The Crisis in Immigration Adjudication

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**This is the second post in a symposium on the decisional independence of administrative adjudicators. For other posts in the series, click here.*

Immigration law is the poster child for the need for greater decisional independence in agency adjudication. Take, for example, the politicized hiring of immigration judges, executive branch interference in a pending case, attempts to decertify the immigration judges' union, or the imposition of case completion quotas that factor into performance reviews.

Congress exempted removal (deportation) adjudication from the Administrative Procedure Act (APA) shortly after its enactment and created a separate system of adjudication. Under this parallel system, immigration adjudicators are not Administrative Law Judges and proceedings are not subject to the formal adjudication requirements of the APA. Instead, immigration judges and members of the Board of Immigration Appeals are attorney employees of the Department of Justice. They serve under the thumb of the nation's chief law enforcement officer. Immigration judges have been subject to various directives to influence them to deport more and members of the Board of Immigration Appeals with reputations friendly to immigrants have been eliminated from the Board. Even if the attorney general left immigration adjudicators alone, the attorney general retains the right to certify any case to himself to change the outcome.

The story of immigration law and decisional independence is curious because immigration law has achieved the separation of functions denied to it when Congress disconnected removal adjudication from the Administrative Procedure Act. Immigration adjudication has evolved from featuring one job position responsible for investigating and adjudicating (although not in the same case). Now, the immigration "prosecutors" work for the Department of Homeland Security and the immigration adjudicators work for the

Department of Justice. This separation of functions, however, has not created decisional independence. The separation of prosecutorial and adjudicatory functions into two different agencies did not promote decisional independence within the Department of Justice.

Compounding the situation are other fundamental problems with the system besides a lack of decisional independence. The system is extremely inefficient. There are over 1.5 million cases in a backlog. The system also is not acceptable, in part because of the lack of decisional independence, but also due to the lack of government-funded counsel for immigrants, because the substantive law leaves little room to consider equities, and because the substantive law is not proportionate. The accuracy of the system also is in doubt, as revealed by extreme disparities in the decisional records of adjudicators and a history of procedural shortcuts.

Thus far, administrative law has not given immigration law the tools it needs to demand a removal system that incorporates administrative process design values. New tools are necessary. One proposed new tool is the creation of an Article I immigration court. The American Bar Association, the American Immigration Lawyers' Association, the Federal Bar Association, the National Association of Immigration Judges, and other groups support the creation of an Article I court. The proposals aim to inject decisional independence into the system by moving removal adjudication out of the Department of Justice and into an Article I court.

Representative Zoe Lofgren recently introduced The Real Courts, Rule of Law Act, which would create an Article I immigration court consisting of trial and appellate divisions. There would be 21 appellate judges who would be appointed by the President with the advice and consent of the Senate. The trial judges would be appointed by the appellate judges. Appellate judges and trial judges would serve 15-year terms. The bill would create criteria for the selection of the judges and would limit the removal of judges to incapacity, misconduct, neglect of duty, or having engaged in the practice of law. The House of Representatives recently held a hearing on the ideas represented in the bill.

Decisional independence is crucial for immigration adjudication, and the Article I model shows promise for delivering the decisional independence immigration adjudication needs. The Article I model would allow the executive branch and Congress to maintain adequate control over immigration policy.

Creating decisional independence is a key component, but more action is needed to fix all that ails removal adjudication. An Article I Court will apply immigration law as it currently exists. I have argued that the harshness, complexity, and opacity of substantive immigration law contributes to the volume of cases, thus thwarting the efficiency of the system. The lack of lawyers in the system is also a problem, both in terms of fairness and in terms of the esteem and reputation of the adjudication system. There are also de facto decisional independence issues in that immigration adjudicators do not have the resources they need

to perform their duties. Additionally, Congress has cut back on judicial review of the output of the agency system. Finally, diversions from adjudication result in most immigration adjudication taking place outside of immigration court. Moving immigration adjudicators to an Article I court will not solve all these problems.

These other problems should not discourage incremental improvement. An Article I court should be pursued, but we should not expect it to cure all that ails immigration adjudication. The Article I approach is especially intriguing given the shifting understanding of Congress' power to limit the removal of executive branch officials. The ultimate reform, however, is a multifaceted approach that also creates substantive law reforms that introduce proportionality, encourage representation, consider equities, and encourage judicial review.