dismiss backlash as either empirically unlikely or judicially irrelevant. I cannot speak to the former except to suggest that the likelihood and magnitude of any backlash presumably would depend on many factors, including the specific issue and its visibility, the percentage of courts who reach particular outcomes, the fluctuations in public opinion, and the political proclivities of the elected officials. As to the latter, whether judicial consideration of potential backlash is appropriate or not, history suggests judges are in fact influenced by public opinion for the reasons considered above.<sup>136</sup>

In the administrative context, a separate but related cost of decisional independence is policy coherence. Allowing an agency head to control the decision making of administrative tribunals within the agency permits him or her to synthesize all of the relevant policymaking decisions—those made through rulemaking and those made through administrative adjudication—into a single, coherent framework. Whether rulemaking, with all its procedural complications and delays, could adequately replace agency-head review of adjudication remains an open question. At any rate, the benefits of policy coherence are at most an argument for retaining agency-head review of adjudicative decisions, not an argument for linking the adjudicators' job security to their abilities to anticipate the agency head's preferred outcomes and their willingness to tailor their legal reasoning to those outcomes. In the particular context of deportation, the policy-coherence concern commands less weight now that the bulk of the Attorney General's immigration policymaking authority has been ceded to the

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<sup>134</sup> See, e.g., Keenan D. Kmiec, Comment, *The Origin and Current Meanings of "Judicial Activism,"* 92 CAL. L. REV. 1441 (2004).

<sup>135</sup> See, e.g., Jackson, *supra* note 132, at 373.

<sup>136</sup> See *supra* note 132 and accompanying text.

Department of Homeland Security,<sup>137</sup> while the Attorney General remains in charge of the immigration judges and the BIA.<sup>138</sup>

### C. Ten Theories of Decisional Independence

The story of American-style judicial independence begins in fourteenth-century England.<sup>139</sup> It was then that English judges began to experience the wrath of both monarchs and parliaments.<sup>140</sup> In 1387, six judges advised King Richard II that a proposed parliamentary commission to limit royal power would be unlawful.<sup>141</sup> They were promptly impeached, convicted, and sentenced to death (though ultimately only one was hanged; the others were banished to Ireland).<sup>142</sup> Lord Justice Brooke writes that “after this unhappy episode there was a very long period of judicial calm” in which judges carefully avoided any possible intrusions into the political realm.<sup>143</sup> Two centuries later, soon after her accession to the throne, Queen Mary began to exercise the long-standing (but until then rarely exercised) royal power to dismiss judges.<sup>144</sup> As noted earlier,<sup>145</sup> King James I in 1616 dismissed Sir Edward Coke for ruling that the King is subject to the law; the King’s Chancellor then warned Coke’s successor that the dismissal was “‘a lesson to be learned of all, and to be remembered and feared of all that sit in judicial places.’”<sup>146</sup> Throughout the remainder of the seventeenth century additional dismissals followed, most over issues that arose out of the continuing power struggles between monarchs and parliaments.<sup>147</sup>

In 1701, unwilling to accept any longer the continuing vulnerability of English judges to the whims of monarchs, Parliament, in the Act of Settlement, guaranteed judges life tenure.<sup>148</sup> Although the statute undoubtedly reflected Parliament’s desire that judges not become tools of the monarch, the separation-of-powers concerns would soon

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<sup>137</sup> See Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 442, 451, 471(a), 116 Stat. 2135, 2193–97, 2205 (codified as amended at 6 U.S.C. §§ 252, 271, 291).

<sup>138</sup> *Id.* §§ 1101, 1102(2), 116 Stat. at 2273–74 (codified as amended at 6 U.S.C. § 521, 8 U.S.C. § 1103).

<sup>139</sup> For the relevant English developments, I am indebted to the Right Hon. Lord Justice Brooke, who has carefully catalogued the critical events in *Judicial Independence—Its History in England and Wales*, in FRAGILE BASTION: JUDICIAL INDEPENDENCE IN THE NINETIES AND BEYOND (1997).

<sup>140</sup> *See id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *See id.*

<sup>145</sup> *See supra* note 60 and accompanying text.

<sup>146</sup> Brooke, *supra* note 139 (citing 5 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 441 (3d ed. reprint 1966)).

<sup>147</sup> *See id.*

<sup>148</sup> *See id.*

emphasize the links between judicial independence and individual rights. In 1748, Montesquieu wrote: "Nor is there liberty if the power of judging is not separate from legislative power and from executive power."<sup>149</sup> Blackstone later added that, for this liberty to be protected, the judges must not be "removable at pleasure by the Crown."<sup>150</sup>

Meanwhile, unlike their counterparts at home, British *colonial* judges continued to serve at the pleasure of the Crown.<sup>151</sup> This angered the American revolutionaries, but for a variety of reasons.<sup>152</sup> While some believed that the problem lay in subjecting judges to the whims of legislatures and executive officials, others felt that the problem was subjecting them to *British*, rather than *American*, political constraints.<sup>153</sup> The constitutional debate, therefore, centered on whether judges should be independent or whether, instead, they should be accountable to the American people and/or their representatives in state legislatures.<sup>154</sup> The latter possibility implicated not only the role of judges, but also sharply contested views on federalism.<sup>155</sup>

At the constitutional convention, these conflicting goals required a number of compromises. Federal judges were guaranteed life tenure and protections against salary reductions, but state judges were not (and it thus became common for state constitutions to require judges to stand for periodic reelection).<sup>156</sup> Further, even though federal judges enjoyed life tenure "during good Behaviour,"<sup>157</sup> Congress was given the power to impeach judges, as well as the power to decide which inferior courts to establish.<sup>158</sup>

Consistent, then, with both the English history recounted above and the debate in colonial America, the *Federalist Papers* identified two complementary theories of judicial independence.<sup>159</sup> One theory, reflecting traditional separation-of-powers concerns, was that judges would be unable to provide a check on Congress and the executive unless the judges enjoyed some degree of independence.<sup>160</sup> The other theory was that judges needed to be independent in order to

<sup>149</sup> *Id.* (quoting SPIRIT OF LAWS (1748)).

<sup>150</sup> *Id.* (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND (Garland Publ'g Co. 1978) (1783)).

<sup>151</sup> See Charles Gardner Geyh, *The Origins and History of Judicial Independence*, in ABA REPORT, *supra* note 108, app. A.

<sup>152</sup> See *id.*

<sup>153</sup> See *id.*

<sup>154</sup> See *id.*

<sup>155</sup> See *id.*

<sup>156</sup> See *id.*

<sup>157</sup> U.S. CONST. art. III, § 1.

<sup>158</sup> See Geyh, *supra* note 151; U.S. CONST. art. 1, § 2, cl. 5; art. I, § 3, cl. 6; art. III, § 1.

<sup>159</sup> See Geyh, *supra* note 151 (citing THE FEDERALIST NOS. 78, 79 (Alexander Hamilton)).

<sup>160</sup> See *id.*

prevent the other branches from violating individual rights.<sup>161</sup> These twin historical objectives—preserving separation of powers and safeguarding individual rights—are the nucleus for most of the reasons for ensuring the decisional independence of modern-day adjudicators. What, precisely, are those reasons?

Probably the most obvious, and certainly one of the most frequently asserted, theories of decisional independence is procedural fairness.<sup>162</sup> The concern is about the dispensation of justice, and it applies whether or not the government is a party to the case. In the words of one judge, “[T]he independence of the judiciary from political pressures is an essential aspect of justice at any level.”<sup>163</sup> Simply put, people who perform adjudicative functions should reach their decisions honestly. We want them to base their findings of fact solely upon the evidence before them, and we want them to base their legal conclusions solely on their honest interpretations of all the relevant sources of law—not on the basis of which outcome they think the person (or public) who will be reappointing them might prefer. The problem exists not only when adjudicators’ job security is in the hands of a government actor, but also when job security is in the hands of the electorate and potential campaign donors, as is the case with most state court judges.<sup>164</sup> How can a party possibly hope for a fair shake if the adjudicator is thinking, “I could lose my job if I rule in favor of that party”?

A second, related potential consequence of threats to decisional independence is what might be termed “defensive judging.” The adjudicator who has to worry about staying popular might have a strong incentive to play it safe. Safety, in turn, might entail avoiding controversial rulings that would attract public attention or otherwise displease one’s superiors.

Third, decisional independence is conceived of as a way to protect unpopular individuals, minorities, and political viewpoints.<sup>165</sup> In any of those circumstances, reliance on the majoritarian political process is likely to be misplaced. To protect these unpopular interests, judges require the freedom to apply the law objectively in the face of a hostile public.

Fourth, and more generally, in the United States certain individual liberty and property rights have been thought important enough

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<sup>161</sup> See Cox, *supra* note 60, at 567–74; Geyh, *supra* note 151.

<sup>162</sup> See, e.g., Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455 (1986).

<sup>163</sup> J. Clifford Wallace, *An Essay on Independence of the Judiciary: Independence From What and Why*, 58 N.Y.U. ANN. SURV. AM. L. 241, 242 (2001).

<sup>164</sup> See, e.g., Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 316 (1999).

<sup>165</sup> See, e.g., *id.* at 319; Cox, *supra* note 60, at 572–73; Jackson, *supra* note 132, at 370–76.

to protect even from the majoritarian political process. Those rights have been entrenched in a written constitution that courts have exercised the power to interpret. For the courts to perform the interpretation function in a way that will adequately safeguard those rights against transient majoritarian preferences, a judge has to be confident that an unpopular decision will not have adverse personal consequences.<sup>166</sup>

Much of the same could be said even for subconstitutional questions. Rights created or preserved by statutes, for example, might well require similar judicial protection from a hostile transient majority or even a powerful interest group, whether the threat is direct (as for a state court judge facing reelection) or channeled through a legislative or executive branch conduit.<sup>167</sup> Judges who depend on the will of the public or their representatives seem poorly situated to that task. In the words of one judge who is usually associated with judicial restraint, to protect fundamental rights judges have to be free to rule against government "without fear of reprisal."<sup>168</sup>

While implicit in each of the preceding theories, separation of powers can be viewed as a fifth, discrete reason to ensure decisional independence in adjudication. Even when fundamental rights are not at stake and the particular litigants are not unpopular, the historical sketch provided above explains how the judiciary came to be seen as an important check on the powers exerted by the political branches of government.<sup>169</sup>

A sixth possible interest served by decisional independence, one that I have not seen considered in the existing literature, is a more generic equality interest. To the extent possible, individuals who are similarly situated should be similarly treated. As it is, the indeterminacy of the law and the inherent differences among human adjudicators already mean that to some extent the outcome of any case will unavoidably depend on which adjudicator a party happens to land. One's first reaction might be that, if anything, decisional independence is a centrifugal force because it permits adjudicators to go off on their own. Thus, one might assume that some form of political accountability would be a centripetal, unifying force because the various adjudicators would be encouraged to gravitate toward the particular outcome preferred by their political superiors.

There is something to be said for that reasoning, but the effect of decisional independence might be precisely the opposite. If adjudica-

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<sup>166</sup> See, e.g., Cox, *supra* note 60, at 573.

<sup>167</sup> See, e.g., *id.* at 574 (stressing the importance of judicial independence in the "day-to-day administration of justice").

<sup>168</sup> Wallace, *supra* note 163, at 242.

<sup>169</sup> See *supra* notes 140–61 and accompanying text.

tors know that their decisions will affect their job security, they are likely to be influenced, but to varying degrees. How much adjudicators are influenced will depend, for example, on their particular family and other personal circumstances; how firm-specific their credentials are and the availability of other job options; their own levels of integrity, courage, and personal and professional pride; their own perceptions of how much their superiors will actually care about the particular issues before them; and what preferences they predict their superiors will have if they do care. Consequently, political accountability might actually add another source of variance, and decisional independence might actually diminish, rather than aggravate, the degree of variance.<sup>170</sup>

The decisional independence theories discussed thus far, I submit, have one thing in common: Each of them is a means of ensuring fidelity to the rule of law. The first of those theories—that decisional independence is an essential ingredient of fair procedure—presents the clearest case. In a different context, Professors Shapiro and Levy have asserted a link between the Due Process Clause and the rule-of-law principle.<sup>171</sup> In their words, “the constitutional *function* of the Due Process Clause is to provide an essential safeguard for the rule of law.”<sup>172</sup>

Similarly, I suggest that the procedural-fairness rationale that lies at the heart of decisional independence is a specific application of the principle that government actors are bound by the rule of law. I mean this in two different senses. In one sense, the requirement of procedural fairness is itself an element of law to which the rule-of-law principle demands adherence (at least when procedural due process or some more specific, applicable subconstitutional equivalent, such as a statutorily prescribed procedure, is required). In another sense, even when no specific rule of constitutional or other law requires procedural fairness, fair procedure is the only way to ensure governmental compliance with the applicable *substantive* rules. Therefore, to the extent that the absence of decisional independence impairs the fairness of the procedure, it prevents outcomes that comport with the relevant substantive legal principles.

We do not always adhere to these principles today, as Part I and the additional example of state court judges illustrate, but we should. The link between the fairness rationale for decisional independence

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<sup>170</sup> I mean to make no empirical claim that the centripetal effects of decisional independence in fact exceed the centrifugal effects. I simply raise the issue.

<sup>171</sup> See Sidney A. Shapiro & Richard E. Levy, *Government Benefits and the Rule of Law: Toward a Standards-Based Theory of Due Process*, 57 ADMIN. L. REV. 107, 111–13 (2005) (arguing that the rule-of-law principle should require courts to expand the range of property interests protected by the due process clause).

<sup>172</sup> *Id.* at 111 (emphasis added).

and the rule-of-law principle logically applies to all components of adjudication—finding facts, interpreting law, and even exercising discretion.

The link seems clearest for questions of law. If we are truly “a government of laws, and not of men,”<sup>173</sup> and if the people’s representatives in the legislature have spoken as to those laws, then procedural artifacts that encourage adjudicators to interpret the law in ways that differ from those decreed by the lawmakers are inherently at war with the rule of law. To the extent that the absence of decisional independence encourages that sort of decision making, it too is at odds with the goal of respecting the rule of law. To be sure, there will always be debate over both the objectives and the permissible methods of interpreting statutes and other legal instruments. Is it the meaning of the written instrument or the actual intentions of the legislators that a court should seek to discover? What relative weights should be placed on the text and other indicia of legislative purpose and intent? These and other questions remain the subject of legitimate debate, and I do not intend to weigh in on that subject here. It seems sufficient to observe that there is *no* respectable statutory interpretation theory under which a judge should interpret a statute or other source of law by asking the question, “Which interpretation is least likely to cost me my job?” If the rule of law means anything, it surely means at a minimum that those charged with interpreting the law must do so on the merits, not on the basis of factors so clearly extraneous to the adjudicative function.

What about questions of fact? Here too, the procedural unfairness that decisional independence is capable of generating can undermine the rule of law. Factfinders who bend their analyses of the evidence to reach results more pleasing to their superiors thereby reach outcomes that differ from the ones the legislature has prescribed for the true facts. The same problem occurs when appellate adjudicators, deciding whether the evidence below supports the findings of fact, distort their analyses to reach results that differ from their honestly held views of the merits. The rule of law is violated not just in the technical sense that an appellate court will characterize a finding of fact based on insufficient evidence as an error “of law” for purposes of review, but in the very real sense that the adjudicator has thereby produced a result precisely contrary to the substantive outcome prescribed by law on the true facts.

An adjudicator’s exercise of discretion presents at least two slight twists. Whatever philosophical debate there might be over whether a statute can have more than one true meaning, the very essence of

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<sup>173</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

discretion is the “power to make a choice between alternative courses of action.”<sup>174</sup> Thus, there will generally be no uniquely correct discretionary decision. But it does not follow that a discretionary decision is incapable of violating the rule of law, for there can certainly be legally incorrect exercises of a discretionary power.<sup>175</sup> In the United States, that is why courts may generally review the exercise of agency discretion (in formal adjudication) for abuse of discretion.<sup>176</sup> An adjudicator who bases a discretionary decision on improper factors (such as fear for the adjudicator’s career prospects) would obviously be abusing his or her discretion. To the extent that the absence of decisional independence creates that incentive, it contributes to violation of the rule of law.

The other complication with discretionary decisions is that they require the decision maker to make policy judgments, often including the weighing of competing interests. The policy element of that decision might be thought to make discretionary decisions more suitable for a body with political accountability than for a body with decisional independence. Still, the policymaking is tailored to the facts of the individual case; it is not a precedent-setting decision that will create binding general norms to be applied prospectively. Further, the adjudicator who arrives at his or her discretionary decision by considering factors that the legislature surely regarded as improper—such as the effect of the decision on his or her career—will be contravening binding legal norms. The violation of the rule of law seems just as clear in that context as it does in the contexts of fact-finding and legal interpretation.

The foregoing analysis assumed procedural fairness as the relevant decisional independence theory and demonstrated that that theory is ultimately rooted in the rule of law. Similar considerations apply to several of the other decisional independence theories set forth above. The theories based on defensive judging, protection of unpopular individuals, minorities, and viewpoints, and protection of fundamental legal rights each rest on the notion that an adjudicator who is encouraged to base a decision on legally irrelevant factors (especially irrelevant *and secret* factors) is unacceptably likely to reach an outcome that differs substantively from the one that the legislature prescribed on the true facts. For that reason, these theories too can be thought of as applications of the rule-of-law principle.

The separation-of-powers theory of decisional independence requires a somewhat different analysis, but ultimately it too implicates

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<sup>174</sup> J.M. EVANS, DE SMITH’S JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 278 (4th ed. 1980).

<sup>175</sup> See *id.* at 97.

<sup>176</sup> See 5 U.S.C. § 706(2)(A) (2000).



the rule of law. As the introductory discussion in this subpart explained, worries that an absence of decisional independence would breach separation of powers were engendered not only by concerns about good government, but also by concerns about the role of the courts in *checking* the unlawful excesses of the legislative and executive branches.

Finally, the generic equality theory demands that, to the extent reasonably possible, similarly situated litigants be treated equally. Again, the notion that our government is “one of laws, and not of men” suggests that each adjudicator should endeavor to find the outcome most likely intended by the statute or other applicable source of law—not the outcome that each adjudicator personally prefers for reasons that relate less to the law than to the adjudicator’s personal advantage.

I do not suggest that the rule of law explains everything. In addition to the six theories just discussed, there are at least four less central theories of decisional independence that do not rest on the rule of law. The first of these is that threats to decisional independence can create public perceptions of unfairness. Without decisional independence, the public has no way to be sure that the rule of law was respected. Ultimately, the argument runs, those perceptions must diminish public confidence in the legal system.<sup>177</sup>

Second, I submit that when adjudicative tribunals lack meaningful decisional independence, the danger is a result that might be termed “reverse social Darwinism.” Instead of survival of the fittest, we have survival of those who are *least* fit to serve. Given the empirical data discussed in Part I.B above, one might argue that the BIA has been the victim of reverse social Darwinism. Admittedly, it is easy for a tenured academic to be judgmental of others for succumbing to pressures, but it is a sad result when the adjudicators most likely to survive the purges are the weakest and the most spineless. Those with the most integrity and courage will invariably be the first ones culled from the herd.

Third, all else being equal, the same enhanced job security that enables adjudicators to reach results without fear of displeasing the public and the political branches presumably makes the positions more attractive to potential applicants. These recruitment advantages expand the pool of talented potential candidates.

Finally, by insulating the adjudicators from the wrath of public officials, one effectively frees the adjudicators from the views of the particular Administration. The effect is to maintain a continuity of interpretation from one Administration to the next.

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<sup>177</sup> See, e.g., Wallace, *supra* note 163, at 243.

#### D. The Prescription

If, as suggested here, decisional independence in adjudication is truly essential to the rule of law, then it is possible to argue that decisional independence should be built into every stage—hearing and review—of every adjudicative process. The assertion would be that it is not enough to ensure that decisional independence be present at merely *some* point in every adjudicative process. It is pointless, the argument would run, to have decisional independence at the initial hearing if politically accountable officials can then pressure a review body to reverse a decision for reasons unrelated to the legal merits of the case. At a minimum, the argument would continue, decisional independence is critical for whichever adjudicative body has the last word.

Critical perhaps, but not sufficient. If anything, one might argue, decisional independence is most important at the time of the original hearing or trial. For one thing, fewer than 100% of the initial decisions will ever reach the appellate stage, because of lack of awareness, lack of resources, or a variety of other reasons that might have nothing to do with the merits. Further, unless review is *de novo*, the appellate body will be constrained in its ability to repair errors even when a case is appealed.

If these arguments are accepted, the logical conclusion is that the law should insist on decisional independence at every adjudicative step of the process. That conclusion, however, would preclude one of the most common administrative regimes—allowing an agency head to review and reverse a determination of one of the agency's administrative tribunals. In the deportation context, for example, the Attorney General has the power to review decisions of the BIA.<sup>178</sup> As noted above, there is undoubtedly value in the internal policy coherence that an agency head can achieve by bringing precedent-setting decisions of the agency's adjudicative tribunals into conformity with agency regulations and other expressions of general agency policy.

To this, one who favors decisional independence at every stage might reply that that is what rulemaking is for. Either the agency head's interpretation is consistent with the governing statute and other applicable law (and within the agency's rulemaking authority) or it is not. If it is, then the proper response is to issue a rule, after proper notice and opportunity for comment, that supersedes the tribunal's decision at least prospectively. If it is not, then the agency head should not be allowed to reverse the tribunal's correct decision. Either way, the argument would run, there is no need to authorize a political official to reverse the decision of an adjudicative tribunal.

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<sup>178</sup> See 8 C.F.R. § 1003.1(h) (2005).

Thus, there is every reason to require decisional independence at every stage of an adjudicative process and no reason not to do so.

There are, however, some practical difficulties with that approach. Whether formal rulemaking should be the *only* way in which an agency head may supersede the legal conclusions of the agency's adjudicative tribunals is a contentious subject, largely because of the many cumbersome logistical constraints on rulemaking procedure and because of the delays that rulemaking can engender in complex regulatory settings. I remain sympathetic to the position that decisional independence should be required at every adjudicative phase of every adjudicative process, but this Article need not get enmeshed in the rulemaking versus adjudication debate. As Part I demonstrated, there are now categories of deportation cases in which decisional independence is present at *no* stage of the process—neither hearing nor review. For the moment, therefore, I am content to press the less radical proposition that, at a minimum, the rule of law demands the presence of decisional independence at *some* significant stage of the adjudication.

Even for that milder proposition, I concede two exceptions. At one end of the spectrum, perhaps there are instances of adjudication in which the substantive interests at stake are too trivial to warrant assigning the cases to adjudicators who enjoy decisional independence. Perhaps, for efficiency reasons, it is better to assign some cases to officials who already perform other tasks requiring political accountability than to create new, purely adjudicative positions. I have no specific examples in mind, but there might well exist adjudicative decisions in which the interests are trivial enough to make this brand of imperfect justice acceptable.

At the other end of the spectrum, the public interest at stake in a specific case might be so compelling that it is necessary to leave the ultimate decision in the hands of politically accountable officials, even though important individual interests of the sort that are usually left to independent adjudicators might also be at stake. National security and other public safety issues come readily to mind. But the exception should not be allowed to swallow the rule; for it to apply, the public interest should have to be compelling.

### III THE REMEDIES

As Part I demonstrated, the administrative phase of the deportation process is now bereft of any meaningful decisional independence, and for certain subcategories of deportation cases there is no longer even the possibility of judicial review. Part II explained why the absence of decisional independence is so problematic. If those

conclusions are accepted, the question then becomes one of remedy. My preference—clearly not politically realistic at this writing—would be a return to the pre-1996 status quo. One way or another, Congress should *both* restore decisional independence to the administrative process (at both the initial hearing and the administrative appeal stages) *and* repeal the 1996 and subsequent limitations that it has imposed on judicial review.

There is a multitude of possible remedies; their pros and cons could themselves be the subject of an entire article. In this Part, however, the goal is simply to offer a broad menu of possibilities and to identify some of the general policy tradeoffs that these options present.

#### A. The Executive-Branch Phase

There are several possible ways to restore decisional independence to the executive-branch phase of the deportation process. The simplest (though not necessarily the best) approach would be to retain the existing structure but provide reasonable guarantees of job security to the immigration judges and the members of the BIA. For example, these adjudicators could be made ALJs or be given the same protections as ALJs.<sup>179</sup> Only Congress could make those guarantees effective. It would have to pass legislation that codifies the existence and jurisdiction of the BIA and prohibits both the removal and the reassignment of immigration judges and BIA members, with narrow exceptions comparable to those applicable to ALJs. In theory, the Department of Justice could achieve the same result by issuing an administrative regulation, but any such regulation could be rescinded at any time by any present or future Attorney General, thus making the guarantee illusory at best. In view of the events of 2002 and 2003, the adjudicators can never again feel confident that they can safely rule against the Department, even though they might be temporarily protected by an agency regulation. Now that the genie is out of the bottle, only Congress can provide effective assurance to immigration judges and BIA members that they need not look nervously over their shoulders when deciding cases.

A second option would be to move the immigration judges and the BIA out of the Justice Department altogether and make them independent executive-branch tribunals (or components of a single tribunal). Under that arrangement, which some commentators have favored in the past,<sup>180</sup> the Attorney General would no longer appoint,

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<sup>179</sup> See *supra* note 123 and accompanying text.

<sup>180</sup> See, e.g., James J. Orlow, *Comments on "A Specialized Statutory Immigration Court,"* 18 SAN DIEGO L. REV. 47, 50 (1980) (proposing an "independent administrative tribunal with authority to manage its own affairs, both at trial and on appeal"); Leon Wildes, *The Need for*

and could no longer remove or reassign, immigration judges or BIA members; nor would the Attorney General control either the jurisdiction or the procedures of the immigration judges or the BIA. Writing twenty years ago, I thought such a significant change unnecessary; the culture of several decades had suggested that the jobs of immigration judges and BIA members were secure.<sup>181</sup> The events of 2002 and 2003 have altered my thinking. I now believe I was shortsighted to dismiss future threats to the independence of the administrative adjudicators and today would favor making them an independent entity within the executive branch.

A third option, only slightly different from the second, would be to replace the immigration judges and the BIA with a newly created, independent, and specialized Article I immigration court with both trial and appellate divisions. This arrangement has also been advocated by others.<sup>182</sup> Its decisions could be made reviewable by the federal courts of general jurisdiction. Alternatively, if an independent, specialized Article I immigration court were sufficiently staffed and structured to do its job with the same thoroughness and care that the Article III courts provide, it could replace the entire combination of administrative tribunals and courts.

## B. The Judicial-Review Phase

As described more fully in Part I.C, Congress in 1996 precluded court of appeals review of several classes of BIA deportation decisions, as well as several miscellaneous forms of district court review. In a series of cases, the Supreme Court construed these deportation-related court-stripping provisions as not eliminating statutory habeas corpus under 28 U.S.C. § 2241. Believing that a statute interpreted to preclude habeas review would raise serious constitutional questions,<sup>183</sup> the Court insisted that any congressional intent to repeal habeas corpus be more clearly expressed.<sup>184</sup>

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*a Specialized Immigration Court: A Practical Response*, 18 SAN DIEGO L. REV. 53, 62 (1980) (suggesting an “independent statutory agency, separate and apart from the Immigration Service”); NAIJ Proposal, *supra* note 11, at 14–15.

<sup>181</sup> See Legomsky, *Forum Choices*, *supra* note 62, at 1377–78.

<sup>182</sup> See, e.g., Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 NOTRE DAME LAW 644 (1981); Maurice A. Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 SAN DIEGO L. REV. 1 (1980). A bill to that effect has at least once been introduced in Congress. See 142 CONG. REC. E1806 (daily ed. Sept. 28, 1996) (statement of Rep. McCollum) (introducing the United States Immigration Court Act of 1996).

<sup>183</sup> As to those constitutional questions, see the classic article by Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

<sup>184</sup> See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 298–300 (2001). Several recent Supreme Court decisions have invoked statutory habeas corpus under 28 U.S.C. § 2241 to review BIA removal orders in the face of apparent congressional attempts to bar judicial review. See, e.g., *Demore v. Kim*, 538 U.S. 510, 516–17 (2003); *Zadydas v. Davis*, 533 U.S. 678, 687

The REAL ID Act of 2005 expressed that congressional intent in clear and unmistakable language, referring specifically to the bar on habeas review and specifically citing 28 U.S.C. § 2241 as one of the provisions it meant to render unavailable.<sup>185</sup> As Part I.C further explains, some questions remain as to precisely which decisions are subject to the new bar on habeas review. For whatever range of decisions the bar covers, however, there is no doubt that Congress has put the final nail in the coffin of statutory habeas corpus. Absent a constitutional rebellion—admittedly a real possibility in the light of the reasoning used in the Supreme Court cases cited above—only Congress, not the courts, may restore judicial review in those situations Congress is held to have addressed.

Ironically, despite the 1996 restrictions on judicial review, the courts of appeals have since experienced a spectacular rise in the number of petitions for review of removal orders.<sup>186</sup> There is a consensus that the lion's share of the increase is directly attributable to the BIA reforms implemented by Attorney General Ashcroft in 2002 and 2003,<sup>187</sup> though there is some debate over precisely why those reforms precipitated the surge in judicial review.<sup>188</sup> At a time when courts and the executive officers who must represent the government in those cases are desperately seeking ways to manage their staggering caseloads, it might seem insensitive to advocate repeal of provisions that bar judicial review of additional removal orders. The hope, of course, is that restoring the BIA to its pre-2002 position would eliminate whatever caseload increase was attributable to the 2002 changes in the first place. At any rate, the implications of decisional independence for the rule of law, combined with the magnitude of the individual interests potentially (perhaps usually) at stake in deportation cases, make a compelling case for following the long-standing tradition of judicial review of important agency action.

What form judicial review should take is certainly open to debate. Congress could simply guarantee the right to judicial review of all deportation decisions by petition for review in the courts of appeals—

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(2001); *St. Cyr*, 533 U.S. at 298–300; *see also* *Clark v. Martinez*, 593 U.S. \_\_\_\_, 125 S. Ct. 716 (2005) (agreeing *sub silentio*); *Jama v. Immigration & Customs Enforcement*, 543 U.S. \_\_\_\_, 125 S. Ct. 694 (2005) (agreeing *sub silentio*).

<sup>185</sup> *See* REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a), 119 Stat. 302, 310–11 (2005) (codified at 8 U.S.C.A. § 1252 (West 2005)).

<sup>186</sup> *See* DORSEY & WHITNEY LLP, *supra* note 33, at 40–41.

<sup>187</sup> *See, e.g., id.*

<sup>188</sup> *See, e.g.,* Stanley Mailman & Stephen Yale-Loehr, *Immigration Appeals Overwhelm Federal Courts*, N.Y.L.J., Dec. 27, 2004, at 3, *reprinted in* 10 BENDER'S IMMIGR. BULL. 45 (2005); John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review* (Cornell Law Sch. Working Papers Series, Paper No. 18, 2005), available at <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1019&context=cornell/clspops>.

i.e., the present structure but without all the exceptions. Alternatively, Congress could retain the present restrictions on petitions for review but repeal the REAL ID Act's bar on the use of habeas corpus, thus giving the district courts jurisdiction over those deportation cases that cannot go directly to the courts of appeals. Determining which of these two routes is more efficient would require, among other things, quantifying such factors as the likely percentage of district court denials of habeas corpus that would be appealed to the courts of appeals, the respective amounts of judge-time required for one-judge district court review and three-judge panel review by courts of appeals, and the potential for noncitizens to delay their removal by seeking two levels of judicial review in nonmeritorious cases.<sup>189</sup> A third possibility is for Congress to make no statutory changes, but for the courts to hold that habeas corpus is available as of right under the Suspension Clause of the Constitution<sup>190</sup> in cases where judicial review of deportation orders would otherwise be statutorily unavailable. As noted above, the constitutional question remains open.<sup>191</sup>

### C. Attributes of Executive and Judicial Branch Decision Makers

While I prefer to plug the holes in *both* the executive and judicial phases of the deportation process, the priority should be the executive phase. Even where the law permits appeal, only a fraction of the decisions rendered by the relevant executive-branch tribunals will ever be appealed to courts. That fraction might be high or low, and the perceived quality of the executive-branch decision will presumably affect the appeal rate, but under no circumstances will the appeal rate be 100%. Many incorrectly decided cases, therefore, might be left unreviewed. Moreover, even when the executive-branch decision is appealed, the combination of less than *de novo* review by the court on factual and discretionary decisions<sup>192</sup> and the customary judicial deference to specialized agency interpretations on legal questions<sup>193</sup> means that the outcomes in close cases will generally be affirmances of the executive-branch decisions. Finally, providing a full and fair procedure at the administrative level will minimize the need for expensive judicial involvement.

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<sup>189</sup> See generally David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1 (1975) (examining the variables that determine the most appropriate forum for judicial review of administrative action); Legomsky, *Forum Choices*, *supra* note 62 (laying out variables to consider when choosing forums for both administrative and judicial review of agency adjudication in the immigration context).

<sup>190</sup> See U.S. CONST. art. I, § 9, cl. 2.

<sup>191</sup> See *supra* notes 98–99 and accompanying text.

<sup>192</sup> 5 U.S.C. § 706(2) (A), (E) (2000).

<sup>193</sup> See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–45 (1984).

Ranking these various options requires policy trade-offs. Administrative tribunals perform many of the same functions as courts of general jurisdiction, and, like courts, can be either centralized or dispersed. Other attributes of administrative tribunals, however, do generally differ from those of courts in ways that generate both relative strengths and relative weaknesses. Moreover, as the brief preceding discussion illustrates, there are differences within the realm of administrative tribunals and differences within the realm of courts. Decisional independence is one of the variables, and it is the one with which this Article is chiefly concerned, but other variables are relevant as well.

One of the more obvious variables is the desired degree of specialization. Executive-branch tribunals and federal Article I courts always deal with specialized subject matter; federal Article III courts rarely do.<sup>194</sup> Elsewhere I have examined the advantages and disadvantages of specialized adjudicative bodies, the case attributes that determine whether the benefits of specialization outweigh the costs, and the forms that specialized tribunals might take.<sup>195</sup>

Specialization aside, executive-branch tribunals are usually assumed to be “faster, cheaper, and procedurally simpler and less formal than courts.”<sup>196</sup> Administrative tribunals typically do not have the same stature in the public mind as courts of general jurisdiction; there are implications, therefore, both for recruiting potential adjudicators and for commanding public confidence in the outcomes.<sup>197</sup> Moreover, the decisions of administrative tribunals are not generally as well publicized as those of the general courts.<sup>198</sup>

#### CONCLUSION

Recent years have witnessed a sustained assault by Congress and the executive branch on the concept of decisional independence in deportation adjudications. As this article has explained, various actions taken by Attorney General Ashcroft in 2002 and 2003 and still in place today have left both immigration judges and the members of the BIA without any meaningful decisional independence. Combined with Congress's enactment of court-stripping legislation in 1996 and

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<sup>194</sup> One prominent exception is the United States Court of Appeals for the Federal Circuit, which has appellate jurisdiction in intellectual property and certain other specialized areas. See 28 U.S.C. § 1295 (2000).

<sup>195</sup> See STEPHEN H. LEGOMSKY, *SPECIALIZED JUSTICE: COURTS, ADMINISTRATIVE TRIBUNALS, AND A CROSS-NATIONAL THEORY OF SPECIALIZATION* 7–42 (1990).

<sup>196</sup> STEPHEN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA* 283 (1987).

<sup>197</sup> See *id.* at 282–90 (discussing the differences between the courts of general jurisdiction and administrative tribunals in the United States and the United Kingdom).

<sup>198</sup> See *id.* at 283.



again in 2005, the result is that there now exist whole categories of deportation cases in which decisional independence is absent from the entire process—administrative and judicial phases, trial and appellate phases. The whole is even worse than the sum of its parts.

More generally, the law should at a minimum require decisional independence at *some* stage of every adjudication process, unless a particular case presents a compelling need for political accountability or the individual interests are trivial. After examining the history of judicial independence in England and early America, and after considering ten theories that either have been or could be asserted on behalf of decisional independence, I argue that the most convincing theories ultimately are united by the principle of the rule of law.

The final Part of the Article sketches the possible forms that solutions might take in the particular context of deportation. It recommends that the resulting structure embody meaningful decisional independence in the administrative phase of the deportation process, followed by the right of judicial review in all deportation cases. That Part also identifies the relevant subvariables and considers the general pros and cons of the different models.

