

Towards Transforming Immigration Courts: Lessons from Bankruptcy in Creating Structural Change

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Immigration courts are broken, but what does it take to change the structure of an entire adjudication system? This Note discusses the concerns for judicial independence created by structural features of the contemporary U.S. immigration courts and the potential pathways to creating systemic immigration court reform, such as an independent immigration court under Article I of the Constitution. This analysis begins by identifying the ongoing issues with decisional independence that stem from control of the immigration courts by the Executive Branch. In response to these problems, this Note then provides an overview of the proposals for reforming the immigration court system, including proposals to create specialized Article I immigration courts. As a comparative model, this Note then provides an account of the transformation of the bankruptcy court system into a specialized legislative court, exploring how the successes and failures of the bankruptcy system's transformation can be understood through the lens of structural challenges to stripping power from one branch of government and reallocating it among the others. Taking lessons from the efforts of Congress to create bankruptcy court reform, this Note argues that structural reforms to immigration courts will require a broad reallocation of power among the branches of government. Given this need to reallocate power, this Note suggests reframing the problem facing the immigration courts as a separation of powers one, and proposes emphasizing within the immigration-reform narrative the value of shifting power from the Executive Branch to the Legislative and Judicial Branches as a part of the overall strategy for successful structural change.

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Introduction

“‘[W]e’re doing death-penalty cases in a traffic-court setting.’”¹ Judge Dana Leigh Marks, president emeritus of the National Association of Immigration Judges (NAIJ) (the recognized collective-bargaining unit representing immigration judges²), provided a striking appraisal of the then-current situation facing immigration courts in April of 2018.³ Judge Marks’s comment has since become a popular phrase quoted by advocates for comprehensive reform of the U.S. immigration courts.⁴ As debate on immigration policy has become a hot-button topic in American politics, the

1. Nina Shapiro, *Trump Orders Judges to Hurry Up; Here’s What the Public Rarely Sees in Seattle and Tacoma Immigration Courts*, SEATTLE TIMES (Apr. 6, 2018, 6:47 AM), <https://www.seattletimes.com/seattle-news/northwest/immigration-courts-out-of-public-sight-face-new-criticism-as-trump-ramps-up-pressure/> [https://perma.cc/VL6B-MTM4] (quoting Judge Dana Leigh Marks).

2. NAT’L ASS’N OF IMMIGR. JUDGES, <https://www.naij-usa.org> [https://perma.cc/8DMT-SPU4].

3. Shapiro, *supra* note 1.

4. See, e.g., *Death Penalty Cases in Traffic Court Setting*, IMMIGRANT L. CTR. OF MINN. (Mar. 31, 2020), <https://www.ilcm.org/latest-news/death-penalty-cases-in-traffic-court-setting/> [https://perma.cc/S49X-TXGM] (quoting Judge Marks’s refrain in the article title and advocating for Congress to make immigration courts Article I courts).

public has turned its attention towards the country's southern border and existential questions about U.S. immigration policy.⁵ Moreover, since the Trump Administration's numerous public attacks on immigrants through incendiary policies such as the Executive Order ending birthright citizenship,⁶ the "Muslim Ban,"⁷ and family separation, public outrage has been directed towards the actions of enforcement agencies such as the Department of Homeland Security (DHS) and Immigration and Customs Enforcement (ICE).⁸ However, considerably less public attention has been captured by a central topic of concern for lawyers and advocates—one that has plagued the immigration courts since their inception: the striking control exerted by the Executive Branch over the immigration courts and the resulting lack of judicial independence in immigration adjudication.⁹

On February 3, 2022, Representative Zoe Lofgren, a Democrat from California,¹⁰ introduced House Bill 6577, the Real Courts, Rule of Law Act of 2022, which would remove the immigration courts from their current home in the Department of Justice (DOJ) and transform them into specialized legislative courts established under Article I of the Constitution.¹¹ The proposal garnered the support of many parties within the legal community, including the American Bar Association (ABA), American Immigration Lawyers Association (AILA), and the Federal Bar Association (FBA), as

5. See, e.g., Erik Ortiz, *Influx of Migrants at Border Gains Renewed Attention as 'Crisis' Rhetoric Spreads*, NBC NEWS (Oct. 4, 2023, 5:00 PM), <https://www.nbcnews.com/politics/politics-news/influx-migrants-border-gains-renewed-attention-crisis-rhetoric-spreads-rcna118595> [<https://perma.cc/2RJW-T975>] (describing rising concern for the U.S. immigration system in "cities inundated with an influx of migrants"); Will Weissert & Linley Sanders, *More Americans Think Foreign Policy Should Be a Top US Priority for 2024, an AP-NORC Poll Finds*, ASSOCIATED PRESS (Jan. 1, 2024, 12:27 PM), <https://apnews.com/article/2024-top-issues-poll-foreign-policy-israel-d89db59deb07f53382cc9292b49f4d1c> [<https://perma.cc/3LRU-LV8G>] (listing foreign policy and immigration as top concerns of the American public).

6. Exec. Order No. 14160, 90 Fed. Reg. 8449 (Jan. 20, 2025).

7. See *Muslim Travel Ban*, IMMIGR. & ETHNIC HIST. SOC'Y, <https://immigrationhistory.org/item/muslim-travel-ban> [<https://perma.cc/HTV4-ZU97>] (explaining that the "Muslim Ban" refers to a series of executive orders prohibiting "travel and refugee resettlement from select predominately Muslim countries").

8. See Muzaffar Chishti & Jessica Bolter, *Once Relatively Obscure, ICE Becomes a Lightning Rod in Immigration Debate*, MIGRATION POL'Y INST.: POL'Y BEAT (Aug. 22, 2018), <https://www.migrationpolicy.org/article/once-relatively-obscure-ice-becomes-lightning-rod-immigration-debate> [<https://perma.cc/K3LR-U33A>] (describing the increase in public anger toward ICE for the Trump Administration's immigration policies).

9. See, e.g., Mary Holper, *Taking Liberty Decisions Away from "Imitation" Judges*, 80 MD. L. REV. 1076, 1081–100 (2021) (summarizing ways in which the independence of immigration judges suffers under the current system).

10. *About Zoe: Congresswoman Zoe Lofgren*, U.S. CONGRESSWOMAN ZOE LOFGREN, <https://lofgren.house.gov/about> [<https://perma.cc/C3Y5-T7B3>].

11. Press Release, Zoe Lofgren, House of Representatives, Lofgren Introduces Landmark Legislation to Reform the U.S. Immigration Court System (Feb. 3, 2022) [hereinafter Lofgren Press Release], <https://lofgren.house.gov/media/press-releases/lofgren-introduces-landmark-legislation-reform-us-immigration-court-system> [<https://perma.cc/AUQ3-4TNS>].

well as numerous immigrant rights advocacy groups and the NAIJ,¹² which had been advocating for this change for over fifteen years.¹³ Although the initial 2022 bill failed to advance, Representative Lofgren reintroduced the bill in March of 2024.¹⁴

Only time will tell how the proposal plays out in Congress, but proposals to create an immigration adjudication system established under Article I of the Constitution are far from novel; calls to turn the immigration courts into Article I courts have persisted in scholarship and in the immigration professional community since the 1980s.¹⁵ Moreover, this proposal has garnered support from an unlikely array of actors, including lawyers, advocates, scholars, judges, and congressional representatives.¹⁶ Rarely in the world of immigration law and policy is there any modicum of agreement on a specific policy plan for reform that stretches back over decades. So, then, why has this proposal to vest judicial decisionmaking of immigration law into a court under Article I failed to materialize despite such enduring support?

This Note explores the answer to that question by contrasting the development of a specialized bankruptcy court system—focusing principally on efforts to enact the Bankruptcy Reform Act of 1978, which began the process of developing independent bankruptcy courts under Article I of the Constitution¹⁷—with efforts to create an immigration court system under Article I. It analyzes the legislative history of the Bankruptcy Reform Act of 1978 to determine how the compromises to create an Article I bankruptcy court were achieved through concerted efforts to strip power from the Judicial Branch. Ultimately, this Note concludes that one root cause of the failure to create an independent immigration court lies in the failure to recognize the need for deliberate action on the part of the Legislative and Judicial Branches to strip the Executive Branch of its comprehensive control over the current immigration courts. Taking lessons from the bankruptcy context, this Note thus suggests shifting the narrative focus of proposals to create independent immigration courts by placing increased emphasis on the separation-of-powers concern present in the current system. This Note recommends moving towards a political and legal narrative for court reform that encourages increased oversight of immigration law and policy by the

12. *Id.*

13. Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGR. BULL. 3, 3 & n.1 (2008).

14. Real Courts, Rule of Law Act of 2024, H.R. 7724, 118th Cong. (2024).

15. *E.g.*, Maurice A. Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 SAN DIEGO L. REV. 1, 18 (1980).

16. Lofgren Press Release, *supra* note 11.

17. *See generally* Glenn E. Pasvogel, Jr., *The Bankruptcy Reform Act of 1978—A Review and Comments*, 3 U. ARK. LITTLE ROCK L.J. 13 (1980) (outlining the history of the Bankruptcy Reform Act).

Legislative Branch and the Judiciary as a way to maintain a proper governmental separation of powers. Finally, this Note posits that making this shift will aid in efforts to reform the immigration court system by ultimately increasing judicial independence.

In Part I, this Note discusses the structure of the current immigration courts, identifying the problems inherent in that structure for judicial independence, fundamental fairness, and due process, which have arisen due to the outsized control exerted by the Executive Branch. Part II reviews the proposed solution to turn immigration courts into Article I courts and the potential benefits created by such a change, while also addressing additional proposals and concerns. Then, Part III addresses the tactics for turning immigration courts into Article I courts, contrasting the current struggle to reform the immigration courts with the creation of an Article I bankruptcy court through the lens of checks and balances on the separation of powers. Finally, based on this comparative analysis, Part IV offers several limited proposals to shift the narrative of reform away from one based solely on judicial independence and towards one rooted in increased oversight by Congress and the Judiciary.

I. Structure of Immigration Courts and Consequences of Executive Control

U.S. immigration adjudication has never functioned with an independent judicial arm since the inception of federal immigration enforcement in the late 1800s.¹⁸ Instead, it has been subsumed under an administrative agency controlled by the Executive Branch.¹⁹ Traditionally, the judiciary has viewed immigration as a policy matter for the political branches.²⁰ However, with the development of a more complex statutory legal schema and robust processes for deportation, the Supreme Court has recognized that deportation is “a drastic measure . . . at times the equivalent of banishment” that implicates fundamental due process concerns.²¹ Despite increasing recognition of the constitutional stakes of deportation, the

18. See Daniel Buteyn, Note, *The Immigration Judiciary’s Need for Independence: Breaking Free from the Shackles of the Attorney General and the Powers of the Executive Branch*, 46 MITCHELL HAMLINE L. REV. 958, 961–67 (2020) (describing the history of immigration adjudication).

19. *Id.* at 961–66.

20. See *Galvan v. Press*, 347 U.S. 522, 531 (1954) (“[Immigration policies] are peculiarly concerned with the political conduct of government. . . . [T]hat the formulation of these policies is entrusted exclusively to Congress [is] . . . firmly imbedded in the legislative and judicial tissues of our body politic . . .”).

21. *Id.* at 530–31 (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)). The Court also recognized that “intrinsic consequences of deportation are so close to punishment for crime” despite ultimately declining to extend the constitutional safeguards due criminal defendants to noncitizens facing deportation. *Id.* at 531.

immigration courts and immigration judges sit within the DOJ, a law enforcement agency.²² The general public appears to possess little awareness of the functioning of immigration courts and the ways in which they diverge substantially from Article III federal courts.²³ Unique features of the immigration courts create a lack of decisional independence that is inherent in the system's structure due to the ability of the Executive Branch, through the Attorney General, to substantively alter the law and adjudication procedures in a variety of ways.²⁴

A. *Brief Structural Overview of Immigration Courts*

Before addressing the problems that arise from the outsized role of the Executive Branch in immigration adjudication, this Note provides an abbreviated overview of the relevant structural features of the courts that allow exercise of that control. These structural features are the product of multiple historical shuffles and reassignments within the Executive Branch throughout the twentieth century.

The story begins—for the purposes of this Note—with the creation of the Executive Office for Immigration Review (EOIR) by regulation of the Attorney General in 1983.²⁵ EOIR is an agency under DOJ that adjudicates removal proceedings and contains two levels: the immigration courts and an appellate body known as the Board of Immigration Appeals (BIA).²⁶ Prior to the creation of EOIR, the courts used to fall under the same division of Immigration and Naturalization Service (INS) as immigration enforcement, which was later moved to DHS after INS was abolished.²⁷

The adjudicators in the immigration courts are immigration judges (IJs) who differ substantially from traditional federal judges vested with power under Article III of the Constitution.²⁸ Unlike Article III judges, who are appointed to the judiciary,²⁹ IJs receive delegated authority to adjudicate in

22. Mimi Tsankov, *The Immigration Court: Zigzagging on the Road to Judicial Independence*, 93 U. COLO. L. REV. 303, 305 (2022) (citing 8 C.F.R. § 1003.0(a) (2021)).

23. See Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1650 (2010) (contrasting the lack of evidence “that the general public has any particular view of the immigration adjudication procedures” with the “commonplace” expert criticisms of the system).

24. See *id.* at 1667–68, 1671–72 (describing “the erosion of the immigration judges’ and the BIA members’ job security and the real and perceived effects of that erosion on their decisional independence” as a recurring effect of the Executive Branch’s involvement in immigration courts).

25. Buteyn, *supra* note 18, at 965–66.

26. Christopher Manion, Note, *Agency Indiscretion: Judicial Review of the Immigration Courts*, 82 ST. JOHN’S L. REV. 787, 790–91 (2008).

27. *A Historical Lens of EOIR*, EXEC. OFF. FOR IMMIGR. REV., <https://www.justice.gov/eoir/strategic-plan/organizational-overview/historical-lens> [<https://perma.cc/WDP2-UDGZ>].

28. See Note, *Courts in Name Only: Repairing America’s Immigration Adjudication System*, 136 HARV. L. REV. 908, 909 (2023) (describing the source and scope of the authority of IJs).

29. *About Federal Judges*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/about-federal-judges> [<https://perma.cc/HH5B-S8ES>].

civil administrative proceedings.³⁰ IJs are statutorily defined as “attorneys whom the Attorney General appoints as administrative judges . . . [to] act as the Attorney General’s delegates in the cases that come before them.”³¹

These immigration judges, who staff around seventy immigration courts,³² are hired by the Attorney General in the same manner as other civil servants.³³ As a result, IJs lack the traditional job protections afforded to other judicial actors.³⁴ IJs are subject to termination at any time and do not have terms or term limits.³⁵ In addition, they are typically not required to have prior experience in immigration law to qualify for employment by EOIR.³⁶ Moreover, IJ positions are often filled by prior attorneys for DHS, the “prosecutors” in immigration courts.³⁷

IJs are not Administrative Law Judges (ALJs)—who oversee adjudications at other administrative agencies—and therefore do not receive the same protections from agency influence afforded to ALJs under the Administrative Procedure Act.³⁸ IJs also possess limited judicial powers.³⁹ For example, they lack the power to hold attorneys for DHS in contempt of court or issue sanctions when DHS attorneys fail to comply with court directives.⁴⁰

Individuals facing removal proceedings (formerly known as “deportation” or “exclusion” proceedings)⁴¹ are known as “respondents”⁴²

30. *Courts in Name Only*, *supra* note 28, at 909 & n.10 (“[T]he term ‘judge’ refers not to true judicial authority but to IJs’ authority to adjudicate administrative proceedings.”).

31. 8 C.F.R. § 1003.10(a) (2024).

32. See *Find an Immigration Court and Access Internet-Based Hearings*, EXEC. OFF. FOR IMMIGR. REV., <https://www.justice.gov/eoir/find-immigration-court-and-access-internet-based-hearings> [<https://perma.cc/EB37-2TKA>] (listing the current active immigration courts).

33. Leonard Birdsong, *Reforming the Immigration Courts of the United States: Why Is There No Will to Make It an Article I Court?*, 19 BARRY L. REV. 17, 29–30 (2013).

34. Compare Rebecca Baibak, Comment, *Creating an Article I Immigration Court*, 86 U. CIN. L. REV. 997, 1004 (2019) (noting that IJs “lack protection against removal without cause”), with *About Federal Judges*, *supra* note 29 (noting that “Article III judges can be removed from office only through impeachment by the House of Representatives and conviction by the Senate”).

35. Baibak, *supra* note 34, at 1004.

36. See Birdsong, *supra* note 33, at 30 (describing IJ hiring criteria, which require only several “years relevant post-bar admission legal experience” and list “knowledge of immigration laws and procedure” as one of several areas of experience considered).

37. Legomsky, *supra* note 23, at 1666.

38. *Courts in Name Only*, *supra* note 28, at 912–13, 912 n.35.

39. See *id.* at 913 (“The executive branch’s influence over IJs is so prominent that IJs bear more resemblance to fungible DOJ employees than to judges.”).

40. *Id.*

41. EXEC. OFF. FOR IMMIGR. REV., IMMIGRATION COURT PRACTICE MANUAL § 7.2(a)(1) (2023) [hereinafter IMMIGRATION COURT PRACTICE MANUAL], <https://www.justice.gov/media/1239281/dl?inline> [<https://perma.cc/UZ6H-AMWL>].

42. *Id.* at § 4.3.

and lack the constitutional right to appointed counsel in immigration court.⁴³ On the other hand, the government is represented by an attorney for DHS who advocates for removal.⁴⁴ In practice, this means that the majority of respondents (around 60% in 2023) represent themselves pro se in their removal proceedings in immigration court.⁴⁵

Given that many respondents represent themselves pro se, IJs are often tasked by law with also developing the record themselves and asking probing questions to do so.⁴⁶ This blurs the line between advocate and neutral arbiter in a way that impacts how respondents experience immigration court, and that influences how IJs ultimately make adjudicatory decisions.

IJ decisions are subject to a limited review by higher courts.⁴⁷ Adjudication decisions can be reviewed by the BIA, the appellate panel also appointed by the Attorney General,⁴⁸ which is housed under EOIR and made up of attorneys who “act as the Attorney General’s delegates.”⁴⁹ The BIA issues published, precedential decisions that are nationally binding on the immigration courts and generally conducts a review only of the established paper record.⁵⁰

Beyond seeking redress at the BIA, respondents in immigration court can appeal to the U.S. Courts of Appeals, subject to the significant restrictions on federal judicial review of administrative agency decisions.⁵¹ These restrictions include deference to agency interpretation of questions of law,⁵² limiting review to only the administrative record with a prohibition on

43. See 8 U.S.C. § 1362 (granting only a “privilege” to counsel “at no expense to the Government”).

44. See IMMIGRATION COURT PRACTICE MANUAL, *supra* note 41, §§ 1.4(e), 4.3 (noting that the DHS officer “enforces the immigration and nationality laws and represents the United States government’s interests in immigration proceedings”).

45. See *Executive Office for Immigration Review Adjudication Statistics: Current Representation Rates*, EXEC. OFF. FOR IMMIGR. REV. (Oct. 12, 2023), <https://www.justice.gov/eoir/page/file/1062991/dl> [<https://perma.cc/BAT3-V288>] (providing the total representation rate for overall pending cases).

46. See *Amicus Invitation No. 24-28-06*, BD. IMMIGR. APPEALS (June 28, 2024), https://www.justice.gov/d9/2024-06/amicus_invitation_24-28-06.pdf [<https://perma.cc/X5UN-YC8Y>] (inviting the public to file amicus briefs on the circuit split regarding the source of the duty for IJs to develop the record).

47. See *Courts in Name Only*, *supra* note 28, at 909–10 (describing the avenues for appealing an immigration court decision).

48. Birdsong, *supra* note 33, at 25.

49. Manion, *supra* note 26, at 791 (quoting 8 C.F.R. § 1003.1(a)(1) (2007)).

50. Tatum P. Rosenfeld, Note, *Time to Go Auer Separate Ways: Why the BIA Should Not Say What the Law Is*, 94 S. CAL. L. REV. 1279, 1283 (2021).

51. Legomsky, *supra* note 23, at 1643–44, 1643 n.32 (citing Jill E. Family, *Stripping Judicial Review During Immigration Reform: The Certificate of Reviewability*, 8 NEV. L.J. 499, 502–03 (2008)).

52. The Supreme Court recently overturned *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2273 (2024). The *Chevron* standard had long been applied in immigration law for deference to agency

additional fact-finding, and various statutory restrictions on the scope of cases and questions that are subject to judicial review.⁵³ In practice, only around two percent of immigration cases are ever appealed to federal courts, and of that two percent, only eight percent of those appeals are granted on average.⁵⁴ This means that virtually all removal cases will be decided within EOIR's adjudication system, and most noncitizens facing removal will never have an Article III federal judge review their deportation case.

In addition to the limits on judicial review, one of the most unique aspects of EOIR's structure is that the Attorney General, as the head of EOIR, is able to certify decisions made by the BIA to him or herself using a special self-referral power that allows the Attorney General to reexamine all aspects of the BIA decision⁵⁵ *de novo*.⁵⁶ This power allows the Attorney General to vacate the BIA decision and then issue their own decision—a decision which ultimately serves as nationally binding precedent and overrules any inconsistent prior precedent.⁵⁷ This referral power stems from federal regulation granting broad authority to the Executive Branch in immigration law.⁵⁸ In practice, this power grants almost limitless executive control over the substantive interpretation of immigration law.⁵⁹

B. *Problems Stemming from Executive Control over EOIR*

The structure of EOIR creates a system in which the Executive Branch exercises significant control over the immigration courts, thereby creating a court system in which there is significant risk of political influence and a law-enforcement mindset over judicial decisionmaking. Over the course of the history of the immigration courts, numerous policies undertaken at the direction of the Attorney General, acting on behalf of the Executive Branch,

interpretation of the law, and the question of what level of deference to agency interpretation will be applicable in the immigration context moving forward remains an open one. *See* Brian Green, Mark Stevens, Cyrus Mehta & Stephen Yale-Loehr, *Think Immigration: Chevron Is Dead! Thoughts on the Immigration Impact of Loper Bright Enterprises*, AM. IMMIGR. LAWS. ASS'N (July 2, 2024), <https://www.aila.org/library/think-immigration-chevron-is-dead-thoughts-on-the-immigration-impact-of-loper-bright-enterprises> [https://perma.cc/JB8A-WEWF] (describing the current state of the law post-*Loper Bright* and providing arguments for the new standard for agency deference in the immigration legal context).

53. *See* Baibak, *supra* note 35, at 999–1000 (explaining such restrictions).

54. Fatma Marouf, *How Immigration Court Works*, THE CONVERSATION (June 25, 2018, 6:36 AM), <http://theconversation.com/how-immigration-court-works-98678> [https://perma.cc/7TDW-C99U].

55. 8 C.F.R. § 1003.1(h)(1) (2024); 8 U.S.C. § 1103(g)(2).

56. Julie Menke, Note, *Abuse of Power: Immigration Courts and the Attorney General's Referral Power*, 52 CASE W. RESV. J. INT'L L. 599, 608 (2020).

57. *Id.* at 608–09.

58. *Id.* at 608.

59. *See id.* at 608–09 (“The Attorney General may . . . choose to strategically select cases for review to advance the presidential administration’s immigration agenda.”).

have led to some of the most troubling outcomes for judicial independence, fundamental fairness, and due process in immigration policy.⁶⁰ As one advocate put it, “draw[ing] the curtain back on first impressions, the attorney general sits as the great and powerful Oz at the helm of the entire judicial enterprise.”⁶¹

Attention to this pervasive issue was directed acutely towards the first Trump Administration’s overt efforts to undermine the independence of EOIR, but the challenges for judicial independence have long persisted across administrations. In 1999, regulation changed the structure of BIA review from a hearing before a panel comprised of at least three members to review by only a single member in some cases.⁶² In 2002, during the Bush Administration, Attorney General Ashcroft took an unprecedented step and promulgated a rule that reduced the size of the BIA by more than half, reassigning the BIA members who most often ruled in favor of noncitizens to other positions in an effort to substantially alter the number of grant rates and change national jurisprudence towards more anti-immigrant policies.⁶³ The standard of review for factual determinations made by IJs was changed at the BIA from *de novo* to a clearly-erroneous standard.⁶⁴ Then, in 2004, the Attorney General shifted the hiring process for IJs from one that had been largely conducted internally by EOIR to one that was assumed directly by the Office of the Attorney General.⁶⁵ This shift ultimately led to an illegal hiring scandal, which was exposed in 2008 when the DOJ’s Office of the Inspector General confirmed that judges hired during this period were selected for political and ideological affiliations in direct violation of federal hiring laws.⁶⁶

But although the political influence of the Executive Branch over the immigration courts was far from novel, the efforts of the first Trump Administration to influence EOIR reached new heights. In 2018, the Attorney General began requiring individual case-completion quotas along with suggested time-completion deadlines for all removal cases, prioritizing speed over accuracy in removal proceedings and linking job security and performance reviews for IJs to these metrics.⁶⁷ The move was harshly

60. See Christine Lockhart Poarch, *Immigration Court Reform: Congress, Heed the Call*, FED. LAW., Oct.–Nov. 2016, at 10, 10–11 (discussing the lack of judicial independence in the immigration courts).

61. *Id.* at 11.

62. Baibak, *supra* note 35, at 1005.

63. Holper, *supra* note 9, at 1083.

64. Baibak, *supra* note 35, at 1005.

65. Tsankov, *supra* note 22, at 310.

66. *Id.*; Birdsong, *supra* note 33, at 35.

67. *Courts in Name Only*, *supra* note 28, at 915–16; KATHERINE H. REILLY, U.S. DEP’T OF JUST., IMMIGRATION JUDGE PERFORMANCE MEASURES OVERVIEW 1–2 (2018),

criticized by both immigrants' rights advocates and the NAIJ as having perverse effects on due process and fundamental fairness by encouraging summary removals over investigative fact-finding, which required additional time for judges to conduct.⁶⁸ Later, in 2019, the Trump Administration undertook efforts to strip the NAIJ of collective bargaining rights after numerous public complaints were issued against the administration's policies.⁶⁹

Due to EOIR's lack of independence from the Executive Branch, there has been increasing pressure and strain to issue decisions quickly, without regard for other important judicial values. For example, IJs often do not issue written decisions,⁷⁰ and even when a written decision is issued, it is not made available to the public.⁷¹ In addition, since its restructuring in 2002, the BIA has gained the power to issue "affirmances without opinion" in which no reasoning for the affirmance is offered.⁷² Since the early 2000s, the BIA has prioritized speed by moving away from issuing full legal opinions and instead preferring to issue short, paragraph-long decisions.⁷³ This means that an IJ may issue a private oral decision that is then affirmed by the BIA in summary affirmance or in a single-paragraph decision without providing any additional, publicly-available written explanation. Thus, without transparency in the adjudication process, little information about immigration court proceedings reaches the public.

However, the information that has been publicized raises serious questions about the way in which some IJs conduct themselves as

<https://www.aila.org/files/o-files/view-file/AC17F1B0-8C58-48EA-A939-2DABF6D53485>
[<https://perma.cc/ZB6P-GUAC>].

68. See, e.g., AM. IMMIGR. LAWS. ASS'N, AILA POLICY BRIEF: RESTORING INTEGRITY AND INDEPENDENCE TO AMERICA'S IMMIGRATION COURTS 2–3 (2020), <https://www.aila.org/aila-files/BA0F41A4-6D36-49D3-8EFC-F92B18052285/18092834.pdf?1697590107> [<https://perma.cc/D4XA-FBLB>] (providing a critique of these policies); *Imposing Quotas on Immigration Judges Will Exacerbate the Case Backlog at Immigration Courts*, NAT'L ASS'N OF IMMIGR. JUDGES (Jan. 31, 2018), https://www.naij-usa.org/images/uploads/publications/NAIJ_Imposing_Quotas_on_IJs_will_Exacerbate_the_Court_Backlog_1-31-18_.pdf [<https://perma.cc/PN5J-TSUQ>] (same); *Strengthening and Reforming America's Immigration Court System: Hearing Before the Subcomm. on Border Sec. & Immigr. of the S. Judiciary Comm.*, 115th Cong. 7–8 (2018) (statement of J. A. Ashley Tabaddor, President, National Association of Immigration Judges), <https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf> [<https://perma.cc/NK5D-BKV3>] (same).

69. Buteyn, *supra* note 18, at 973–74; Zolan Kanno-Youngs, *Immigration Judges' Union Lodges Labor Complaints Against Trump Administration*, N.Y. TIMES (Sept. 27, 2019), <https://www.nytimes.com/2019/09/27/us/politics/immigration-judges-union.html> [<https://perma.cc/SZ63-HR79>].

70. *Asylum Manual*, IMMIGR. EQUAL. § 26.5, <https://immigrationequality.org/asylum/asylum-manual/immigration-court-proceedings/> [<https://perma.cc/AX3D-WWG3>].

71. See 8 C.F.R. §§ 1240.12(a), 1240.13(a) (2024) (providing that a decision may be oral or written, and that a written decision must be sent only to the respondent and DHS counsel).

72. Legomsky, *supra* note 23, at 1657.

73. *Id.*

independent adjudicators. The numbers alone demonstrate the problem. The Transactional Records Access Clearinghouse, a research initiative based at Syracuse University that provides public access to federal law enforcement data, reported that individual-judge grant-rates for asylum from 2018 to 2023 varied from 98.5% to 1.5%,⁷⁴ a range so shockingly wide that it raises serious concerns about whether IJs are applying anything approaching uniform and unbiased legal standards in adjudications. These startling numbers reflect what many advocates and federal judges have been complaining about for years: A non-trivial number of IJs demonstrate incompetence, bias, and overall unprofessionalism in their conduct and decisions—traits which have been left unchecked in a system defined by a culture of law enforcement rather than judicial ethics and consistent legal standards.⁷⁵

However, one of the most striking attacks on the judicial independence of immigration courts in recent years has been the numerous self-certifications by the Attorney General during the first Trump Administration, which completely reshaped the legal landscape of immigration law based on largely political rationales.⁷⁶ Although certification has always been a tactic used to shape policy, during the Trump Administration, the Attorney General certified a record number of cases for self-review—more than twice as many as had been certified during the prior administration—in just two years.⁷⁷ For example, two notable cases certified during the first Trump Administration by then Attorney General Jeff Sessions were *Matter of A-B*,⁷⁸ and *Matter of Castro-Tum*,⁷⁹ both of which significantly altered the landscape of immigration law until the changes were reversed under the Biden Administration.⁸⁰ In *Matter of A-B*, Attorney General Sessions overturned the landmark BIA case on gender-based protections that had recognized that

74. See *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2018–2023*, TRANSACT. RECS. ACCESS CLEARINGHOUSE (Oct. 19, 2023), <https://trac.syr.edu/immigration/reports/judgereports/> [<https://perma.cc/BJQ3-2BFV>] (listing for each IJ the percentage of asylum requests granted between 2018 and 2023).

75. See, e.g., Legomsky, *supra* note 23, at 1675 & nn.191–92 (discussing criticisms of immigration judge behavior); THE ADVOC. FOR HUM. RTS., WITNESS TO IMMIGRATION COURT: STAKEHOLDER REPORT FROM THE IMMIGRATION COURT OBSERVATION PROJECT 22–25 (2021), <https://www.theadvocatesforhumanrights.org/Res/Witness%20to%20Immigration%20Court-Stakeholder%20Report%202019.1.20-3.31.21%20FINAL.pdf> [<https://perma.cc/DW4W-K77G>] (reporting on observers' comments about judicial behavior in immigration court and assessing systemic problems in Immigration Court).

76. See AM. IMMIGR. LAWS. ASS'N., *supra* note 68, at 1, 3–5 (discussing the detrimental effects of these self-certifications).

77. *Id.* at 1, 3–4.

78. A-B-, 27 I. & N. Dec. 316 (Att'y Gen. 2018).

79. Castro-Tum, 27 I. & N. Dec. 271 (Att'y Gen. 2018).

80. *Attorney General Garland Vacates Matter of A-B- and Matter of L-E-A-*, CLINIC (July 28, 2021), <https://www.cliniclegal.org/resources/attorney-general-garland-vacates-matter-b-and-matter-l-e> [<https://perma.cc/5V46-2Q9E>]; Cruz-Valdez, 28 I. & N. Dec. 326, 328 (Att'y Gen. 2021) (overruling *Castro-Tum*).

victims of domestic violence constitute a cognizable particular social group for the purposes of asylum and related relief.⁸¹ Overruling this precedent sent shockwaves throughout the immigration practice community as it deeply altered substantive law.⁸²

In *Matter of Castro-Tum*, Attorney General Sessions attacked procedural measures that had been promulgated to ensure efficiency in the immigration courts, removing the right of IJs to administratively close immigration proceedings⁸³—a tool for docket management that allows IJs to temporarily pause a person’s removal case and take it off of the active docket so that new hearings are not scheduled.⁸⁴ A common use of administrative closure is when a person in removal proceedings has applied and is likely eligible for a legal status that would allow them to remain in the country, but the adjudication of that legal status must be completed by United States Citizenship and Immigration Services (USCIS) rather than by the IJ in the removal process.⁸⁵ By administratively closing proceedings, the IJ can put the removal case on pause until an adjudication by USCIS is complete.⁸⁶ Removing the power to use this tool meant that hearings were required to be finalized with removal a distinct possibility or that hearings would be continuously rescheduled while adjudication by USCIS was ongoing. *Matter of Castro-Tum* increased the docket load on IJs, lowered productivity, and took away a valuable process for people eligible to remain in the United States with legal status to pursue those applications in front of USCIS.⁸⁷

Ultimately, both decisions led to significant restrictions in relief eligibility for noncitizens in removal proceedings by closing off both

81. *A-B-*, 27 I. & N. Dec. at 319; Menke, *supra* note 57, at 614–15.

82. See, e.g., *Matter of A-B-/A-B- II and L-E-A II Are Vacated. What Next?*, NAT’L IMMIGRANT JUST. CTR. (June 17, 2021, 12:00 PM), <https://immigrantjustice.org/for-attorneys/legal-resources/copy/matter-b-b-ii-and-l-e-ii-are-vacated-what-next> [<https://perma.cc/Y6TH-PC2B>] (recognizing the “shift in asylum law” and impact on “individuals fleeing gender and family-based persecution” once *Matter of A-B-* was finally overturned).

83. *Castro-Tum*, 27 I. & N. Dec. at 293.

84. Memorandum from David L. Neal, Dir. of the Exec. Off. for Immigr. Rev., on Administrative Closure 1 (Nov. 22, 2021), <https://www.justice.gov/eoir/book/file/1450351/dl#:~:text=Administrative%20closure%20%E2%80%9Cis%20a%20docket,W%2DY%2DU%2D%2C%2027%20I%26N%20Dec> [<https://perma.cc/M97M-JCZW>].

85. See AM. C.L. UNION & AM. IMMIGR. COUNCIL, ADMINISTRATIVE CLOSURE AFTER *MATTER OF CRUZ-VALDEZ* PRACTICE ADVISORY 2–3, 3 n.15 (2022), https://www.aclu.org/wp-content/uploads/legal-documents/2019.10.22_castro-tum_pa_w_zuniga_romero_update_-_final.pdf [<https://perma.cc/YU7X-A7H6>] (giving an overview of administrative closure and listing examples of the types of applications before USCIS in which administrative closure of removal proceedings to obtain an adjudication can be beneficial).

86. *Id.*

87. Buteyn, *supra* note 18, at 978–79; see also *The Life and Death of Administrative Closure*, TRAC IMMIGR. (Sept. 10, 2020), <https://trac.syr.edu/immigration/reports/623/> [<https://perma.cc/86DW-RXZF>] (comparing the data on case completions between the Obama Administration and the first Trump Administration, the latter of which curtailed administrative closure).

substantive and procedural avenues of protection at the unilateral direction of the Executive Branch. Moreover, these actions led to much confusion in the federal courts, as federal judges began to raise questions about the scope of agency deference to the Attorney General in the face of seemingly politically motivated legal rulings.⁸⁸ For example, the Fifth Circuit has since rejected the Biden Administration's decision vacating *Matter of A-B-* and declined to extend deference to the new controlling precedent, leading to a circuit split on this issue that continues to cause confusion and a lack of uniformity.⁸⁹

The scope of executive control over EOIR is troubling for any system concerned with decisional independence; but it is particularly worrisome for a system that adjudicates issues as important as detention, deportation, and the granting of benefits such as asylum to noncitizens, all of which require a probing judicial inquiry in each case before an IJ. As a result, calls to radically overhaul the immigration system and create a more independent court have gained support in the past several years, building on a long history of similar efforts to transform the system.⁹⁰

II. The Proposal for an Article I Immigration Court

Given the pervasive problems facing the immigration courts and the long history of their failure to function as a judicial body independent of the Executive Branch, a systemic change is needed. Over the course of the past forty years, various proposals have been put forth to reshape the immigration court system, with many systemic proposals focusing on the creation of an independent immigration court under Article I of the Constitution. An Article I immigration court would be modeled on the success of other movements to create specialized legislative courts under Article I, such as the U.S. tax, military, or bankruptcy courts.⁹¹ The underlying rationale of this proposal for reform is to increase the judicial independence of immigration adjudication.

88. See, e.g., AM. C.L. UNION & AM. IMMIGR. COUNCIL, *supra* note 85, at 3–6 (analyzing the circuits that diverged in the aftermath of *Matter of Castro-Tum*).

89. *Jaco v. Garland*, 24 F.4th 395, 405 (5th Cir. 2021); see also Sabrineh Ardanian & Deborah Anker, *Re-setting Gender-Based Asylum Law*, HARV. L. REV.: BLOG (Dec. 30, 2021), <https://harvardlawreview.org/blog/2021/12/re-setting-gender-based-asylum-law/> [<https://perma.cc/TPU6-N9GT>] (discussing the ongoing legal confusion around gender-based asylum protections).

90. See, e.g., AM. IMMIGR. LAWS. ASS'N, *supra* note 68, at 1 (calling for legislation that would create an independent, Article I immigration court).

91. See Laura K. Donohue & Jeremy McCabe, *Federal Courts: Article I, II, III, and IV Adjudication*, 71 CATH. U. L. REV. 543, 571–92 (2022) (discussing the current Article I courts).

A. *Current Reform Through the Lens of Historical Proposals*

The Real Courts, Rule of Law Act of 2024 is the latest in a long line of proposals for an independent immigration court.⁹² Since the 1980s, efforts to radically transform the immigration adjudication system have been periodically popular.⁹³ One of the earliest proposals for an Article I immigration court was put forth in 1980 when Peter Levinson, a consultant for the Select Commission on Immigration and Refugee Policy, submitted an unpublished memorandum to the committee calling for the creation of an Article I immigration court after conducting an extensive investigation into the issues plaguing the system at that time.⁹⁴ That same year, Maurice Roberts, former chair of the BIA, proposed a bill, modeled after draft legislation from Levinson and a similar bill from the NAIJ,⁹⁵ to turn the immigration courts into Article I courts.⁹⁶ Roberts's proposal to create a new court system was met with scholarly interest.⁹⁷

Roberts identified three primary issues with the immigration adjudication system in 1980 that persist today: (1) the lack of qualified immigration judges; (2) the lack of judicial independence of the immigration courts from immigration enforcement agencies; and (3) the lack of resources allocated to the court to complete adjudications.⁹⁸ Roberts's proposal for a new Article I immigration court called for the establishment of a presidential-appointment and Senate-confirmation process for the court's new judges, who would serve a term of fifteen years and receive compensation on the same pay scale as other federal judges.⁹⁹ His proposal also called for protections from removal without cause by only permitting removal initiated by the President in limited circumstances where, for example, the judge had engaged in judicial misconduct, and by requiring a hearing process before a panel of federal judges before removal could take place.¹⁰⁰ His plan was not without its valid critics, including those who were concerned his plan did not

92. See Joan V. Churchill, *Compelling Reasons for an Article I Immigration Court*, JUDGES' J., Winter 2022, at 6, 6–7 (summarizing historical proposals).

93. *Id.*

94. *Id.* at 6. See generally Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 NOTRE DAME LAW. 644 (1981) (providing a summary of and expansion on Levinson's unpublished memorandum).

95. Unfortunately, the text of the original NAIJ proposal appears to have been lost. Churchill, *supra* note 92, at 6 & n.3.

96. Roberts, *supra* note 15, at 19 & n.63.

97. See generally, e.g., Robert E. Juceam & Stephen Jacobs, *Constitutional and Policy Considerations of an Article I Immigration Court*, 18 SAN DIEGO L. REV. 29 (1980) (interrogating the merits of Roberts's proposal).

98. Roberts, *supra* note 15, at 16.

99. *Id.* app. at 21.

100. *Id.*

allow for appeals outside of the newly established appellate division of the Article I court to a lower Article III court, such as a U.S. Court of Appeals.¹⁰¹

Roberts's plan was motivated by a recognition of the fundamental liberty interests involved in deportation and the increasing acknowledgment of discrimination facing noncitizens.¹⁰² As Roberts put it:

[T]he issues that now arise in deportation and exclusion cases are precisely the sort that have been traditionally entrusted to the courts. . . . [T]he courts are sensitive to the fact that what is actually at stake is the freedom of an individual The jealously guarded separation of functions principle makes for a judicial tradition of independence that renders courts less likely than other agencies of government to yield to political pressures.¹⁰³

The following year, Levinson published his own article detailing the problems inherent with the immigration court system, stating that “[t]he Attorney General’s ability to review Board decisions inappropriately injects a law enforcement official into a quasi-judicial appellate process . . . [and] compromises the appearance of independent Board decisionmaking.”¹⁰⁴ Like Roberts, Levinson also argued that it was necessary to establish a system with stronger judicial values because only American courts are capable of making decisions about the fundamental rights and liberties of individuals “without bowing to political expediency.”¹⁰⁵

That same year, the Select Commission on Immigration and Refugee Policy issued a final report recommending that Congress establish an independent immigration court under Article I without endorsing a particular proposal.¹⁰⁶ The first legislative proposal was introduced a year later in 1982 by a bipartisan coalition of fifteen congressional representatives led by Representative Bill McCollum, a Republican from Florida.¹⁰⁷ One of the bill’s Democratic co-sponsors introduced another reform bill a few days later.¹⁰⁸ Neither proposal was successful.¹⁰⁹ Representative McCollum went on to introduce three subsequent bills to create an Article I immigration court throughout the late 1990s, all of which ultimately failed to advance.¹¹⁰ These bills were modeled after the Roberts plan with some modifications, including

101. Juceam & Jacobs, *supra* note 97, at 44.

102. Roberts, *supra* note 15, at 18.

103. *Id.*

104. Levinson, *supra* note 94, at 650.

105. *Id.* at 651–52.

106. SELECT COMM’N ON IMMIGR. & REFUGEE POL’Y, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 248 (1981), <https://files.eric.ed.gov/fulltext/ED211612.pdf> [<https://perma.cc/V6Q6-EZER>]; Churchill, *supra* note 92, at 6.

107. Churchill, *supra* note 92, at 6.

108. *Id.*

109. *Id.*

110. *Id.*

a proposal to send all appeals to the Federal Court of Appeals for the Federal Circuit rather than only allowing appeals to the Supreme Court on a petition for certiorari (as Roberts had suggested).¹¹¹

After the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the attention of scholars turned once again to creating an independent immigration court to address the increasing concerns about the curtailment of judicial review under the IIRIRA.¹¹² Scholars argued that the immigration adjudication system unconstitutionally restricted judicial review and created a separation of powers problem that could be rectified through the creation of an independent court.¹¹³ Calls for an independent court continued periodically throughout the 2000s, with scholars focused on the need for establishing decisional independence from the Executive Branch.¹¹⁴ In 2008, Judge Marks published an article advocating on behalf of the NAIJ for an independent immigration court under Article I, arguing that “[t]he pernicious effect on decisional independence caused by the current structure can no longer be ignored.”¹¹⁵ Like her predecessors, Judge Marks emphasized judicial independence as the primary value at stake and focused the creation of an Article I immigration court on the value of strengthening the judiciary.¹¹⁶

In 2010, the ABA published a detailed report advocating for the creation of an Article I immigration court after a lengthy consideration of alternative proposals.¹¹⁷ In 2013, the FBA joined the ABA in endorsing an Article I immigration court.¹¹⁸ Since then, almost two hundred groups in a variety of sectors have urged Congress to take action to restructure the U.S. immigration courts.¹¹⁹ These decades of advocacy culminated in the introduction of House Bill 6577, the Real Courts, Rule of Law Act of 2022.¹²⁰

111. Birdsong, *supra* note 33, at 44–46.

112. *E.g.*, M. Isabel Medina, *Judicial Review—A Nice Thing? Article III, Separation of Powers and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 CONN. L. REV. 1525, 1525–26 (1997).

113. *See, e.g., id.* at 1525–26, 1555–56 (arguing that IIRIRA’s jurisdiction-stripping provisions are unconstitutional).

114. *E.g.*, Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 370–71, 403–04 (2006).

115. Marks, *supra* note 13, at 3 & n.1, 14–15.

116. *Id.* at 6, 14–15.

117. Churchill, *supra* note 92, at 7 (citing ARNOLD & PORTER LLP, AM. BAR ASS’N COMM’N ON IMMIGR., REFORMING THE IMMIGRATION SYSTEM (2010), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.authcheckdam.pdf [<https://perma.cc/EWN8-Q3HK>]).

118. *Id.*

119. *Id.*

120. Real Courts, Rule of Law Act of 2022, H.R. 6577, 117th Cong. (2022).

Although the initial bill failed to advance, Representative Lofgren reintroduced the same bill as House Bill 7724 on March 19, 2024.¹²¹

B. The Potential Benefits of an Article I Immigration Court

The Real Courts, Rule of Law Act mirrors previous proposals for an independent immigration court. Like in the previous proposals, the new proposed immigration court system would have a trial and appellate division and fifteen-year terms of appointment for both trial- and appellate-level judges.¹²² In addition, judges would receive protections from removal without cause, as well as salary expectations tied to the salaries of district court judges.¹²³ Like Representative McCollum's proposals from the 1990s, the Real Courts, Rule of Law Act would give the new immigration judges the authority to hold parties in contempt.¹²⁴ Notably, the Real Courts, Rule of Law Act borrowed identical language from the statute governing the U.S. Tax Court, stating that “[t]he Immigration Courts is not an agency of, and shall be independent of, the executive branch of the Government.”¹²⁵

Unlike the more rudimentary plans of the past, the Real Courts, Rule of Law Act is detailed and contains several novel provisions of note. First, the new proposal takes account of the increasing complexity of immigration adjudications and the need for an increasing number of judges to staff the system.¹²⁶ Interestingly, the plan would institute a system of presidential appointment and Senate confirmation for only the judges of the appellate division; the appellate judges would then, in turn, appoint the trial-level judges.¹²⁷ The appointment plan borrows from the current U.S. Tax Court appointment system for principal and inferior officers, and some scholars suggest that, given these similarities, the new plan would likely be found

121. Real Courts, Rule of Law Act of 2024, H.R. 7724, 118th Cong. (2024).

122. *Id.* § 601(a)(2), (b)(2)(B), (c)(2)(B).

123. *Id.* § 602(e)–(f).

124. Compare *id.* § 621(c)(1) (“Immigration judges shall have the authority, to sanction by civil money penalty, any individual whose action or inaction obstructs the administration of justice . . .”), with United States Immigration Court Act of 1999, H.R. 185, 106th Cong. § 115(c) (1999) (“Each division of the Immigration Court shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority . . .”), and United States Immigration Court Act of 1996, H.R. 4258, 104th Cong. § 115(c) (1996) (same), and United States Immigration Court Act of 1998, H.R. 4107, 105th Cong. § 115(c) (1998) (same).

125. Compare H.R. 7724, § 601(a)(1), with 26 U.S.C. § 7441.

126. See H.R. 7724, § 601(b)(1), (c)(1), (d)(3)(B)(i) (providing for twenty-one appellate judges and establishing the procedure for a periodic survey “to determine the number of immigration trial courts required to provide for the expeditious and effective administration of justice, as well as the geographical areas to be served by such courts”).

127. *Id.* § 601(b)(2)(A), (c)(2)(A).

constitutional.¹²⁸ Additionally, because the new court would be an independent court with Article I status, the Attorney General would exercise no authority over decisions by the appellate division, which would be subject only to Article III review by the U.S. Courts of Appeals.¹²⁹ Finally, House Bill 7724 creates requirements for competency and guidelines for judicial appointments and retirement.¹³⁰

The current proposal has significant potential benefits, most of which have been championed for years. For one, it would insulate decisionmaking by immigration judges from the Executive Branch by taking away the Attorney General's arbitrary hiring and firing power, which has long been used to manipulate docket structure and pressure judges into caving to the political whims of executive policymaking. Also, as both Levinson and Roberts recognized in the 1980s, instituting a system of presidential appointments with Senate confirmation would likely attract higher status candidates who would be more likely to perform their role in line with judicial values instead of a law-enforcement mindset.¹³¹ Most importantly, the new plan would insulate the immigration courts from the influence of the Attorney General over the substantive interpretation of immigration laws, instead leaving the final interpretation of the law squarely in the hands of the federal judiciary through the appeals process. But even beyond instituting structural and substantive protections from executive meddling, the plan would significantly alter the culture of the immigration courts by removing them from the hands of a law enforcement agency. The hope in making this move is the same one that motivated early calls to create a more "judicial" immigration court: There is something unique about the structure and nature of the judiciary that makes it the correct branch to entrust with upholding rights.

The benefits of adopting the Real Courts, Rule of Law Act are clear. However, several scholars suggest instead that more incremental and intermediate reforms be put in place—such as turning IJs into ALJs—out of concern that an Article I court is too ambitious and has been unsuccessful in the past.¹³² Conversely, other scholars suggest that even an Article I

128. See, e.g., Alison Peck, *Re-Envisioning the Immigration Courts*, 21-10 IMMIGR. BRIEFINGS 1, 2-3, 5-6 (2021) (comparing the two appointment processes and analyzing the constitutionality of this proposal).

129. H.R. 7724, § 625(c)-(d).

130. *Id.* § 602(a)-(b), (g).

131. See Roberts, *supra* note 15, at 19 (noting that the appointment process and better compensation "should help to attract the best qualified candidates"); Levinson, *supra* note 93, at 655 (noting that a federal court could "attract the highest qualified adjudicators"); see also *supra* notes 97-101 and accompanying text.

132. E.g., *Courts in Name Only*, *supra* note 28, at 917-18; see also Karen M. Sams, Comment, *Out of the Hands of One: Toward Independence in Immigration Adjudication*, 5 ADMIN. L. REV. ACCORD 85, 109-10 (2019) (advocating for converting IJs and BIA members into ALJs).

immigration court would be insufficient to truly safeguard the fundamental rights implicated in the removal process and might still be influenced too easily by the Executive Branch.¹³³ These scholars suggest that only by incorporating immigration proceedings into a true Article III court could the values of due process and fundamental fairness in removal proceedings be achieved.¹³⁴ Despite some disagreements on the feasibility and extent of the benefit of creating an Article I court, however, it is clear that under each of these viewpoints, an Article I immigration court would be an improvement over the current system in terms of ensuring decisional independence from the Executive Branch.

The main competing alternative to the creation of an Article I immigration court in scholarship originates from those who are concerned that a new court could further entrench the punitive nature of immigration laws.¹³⁵ Although it is outside the scope of this Note to consider a greater overhaul of immigration laws in general, some scholars raise valid concerns by suggesting that an Article I court could further legitimize the deportation system through a more formal court structure and would impede efforts to decrease the use of deportation as a tool for enforcement entirely.¹³⁶ Given this potential downside, some of these academics push instead for a fully administrative process of immigration-claim adjudication, with the goal of removing the punitive nature of a formal court setting.¹³⁷ Or in the alternative, other scholars suggest creating new jurisdictions and procedures for adjudications, such as removing the power of immigration courts to hear cases related to the detention of individuals or shifting away from deportation proceedings to move asylum adjudications out of immigration courts.¹³⁸ All

133. See, e.g., Legomsky, *supra* note 23, at 1678–80 (expressing concerns about political influence over the renewal process for Article I IJs—who would serve set terms—and the potential removal of Article III appellate judicial review).

134. See, e.g., *id.* at 1686, 1688–92 (proposing the creation of a new Article III appellate immigration court to restore judicial independence); see also Holper, *supra* note 9, at 1078 (arguing that Congress should strip immigration judges of their ability to review detention decisions because detention is a form of punishment and therefore review must be entrusted to Article III judges).

135. E.g., Amit Jain, *Bureaucrats in Robes: Immigration “Judges” and the Trappings of “Courts,”* 33 GEO. IMMIGR. L.J. 261, 325 (2019). Additionally, for a discussion about how immigration reform proposals must consider the ways in which many removals are effectuated without an opportunity to be heard in immigration court, see Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 193–214 (2017).

136. See, e.g., Jain, *supra* note 135, at 323–24 (arguing that creating an Article I court without addressing deeper systemic issues would “legitimize the power imbalances and substantive injustices that have rotted the core of our immigration system”).

137. See, e.g., *id.* at 317–18 (arguing that the non-adversarial nature of bureaucracy could be beneficial); see also *Courts in Name Only*, *supra* note 28, at 918–19 (describing and critiquing Professor Amit Jain’s proposal).

138. See, e.g., Holper, *supra* note 9, at 1078 (proposing that detention decisions should be made by a federal magistrate judge, not an IJ, and reviewed by an Article III judge); Denise Gilman, *Making Protection Unexceptional: A Reconceptualization of the U.S. Asylum System*, 55 LOY. U.

raise valid and competing concerns that reach far beyond the singular goal of increasing judicial independence in immigration adjudications and implicate broader questions about the type of immigration legal system that should exist in the United States.

Despite reasonable debate over the underlying goals of immigration reform, there is a surprising level of agreement among interested parties that an Article I immigration court would be an improvement over the current system, at least in terms of increasing the decisional independence of immigration courts and removing the courts from control by the Executive Branch.

Yet, proposals for this type of reform still face immense challenges.¹³⁹ These challenges give rise to a lingering question about the viability of immigration court reform: What shifts in the reform movement can be made to make these changes a more realistic possibility? As some scholars have suggested, this question cannot be answered solely by pointing to political polarization or the cost of creating a new court given the overwhelming expense of maintaining the current functioning of EOIR and the existence of numerous moments where the plan retained bipartisan support.¹⁴⁰ Moreover, as the story of immigration reform demonstrates, appeals to the value of increasing judicial independence have been constant throughout the history of the reform movement.

Despite these efforts, the difficulties to systemic immigration reform have deep constitutional roots. Importantly, these difficulties stem from the Executive Branch's fundamental desire to retain control and power over immigration by excluding the other branches of government from influence.¹⁴¹

Thus, the problem of how to create a more independent immigration court is not only a matter of advocating for the merits of judicial independence; the analysis also requires a broader look at the process required to rebalance power within a legal system so heavily controlled by one branch of government. This perspective requires a shift to viewing this problem in terms of the separation of powers among all three branches of government, rather than just one or two branches. Correcting a separation-of-powers problem requires an effort to take back power from one branch of government and redistribute it among the other branches. But how can this

CHI. L.J. 1, 65 (2023) (arguing that the “U.S. asylum system should become significantly more expansive”).

139. See, e.g., Aline Barros, *Bill Aims to Remove US Immigration Courts from Executive Branch*, VOA (Feb. 5, 2022, 8:48 AM), <https://www.voanews.com/a/bill-aims-to-remove-us-immigration-courts-from-executive-branch-/6427304.html> [https://perma.cc/Q9GY-QN9G] (discussing partisan opposition to the Real Courts, Rule of Law Act of 2022).

140. Birdsong, *supra* note 33, at 46–47.

141. *Id.*

type of structural change be made, and what obstacles are there? In understanding these broader questions about the process for redistributing power between the three branches of government, this Note suggests analyzing the creation of the current U.S. bankruptcy court system under Article I of the Constitution as an example of a real-world process for rebalancing power.

III. Transforming Bankruptcy Courts into Article I Courts: A Case Study in the Struggle for Control

Although the immigration courts are unique in their structure and diverge substantially from bankruptcy courts, the story of the creation of specialized legislative bankruptcy courts can provide a model for navigating the process of stripping power away from one branch of government and reallocating that power to the other branches, as both the successes and failures of efforts in bankruptcy reform are enlightening. Bankruptcy presents the story of how the political branches made efforts to reallocate some of the control over bankruptcy among themselves while still failing to achieve the complete systemic reform that had been initially desired. Although not a perfect analogue for understanding the process of stripping control by the Executive Branch over immigration courts, there are lessons from this story about the process of stripping power from the Judicial Branch that provide insight into the overall process of restructuring power between the branches.

A. *Bankruptcy Prior to 1978*

This Note provides a brief overview of various issues in bankruptcy adjudication prior to the creation of an independent bankruptcy court system through the Bankruptcy Reform Act of 1978 (The 1978 Act), which paved the way for the first iteration of the modern, independent bankruptcy court that exists today.¹⁴² This discussion provides an understanding of how the bankruptcy system was uniquely insulated within the judiciary from influence by the political branches, even through appointments, and provides the context for legislative efforts to reform bankruptcy and increase oversight. Much like the process to create a new immigration court system, the process to create a new bankruptcy system was one that implicated questions about how to strip power from one branch and reallocate it to another.

The 1978 Act was the product of a years-long process to reevaluate U.S. bankruptcy law in light of persistent criticisms.¹⁴³ After an extensive investigation, a congressional commission was formed to evaluate the

142. Pasvogel, *supra* note 17, at 13.

143. *Id.*

efficacy of the bankruptcy system.¹⁴⁴ The commission recommended the creation of an independent bankruptcy court with the goal to “[s]ever . . . the judicial functions of the bankruptcy judge so as to preserve actual as well as apparent impartiality among the participants in a bankruptcy proceeding.”¹⁴⁵

Prior to the 1978 Act, bankruptcy courts suffered from various concerns, including ones about the impartiality and decisional independence of the bankruptcy judges—or “referees,” as they were often called.¹⁴⁶ Crucially, issues of decisional independence were not a result of a monopoly on control by the Executive Branch, but rather a monopoly on control of the adjudicators by individual actors in the judiciary including the district court judges.¹⁴⁷

Bankruptcy referees were appointed for six-year terms by district court judges who oversaw their actions and decisions.¹⁴⁸ Referees were initially considered a type of adjunct or clerk for district court judges, acting on their behalf to effectuate the law and generally carry out their policy views.¹⁴⁹ Their jobs often involved substantial administrative work, including managing business affairs and even signing disbursement checks.¹⁵⁰ Although bankruptcy referees possessed little power and status in the years after the creation of the office through the Bankruptcy Act of 1898, referees began to gain increasing judicial power throughout the twentieth century.¹⁵¹ By the 1960s, district courts began allowing referees to wear judicial robes and sit in judicial chambers.¹⁵² Meanwhile, more referees transitioned from part-time to full-time bankruptcy work, turning the job into a career rather than a part-time position.¹⁵³ These referees chafed against the system where they were beholden to district courts for continual reappointment, arguing that they were unable to make independent decisions and uphold judicial integrity in a model where their job security was tied to their favor with a small number of particular judicial officers who both appointed them and reviewed their decisions.¹⁵⁴ During the 1960s, the newer and more ambitious referees began pushing for an expansion of the bankruptcy budget, an

144. *Id.* at 13–14.

145. *Id.* at 14 (citing COMM’N ON THE BANKR. L. OF THE U.S., REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. Doc. No. 93-137, pt. 1, at 5–6 (1973)).

146. Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978*, 81 AM. BANKR. L.J. 1, 3 (2007).

147. *Id.* at 3, 15.

148. *Id.* at 3.

149. Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 61–62 (1997).

150. Mund, *supra* note 146, at 3.

151. *Id.*

152. *Id.* at 3–4.

153. *Id.* at 4.

154. *Id.* at 4, 15.

increase in decisionmaking power within the judiciary, and an increase in salary and prestige.¹⁵⁵ These referees wanted increased prestige within the judiciary and took ambitious steps to draft their own proposed bill to reform the system.¹⁵⁶

Additionally, bankruptcy referees were also often in the position to appoint “trustees,” a role in which a lawyer is appointed to administer the debtor’s estate within the bankruptcy proceedings.¹⁵⁷ Referees engaged closely with trustees in routine administrative contexts and sometimes provided advice to trustees on what course of action to pursue in matters before the referee, exposing themselves to accusations of favoritism and bias toward the trustees whom they themselves had appointed.¹⁵⁸ This created conflicts of interest in which referees could learn information about the debtor’s estate from these administrative meetings ahead of judicial proceedings (where this information could later be deemed inadmissible) and engage in conversations with trustees in an *ex parte* manner ahead of trial.¹⁵⁹

Given these issues, critics of the system argued that many referees were biased and underqualified.¹⁶⁰ The National Bankruptcy Conference, a group of practitioners, judges, and academics, urged that “[t]he need, perhaps most pressing, is for an independent, prestigious bankruptcy court with broad jurisdiction and powers.”¹⁶¹

Eventually, this led to a showdown in Congress over competing plans to create a new and independent bankruptcy court.¹⁶² An initial compromise was reached, which culminated in the passage of the Bankruptcy Reform Act of 1978 and the creation of an independent bankruptcy court, which was reexamined after the Supreme Court decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*¹⁶³ struck down most of the initial plan through the Bankruptcy Amendments and Federal Judgeship Act of 1984.¹⁶⁴ By understanding the process through which the creation of the current bankruptcy court system came to pass, guiding principles can be

155. See *id.* at 4–5 (describing the increase in advocacy by referees concerned about salary, lack of resources, and “exclusion from the decision-making process”); see also Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 759 (2010) (discussing the push for a more prestigious bankruptcy court).

156. Mund, *supra* note 146, at 17–20.

157. McKenzie, *supra* note 155, at 758.

158. Posner, *supra* note 149, at 62.

159. *Id.* at 61–62; McKenzie, *supra* note 155, at 758.

160. See McKenzie, *supra* note 155, at 758–59 (discussing criticisms of the bankruptcy system, including the “low status” of bankruptcy judges).

161. *Id.* (quoting *Bankruptcy Reform Act of 1978: Hearing on S. 2266 and H.R. 8200 Before the Subcomm. on Improvements in the Jud. Mach. of the S. Comm. on the Judiciary*, 95th Cong. 832 (1977) (statement of Charles A. Horsky, Chairman, National Bankruptcy Conference)).

162. McKenzie, *supra* note 155, at 759.

163. 458 U.S. 50 (1982).

164. See *infra* text accompanying notes 193–197.

devised and transposed to the current dilemma facing U.S. immigration courts.

B. Legislative Action to Create a Bankruptcy Court Under Article I

Legislative attempts to create a new Article I bankruptcy court began with a similar story of academic and scholarly calls for change in the face of pervasive, systemic problems facing the adjudication system. As a result, the Senate Judiciary Committee created a specialized commission to investigate and evaluate the current state of bankruptcy law in the 1960s.¹⁶⁵ Surprisingly, even though the Senate's initial proposal included a number of bankruptcy referees who would serve on the commission, the referees' input was ultimately excluded at the behest of the judiciary.¹⁶⁶ The Judicial Conference of the United States urged the Senate to exclude referees, claiming that referees had special interests that would not further the goals of the commission.¹⁶⁷ As one scholar argued, this appeared to be a flimsy excuse for the real motivation behind the judiciary's reluctance to allow bankruptcy judges a seat at the table: the fear of a "transfer [of] power and status from the federal judiciary."¹⁶⁸ The initial investigation culminated in the 1973 report by the Commission on the Bankruptcy Laws of the United States, which called for reforms that would reorganize bankruptcy in order to separate trustees from the influence of bankruptcy judges.¹⁶⁹ Bankruptcy judges reacted with anger towards the plan that had been created in their absence and released their own proposal to reform the bankruptcy courts, which would further consolidate power in the hands of the bankruptcy judge.¹⁷⁰ The bankruptcy judges' bill was more detailed than the Commission's proposal and received positive support in Congress, effectively allowing bankruptcy judges a seat at the legislative table.¹⁷¹

Throughout the 1970s, fierce debate in the House ensued over the future of bankruptcy.¹⁷² Several bills were introduced in the House and revised in committee as representatives argued over the specifics of the plan.¹⁷³ Ultimately, the House settled on the plan articulated in House Bill 8200.¹⁷⁴ This bill would have drastically changed the bankruptcy system by elevating the status of bankruptcy judges to Article III judges and by moving the

165. Posner, *supra* note 149, at 67.

166. *Id.* at 74.

167. *Id.*

168. *Id.* at 75.

169. *Id.* at 68.

170. *Id.* at 69.

171. Mund, *supra* note 146, at 22.

172. For a timeline of these events, see Posner, *supra* note 149, at 69–70.

173. *Id.*

174. *Id.* at 70.

bankruptcy trustees to a completely separate agency under the DOJ.¹⁷⁵ The House passed House Bill 8200 by a voice vote in February 1978.¹⁷⁶ During this period, the Senate introduced the previous bills authored by the Commission and the consortium of bankruptcy judges.¹⁷⁷ These bills eventually morphed into Senate Bill 2266, which made its way to a vote and was passed by the Senate as a substitute to House Bill 8200.¹⁷⁸ Rather than creating an Article III bankruptcy court, Senate Bill 2266 would have kept bankruptcy judges working directly under the district courts and added more modest protections for decisional independence.¹⁷⁹ Instead of district court appointments, the U.S. Court of Appeals for each circuit would have appointed bankruptcy judges to twelve-year terms.¹⁸⁰ In addition, bankruptcy trustees would have remained under the Judicial Branch instead of being given a new home under the Executive Branch.¹⁸¹

The competing plans for reform led to an impasse in Congress that persisted over the summer of 1978.¹⁸² However, a compromise between the bills was reached and the 1978 Act was signed into law November of that year.¹⁸³ As suggested by Professor Eric Posner in his detailed account of the legislative and political history surrounding the creation of the modern bankruptcy courts, this initial compromise may have been reached because the new court system created additional “patronage” opportunities for the political branches to exert control over bankruptcy policy in ways that served political interests.¹⁸⁴ Posner identified appointment as one area where the new court shifted the balance of power from the judiciary into the hands of the other branches.¹⁸⁵ For example, the final version of the bill took a middle ground between the proposals for the appointment process and created a process of presidential appointment and Senate confirmation that also included fourteen-year term limits with a pilot transitional program for referees who were already working in the courts.¹⁸⁶ This new appointment process seized power from the district courts and allowed both the Legislative and Executive Branches to gain greater opportunity to influence bankruptcy

175. *Id.*

176. *Id.*

177. *Id.* at 71.

178. *Id.* at 71–72.

179. *See id.* at 72 (describing the proposed administrative structure for the bankruptcy system under Senate Bill 2266).

180. *Id.*

181. *Id.*

182. *Id.* at 72–73.

183. *Id.*

184. *Id.* at 77, 79–82.

185. *Id.* at 88.

186. Tuan Samahon, *Are Bankruptcy Judges Unconstitutional? An Appointments Clause Challenge*, 60 HASTINGS L.J. 233, 240–42 (2008).

policy and receive political benefits through patronage opportunities in the appointments process.¹⁸⁷

Moreover, the Senate's concerns about the appointment of bankruptcy judges for life may have been a driving factor in the rejection of the proposal for an Article III court in favor of the term limits in the final plan, which would also allow the Senate to exercise greater control over bankruptcy judges.¹⁸⁸

However, this iteration of the new plan did not come to fruition with just the efforts of the Executive and Legislative Branches. Indeed, it was not until concessions were made to the Judicial Branch that this initial compromise fully materialized. In a memo to President Carter in the fall of 1978 on the progress of the bill, one advisor stated:

[T]he only remaining opposition [to the Bankruptcy Act of 1978] is that of the Judicial Conference, 25 judges headed by the Chief Justice. It is my judgment that the principal reason for this emotional opposition is the desire of this small group, and particularly the district court judges, to retain the right of appointment of bankruptcy judges (referees), which they now have¹⁸⁹

That fall, an irate Chief Justice Burger lobbied fiercely against the passage of the 1978 Act, concerned about the federal judiciary's perceived loss of status and power.¹⁹⁰ As a result, the Senate created a compromise with the Chief Justice to allow the judiciary to retain some of its power, including several provisions to lower the status of the new bankruptcy judges.¹⁹¹ Key to placating the Judicial Branch was the inclusion of a provision requiring the President to give consideration to nominees recommended by each circuit's judicial council.¹⁹² Thus, Congress was able to fashion a bill for the creation of a new independent bankruptcy court by creating a compromise that reshuffled the power and control over the domain of bankruptcy in the U.S. between the three branches.

However, even though this compromise resulted in the successful passage of the Bankruptcy Reform Act of 1978, the battle was not over. Shortly after the passage of the 1978 Act, the Judicial Branch—who had been mostly shut out by constitutional design of the initial process that had stripped most of its power over bankruptcy—once again reared its head when the Supreme Court struck down the initial compromise as unconstitutional

187. Posner, *supra* note 149, at 88.

188. *Id.* at 85–86, 89.

189. Mund, *supra* note 146, at 2 (quoting Memorandum from Robert Lipshutz to President Carter 2 (Oct. 31, 1978) (on file with the Jimmy Carter Presidential Library)).

190. See Posner, *supra* note 149, at 90 (describing an account of Chief Justice Burger opposing the elevation of bankruptcy judges).

191. *Id.* at 90–91.

192. *Id.* at 91.

after finding it delegated too much authority to bankruptcy judges outside of the Article III framework.¹⁹³ That is to say, the Court found the Act went too far to strip the Judicial Branch of power and reallocate that power among the other branches.

With this decision, the Court took back much of the power that had been stripped from it and forced Congress to return to the drawing board.¹⁹⁴ Briefly, Congress even considered making bankruptcy judges full Article III judges as had been proposed prior to the 1978 Act—a move that would have allowed them to retain control over appointments.¹⁹⁵ Instead, Congress reached a final decision on appointments that left the U.S. Courts of Appeals with control over the process and established an Article I bankruptcy court through the Bankruptcy Amendments and Federal Judgeship Act of 1984.¹⁹⁶ Formally the new bankruptcy courts were to be housed under the district courts, but the bankruptcy judges still retained greater independence through abolishing the previous system of appointment by the district courts.¹⁹⁷

In this sense, some of Congress's efforts to reallocate power were ultimately unsuccessful. However, although the judiciary was able to retake ground in its fight against the creation of an independent bankruptcy court under Article I by retaining the power of appointments through an altered process, other aspects of the independent Article I bankruptcy court remained the same, and control over bankruptcy was eventually shifted out from under the near complete control of referees and district court judges—albeit not to the extent that Congress had initially desired.¹⁹⁸ This push and pull between the branches showcased moments where governmental power ebbed and flowed. And even significant efforts by Congress to enact new legislation were not sufficient to completely reallocate power over bankruptcy in the way that the political branches desired.

Even so, some reallocation of power ultimately did occur through this process of compromise. But this set of compromises was made possible by not only focusing on increasing the decisional independence of bankruptcy adjudications but also appealing to the desire of the other branches of government to exercise control themselves and creating opportunities for

193. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76, 87 (1982) (plurality opinion).

194. See Samahon, *supra* note 186, at 242–43 (noting that the Court stayed the *Northern Pipeline* judgment to allow Congress to react).

195. Jeffrey T. Ferriell, *The Constitutionality of the Bankruptcy Amendments and Federal Judgeship Act of 1984*, 63 AM. BANKR. L.J. 109, 118 (1989).

196. Samahon, *supra* note 186, at 243–45.

197. See McKenzie, *supra* note 155, at 765–66; 792–95 (describing the insulation and decisional independence of bankruptcy judges through the appointment process).

198. See *id.* at 766 (noting that later precedents and “the de facto development of bankruptcy court practice . . . resurrected much of the autonomy that Congress granted to bankruptcy judges in 1978”).

them to do so. Specifically, the set of compromises reflected a serious and concerted effort between the political branches to shift the power of bankruptcy away from the judiciary into an intermediary place between the three branches of government by promoting the attractiveness of the plan to the judiciary, Congress, and the President.

IV. Shifting to a Separation of Powers Narrative

A historical analysis of the creation of the modern U.S. bankruptcy courts demonstrates that the path to achieving court reform may require more than public outrage and the pursuit of a more just and independent immigration system. A difficult challenge to reforming the system is stripping power from one branch of government when that branch, unsurprisingly, is reluctant to give up that power. The comparative analysis of bankruptcy and immigration indicates that bankruptcy adjudication prior to 1978, like the immigration courts of today, were plagued by systemic concerns rooted in control by a singular branch of government. The real divergence between these two models lies in the difference between Congress and the courts stripping power from the *Executive* Branch in immigration compared to Congress and the President stripping power from the *Judicial* Branch in bankruptcy. Yet, even acknowledging this difference, what the bankruptcy analogy reveals is that creating this type of systemic reform when one branch has acquired and maintained control in an area requires a concerted effort by the other two branches of government to shift the balance of that power towards their own substantive interests through significant compromise.

The history of bankruptcy shows that for the other branches of government to be convinced to take radical action, the actors within those other branches must believe that they stand to gain something material from such reform. For example, in the bankruptcy context, court reform was possible only through a set of ongoing compromises with the judiciary. But the essential draw of reform was that it ultimately increased the power of both the Executive and Legislative Branches to exert influence over the new bankruptcy court judges.¹⁹⁹ Thus, this Note suggests that a similar effort to shift the balance of power and appeal to the Legislative and Judicial Branches is most likely required to successfully strip the Executive Branch of some of its control over immigration law while still reaching a reasonable compromise with the Executive Branch so as to avoid the Executive Branch's attempts at retaking power.

Like what occurred in bankruptcy, the only way to achieve such a result is to expand efforts by reformers to convince both Congress and the courts that they stand to gain substantial power over immigration law. Recognizing

199. See *supra* notes 184–197 and accompanying text.

these similarities only further confirms that the creation of an Article I immigration court is a potentially viable—and historically informed—solution to the major systemic issues facing immigration adjudication today.

A. *Appealing to Each Branch of Government*

The path to creating a new immigration court system will require compromises and appeals to each branch of government, just as was required in the bankruptcy context. The plan for an Article I immigration court articulated in the Real Courts, Rule of Law Act would likely appeal to actors within the Judicial Branch who have long been calling for this change.²⁰⁰ In this new proposal, immigration judges would gain significantly more independence and prestige in their positions as Article I judges, thus providing immigration judges with strong incentives to endorse this change.²⁰¹ But how might that impact federal judges, and their own power within the system? Appeals to the increased ability for judicial review by federal judges would likely be a successful tactic in persuading the judiciary of the value of reform. Judges of Article III courts would benefit from the existence of an Article I immigration court, as they would have greater opportunity to eschew current legal tensions in immigration law caused by reliance on the Attorney General's substantive interpretation of the law, and would thus enjoy greater independence in their appellate review functions.²⁰² Many federal judges have already expressed frustration at the current system. For example, Judge Richard Posner harshly criticized EOIR, noting that “the adjudication of these [immigration] cases at the administrative level has fallen below the minimum standards of legal justice.”²⁰³ Accordingly, much of the frustrations expressed by Article III reviewing judges over the perceived legal inadequacies of current immigration decisions, as well as the difficulty of reviewing and overturning numerous and often poorly reasoned opinions, would likely be solved by increasing the overall competence and prestige of trial-level immigration judges through the plan for an Article I court.²⁰⁴

In addition, the Legislative Branch would benefit greatly under this new plan because, for the first time, Congress would have power over the

200. See *supra* notes 91–126 and accompanying text.

201. See, e.g., Marks, *supra* note 115, at 14–15 (discussing the need for decisional independence and calling for the creation of an Article I immigration court).

202. See *supra* notes 75–90 and accompanying text.

203. *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005).

204. See INNOVATION L. LAB & S. POVERTY L. CTR., *THE ATTORNEY GENERAL'S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL* 8 (2019) (listing federal court judges' critiques of immigration adjudication).

appointment of immigration judges.²⁰⁵ This would be a large shift in power for Congress and place a greater emphasis on legislative control over not only substantive questions of law but also the actual immigration judges applying it.

Considering current opposition to the Real Courts, Rule of Law Act reveals how shifting the narrative focus to increased congressional oversight of immigration policy could appeal to more political actors. For example, in opposition to the bill, Representative Tom Tiffany, a Republican from Wisconsin, stated: “This subcommittee should be focused on securing our border and enforcing our immigration laws. . . . *Congress should retain its role, our rightful role*, in making sure that *we* along with the [E]xecutive [B]ranch oversee the immigration courts.”²⁰⁶ As a political branch, patronage power is valuable to Congress. Emphasizing the increased role that Congress would play in overseeing immigration appointments under the new plan could be a strong tactic for reformers to appeal to many members of Congress, even outside of traditional partisan divides.

Although appealing to the ideas of political patronage seems to push against the values of judicial independence, the example of bankruptcy demonstrates that when power is shared between the branches, greater decisional independence and insulation from political whims can arise through the checks-and-balances process. Greater congressional control over appointments will not necessarily lead to judges becoming more partisan but instead can lead to more independence from executive influence and thus more balance and consistency overall.²⁰⁷

Finally, although the Executive Branch would lose some of its current power in the system, it likely would still retain enough vestiges through presidential power over appointments to strike a workable compromise, much like the eventual compromise over appointments that occurred in the bankruptcy court reform model.²⁰⁸ Just as the bankruptcy courts were only able to transform after a compromise grounded in checks and balances of power among the three branches of government, so too will immigration court reform likely be most successful by adopting a similar shift.

205. See Real Courts, Rule of Law Act of 2024, H.R. 7724, 118th Cong. § 601(b)(2)(A) (2024) (providing that the immigration appellate judges would be appointed by the President and confirmed by the Senate).

206. Barros, *supra* note 139 (emphasis added).

207. See Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control over Immigration Adjudication*, 108 GEO. L.J. 579, 630 (2020) (finding that under the current system, the political party in control of the Executive Branch measurably affects IJ decisions, including the likelihood of removal).

208. See *supra* note 127 and accompanying text.

B. The Potential Path to Compromise

To create lasting reform, then, immigration reformers will still need to create a series of compromises, akin to the ones made with the Supreme Court in the bankruptcy context, in order to placate the Executive Branch and ensure it will not lose all its power.

The Real Courts, Rule of Law Act may contain such a compromise by still allowing the president to control the appointment of immigration judges (rather than duplicating the modern bankruptcy model, in which judges are appointed by the U.S. Courts of Appeals). Another compromise that could be included in future legislative proposals for immigration court reform would be for the new immigration courts to retain *some* deference to the Executive Branch's interpretation of immigration rules and regulations. On one hand, this would allow the Executive Branch to retain a level of interpretive authority over some areas of law; on the other, it would ensure the Attorney General is removed from a position of *outsized* authority over substantive interpretation of law.

In addition, proponents of immigration court reform should consider how a scenario analogous to the one in which the Supreme Court struck down aspects of the 1978 Act as unconstitutional might play out in the immigration context. In this case, while reformers are not grappling with the concern that the Court will rule the plan unconstitutional in an effort to fight to maintain power in the judiciary, they will have to contend with the prospect of a presidential veto over any proposed legislation to maintain authority within the Executive Branch.

Although this difference could suggest that the story of bankruptcy is not entirely applicable to immigration reform, the general lessons for power-shifts between the branches of government function in the same manner. Although the obstacles presented by a presidential veto and a finding of unconstitutionality are different, the underlying necessary remedy would be the same: another set of compromises in the legislative plan to ensure that the realignment of power is workable. For immigration court reform, Congress could simply overcome the veto through a two-thirds vote.²⁰⁹ This avenue did not exist for Congress when it navigated bankruptcy reform after the Court forced Congress to return to the negotiating table. But today, overcoming a presidential veto is a somewhat common occurrence, as Congress has overridden at least six presidential vetoes in the last four

209. See *ArtI.S7.C2.2 Veto Power*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S7-C2-2/ALDE_00013645/ [<https://perma.cc/H2EP-LCNS>] (describing how Congress can override a presidential veto with a two-thirds vote in both chambers).

administrations.²¹⁰ Alternatively, Congress could rework the legislation to satisfy the Executive Branch without needing to overcome the veto.

Thus, although critics might suggest that these two contexts diverge too substantially to offer a valuable analogy because of the traditional view that the Judicial Branch of the United States possesses a power that is weaker than the power of the President or of Congress,²¹¹ court reform may still serve as an exception to this general rule—one in which stripping power away from the Executive Branch presents the easier path forward. Therefore, the lessons from bankruptcy still apply and provide a reasonable guide for understanding how power is reallocated among the three branches of government.

The path forward for a realistic plan to reform immigration courts should thus be guided by the historical lessons of reforming bankruptcy courts. To get there will require a reshuffling of the power between the three branches of government. The lessons learned from bankruptcy suggest that the best way to accomplish this goal is to appeal to the other branches of government to create lasting reform.

Conclusion

Reforming the immigration courts into Article I courts is a laudable goal. But in contrasting the stories of the Bankruptcy Reform Act of 1978 and the Bankruptcy Amendments and Federal Judgeship Act of 1984, which ultimately established an independent bankruptcy court system under Article I of the Constitution, with the comparative failure to create immigration courts under Article I, it becomes apparent that the framing for legislative action in the area of immigration requires much change. Ultimately, the failure to create an Article I immigration court lies in the lack of action from the Legislative and Judicial Branches to strip the Executive Branch of its current comprehensive control of the immigration courts. Shifting the narrative focus of proposals to create an Article I immigration court towards increased oversight and opportunity for influence by Congress and the Judiciary, while also emphasizing the separation of powers concern present in the current system, is the best possible path forward. By enacting a plan where Congress and the federal courts are able to exert increased control over immigration law and policy, a fairer and less biased system can be achieved.

210. *Vetoes, 1789 to Present*, U.S. SENATE, <https://www.senate.gov/legislative/vetoes/vetoCounts.htm> [<https://perma.cc/WJT5-Q6B8>].

211. See THE FEDERALIST NO. 78, at 465–66 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[T]he judiciary is beyond comparison the weakest of the three departments of power . . . it can never attack with success either of the other two . . .”).