

ARTICLES

FACTS VERSUS DISCRETION: THE DEBATE OVER IMMIGRATION ADJUDICATION

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ABSTRACT

Justice Amy Coney Barrett recently issued her first majority-led immigration opinion in Patel v. Garland (2022). As background, some immigrants looking to avoid deportation may apply for what is called “discretionary relief” (e.g., asylum or adjustment of status) initially in an immigration court and then, if they lose, at the Board of Immigration Appeals (BIA). These immigration forums fall under the Department of Justice. Prior to Patel, immigrants who lost at the BIA could then ask a federal circuit court to review the factual findings of their case. Now, after Justice Barrett’s decision, Article III review is no longer available for such immigration proceedings involving discretionary relief.

The decision in Patel serves as an important backdrop for the subject of this study. A related, but distinct debate simmers one layer below the federal courts. Namely, the question is how much deference the BIA should give to factual determinations made by immigration courts of first resort in discretionary relief cases. Certain circuits have held that the BIA may intervene rather aggressively, while the largest circuit—the Ninth—has said that the BIA should display enhanced deference.

As this study argues, this circuit split conspicuously ignores how the dividing line between what is fact and what is discretion is often more blurred than discrete. Moreover, there is a gross inequity to this circuit discordance; the

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way that an immigrant's appeal is analyzed and adjudicated depends upon the happenstance of the circuit from where that case originated.

For this reason, this article offers a new theoretical framework to improve the status quo. This model's two-step proposal looks to raise the standard of justice in these immigration proceedings, remove the biases that presently favor the government, and provide greater fairness and equity across the circuits to immigrants seeking relief from deportation.

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I. INTRODUCTION

On May 16, 2022, Justice Amy Coney Barrett issued her first major immigration ruling since being confirmed to the U.S. Supreme Court. In *Patel v. Garland*,¹ Justice Barrett was joined by Chief Justice Roberts as well as Justices Thomas, Alito, and Kavanaugh. Justice Barrett's opinion dealt with §242(a)(2)(B)(i) of the main American immigration statute known as the Immigration and Nationality Act.² In short, she wrote that, going forward, an immigrant who seeks what is called “discretionary relief” from deportation – and is denied by the Justice Department's immigration courts – has no right to appeal to an Article III court to review the facts of that case. As Justice

1. See *Patel et. al v. Garland*, 142 U.S. 164, 1618 (2022).

2. *Id.* (codified as 8 U.S.C. §1252(a)(2)(B)(i)).

Barrett's judgment starkly concluded, simply put, the "federal courts lack jurisdiction."³

To immigration advocates, the *Patel* outcome was deeply concerning. Even Justice Neil Gorsuch, in his dissent, was stunned. He noted that "bureaucratic mistakes can have life-changing consequences,"⁴ especially in immigration cases, and that they are not infrequent occurrences. The "law has long permitted individuals to petition a court to consider the question and correct any mistake," he said.⁵ However, after *Patel*, the federal "courts are [now] powerless . . . no matter how egregious the error [of fact] might be" that comes out of the Department of Justice's (DOJ) immigration court system.⁶

The decision in *Patel* serves as an important backdrop for the subject of this study. Currently, a related but distinct debate simmers one layer below the federal courts. Namely, the question is how much deference should the DOJ's sole immigration *appellate* court give to factual determinations made by its own lower immigration courts.

Consider that three months prior to the *Patel* decision, the First Circuit Court of Appeals issued a judgment in *Adeyanju v. Garland*.⁷ The case involved an immigrant from Nigeria, Adekunle Adeyanju, who in 2019 had been "indicted for kidnapping, as well as two different counts of sexual assault."⁸ Before his arrest on these charges, the federal government's Citizenship and Immigration Services agency had determined that Adeyanju's marriage to a U.S. citizen was fraudulent. Simultaneously, "the Department of Homeland Security ("DHS") initiated removal proceedings against" him.⁹

In his deportation hearing, Adeyanju sought to persuade the presiding immigration judge that he ought to be granted a related form of discretionary relief known as "adjustment of status," commonly known as being awarded permanent residence or being granted a green card.¹⁰ This benefit would allow him the opportunity to transition from being undocumented, when he

3. *Id.* at 21. In *Patel*, the specific form of discretionary relief was not asylum but rather "adjustment of status." More on the different forms of discretionary relief will be discussed below.

4. *Id.* at 1627 (Gorsuch, J., dissenting).

5. *Id.*

6. *Id.* at 1637 (Gorsuch, J., dissenting).

7. See *Adeyanju v. Garland*, 27 F.4th 25, 25 (1st Cir. 2022).

8. *Id.* at 33. See also J.W. Oliver, *ICE Detainee Faces Charges of Kidnapping, Sexual Assault in Wiscasset*, LINCOLN CNTY NEWS (Jan. 14, 2020, 8:44 AM), <https://perma.cc/DS6A-6L4N> (noting that "[t]he indictment alleges that Adeyanju committed the crimes March 1, 2019.").

9. *Adeyanju*, 27 F.4th at 32. It is not uncommon, where there are criminal charges pending against a noncitizen who is in removal proceedings, for the local prosecutors and federal immigration officials to work out an arrangement where the immigration proceeding will take precedence over the criminal matter. Based on the record, that seems to have been what occurred in this matter. My thanks to SangYeob Kim for highlighting this point to me.

10. *Id.* at 33.

could be more easily deported, to having a right to stay in the country permanently.¹¹

Procedurally, the immigration judge whom Adeyanju appeared before was not an Article III adjudicator.¹² Like all of the other “approximately 600” immigration judges currently sitting throughout the United States, this judge was based within the DOJ.¹³ The particular body above the immigration trial court that hears appellate petitions is known as the Board of Immigration Appeals (BIA).¹⁴ It has twenty-three members who have traditionally sat in panels of three.¹⁵ The judges on the BIA, as well as the immigration trial judges themselves, are overseen by, and ultimately answerable to, the Attorney General.¹⁶

In this case, the immigration judge was sufficiently convinced by the arguments put forth by Adeyanju.¹⁷ As such, the judge granted the request for adjustment of status.¹⁸ However, thereafter, the government appealed to the BIA, which reversed the judge’s decision, and from there, Adeyanju took his case to the First Circuit.¹⁹

For the First Circuit, the central question was the degree of deference the BIA ought to have given to the determinations made by the immigration trial judge.²⁰ As background, immigration judges often serve as the primary fact-finder in immigration cases.²¹ Such a role includes comparing the testimony to outside evidence and determining if events occurred as described.²² As the

11. *Id.* at 31–34 (noting that after his marriage, he received what was called “conditional resident status.” He and his spouse then “subsequently filed a joint I-751 petition to remove the condition of his residency.”).

12. *Id.*

13. *See Office of the Chief Immigration Judge*, U.S. DEP’T OF JUST. (Oct. 13, 2022), <https://perma.cc/A8QG-3W39> (noting that there are “approximately 600 immigration judges located in 68 immigration courts and three adjudications centers throughout the Nation.”); *see also* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635 (2010); Jayanth K. Krishnan, *Judicial Power – Immigration Style*, 73 ADMIN. L. REV. 317, 321–22 (2021).

14. *See Board of Immigration Appeals*, U.S. DEP’T OF JUST. (Sept. 14, 2021), <https://perma.cc/ZK22-CNUY> (explaining background on the BIA); *see generally* Jayanth K. Krishnan, *The Immigrant Struggle for Effective Counsel: An Empirical Assessment*, 2022 U. ILL. L. REV. 1021, 1025 (2022).

15. For one paper that has discussed how, beginning in 2002, then-Attorney General John Ashcroft introduced “streamlining rules” to the BIA, *see* Susan Benesch, *Due Process and Decisionmaking in U.S. Immigration Adjudication*, 59 ADMIN. L. REV. 557, 561 (2007) (noting that “Affirmances without Opinions” became routine, whereby the BIA would issue “one-line decisions in which the BIA merely states that it agrees with the decision of the immigration judge below.”). Furthermore, these three-member panels frequently became panels of one BIA judge issuing the affirmance. *See* Beth Werlin, *Practice Advisory: Practicing Before the BIA Under the New “Procedural Reforms” Rule*, AM. IMMIGR. COUNCIL (Jan. 10, 2003), <https://perma.cc/5GYQ-Y39N>.

16. *See Adeyanju v. Garland*, 27 F.4th 25 (1st Cir. 2022).

17. *See id.* at 34.

18. *Id.*

19. *Id.* at 3–4. Note, this is the typical appellate pathway in immigration cases: first there is the hearing at the immigration trial court level. Then an appeal is made to the BIA; and then the case goes to a federal appellate court, the circuit of which is determined by the location of where the original immigration trial proceeding took place.

20. *Id.*

21. *See* 8 C.F.R. § 1003.1(d)(3)(i), (iv) (2022); *see also* Immigration Judge Bench Book, U.S. DEP’T OF JUST. <https://perma.cc/B8SG-TT35>.

22. *Id.* § 1003.1(d)(3)(iv).

First Circuit noted, the standard approach is that where the immigration judge arrives at a factual finding, the BIA should only intervene when there is a “clear error.”²³ Where there are issues concerning “law, discretion, and judgment though, the BIA has the authority to review those determinations of the IJ [immigration judge] *de novo*.”²⁴

Regarding this last point, there are four types of discretionary claims that an immigrant may invoke: asylum, adjustment of status, cancellation of removal, and voluntary departure.²⁵ It is worthwhile here to mention that these types of petitions made by immigrants are not wholly subjective. Immigration judges are supposed to make decisions on discretionary relief applications using objective legal frameworks and criteria as part of their analyses. The discretion part then comes in once the application of these standards have been employed.

Yet, there are many cases heard on appeal that fall in-between—cases that involve “a mixed question of law and fact,”²⁶ where the dividing line between what is fact and what is discretion is often more blurred than discrete.²⁷ Consider how a factual conclusion drawn by the initial immigration judge can affect whether and what type of discretionary relief is available to the petitioner.²⁸ In these mixed cases, a circuit split exists on how the BIA should conduct its evaluation.²⁹ On one hand, there are those courts, like the First Circuit, that have held that the BIA can affirmatively “reweigh the evidence when analyzing the immigration judge’s balancing of the equities in an immigration case.”³⁰ In other words, this approach appears to be signaling that the BIA may take a fresh look at what was decided by the immigration judge below. By contrast, the federal appellate court that hears the highest number

23. Adeyanju v. Garland, 27 F.4th 25, 31 (1st Cir. 2022).

24. *Id.* at 33 (citing 8 C.F.R. § 1003.1(d)(3)(ii) (2022)).

25. These forms of relief will be discussed in Section IV of this Article. But briefly, receiving asylum or adjustment of status can provide an immigrant with an eventual pathway to permanent residency as well as citizenship. Cancellation of removal is a form of relief found in 8 U.S.C. § 1229b, that can stave off deportation for both lawful permanent residents as well as for nonimmigrants (or those here on a temporary basis). Finally, voluntary departure, under 8 U.S.C. § 1229c, allows the immigrant to leave the United States at the immigrant’s “own expense,” with the possible benefit that the immigrant might be able to return at some point in the future. For a detailed discussion on these four types of discretionary relief claims, see Krishnan, *supra* note 14, at 104 n.27.

26. On this point, as it relates to the *Patel* decision and what occurs at the circuit court level, see Geoffrey Hoffman, *Guest Post: Patel v. Garland Missed the Real Issue*, L. PROFESSOR BLOGS NETWORK: IMMIGRATIONPROF BLOG (May 19, 2022), <https://perma.cc/LG7V-SSZV> (noting that: “The real issue in *Patel v. Garland* should not have been whether a ‘factual determination’ was subject to judicial review under 8 U.S.C. § 1252(a)(2)(B)(i), but rather instead whether a legal question or, more precisely, a mixed question of law and fact, should have been subject to judicial review. The answer, if the real question was addressed, is clearly ‘Yes’. As the majority recognized, section 1252(a)(2)(D) would have applied differently for review over legal questions and constitutional claims.”).

27. *Id.*

28. *Id.* Also, as it relates to the *Patel* decision, see Shoba Sivaprasad Wadhia, *Justices split over question of federal court review in immigration cases*, SCOTUS BLOG (May 19, 2022), <https://perma.cc/WXY8-ZZTD>.

29. A detailed discussion of this split will be presented in the next two Sections.

30. Bernie Pazanowski, *Circuit Splits Reported in U.S. Law Week—February 2022*, BLOOMBERG L. (Mar. 8, 2022, 3:06 PM), <https://perma.cc/855J-33WK>.

of immigration cases—the Ninth Circuit³¹—has declared that “the BIA has to accept the [immigration] judge’s balancing analysis.”³²

There are serious ramifications to this circuit discordance, and the thesis of this study is that such a discrepancy runs counter to the interests of equity, fairness, and justice. After all, should immigrants, whose initial immigration court hearing falls within the First Circuit, really have their immigration appeals treated differently than those whose first hearing occurred within the Ninth Circuit’s jurisdiction?

Thus, what is offered here is a new theory, which will be referred to as the Adjudication of Immigration Decisions (AID) model. As will be discussed in detail below, this framework has two stages. The first is in those cases where the immigrant prevails on a discretionary relief claim in front of the immigration trial judge. Here, under the AID model, the case would be over, pending certain other procedural possibilities that will be discussed later in the paper; thus, the Government would be foreclosed from appealing—akin to what occurs in a criminal trial when the defendant is found not guilty.³³

The second stage involves those cases where the immigrant loses on a discretionary petition at the initial immigration hearing. At this point, if the immigrant appeals, the AID model would require the BIA to employ a *de novo* standard of review in more than just cases where a mixed question of law and fact is present. Purely factual findings by the immigration trial judge would also be subject to *de novo* review.³⁴

Moreover, as will be explained, various reports over the last decade have also highlighted how judges at the immigration trial level have subtly, and sometimes not so subtly, skewed the fact-finding process against the immigrant when deciding deportation cases.³⁵ If there is no chance for the immigrant to be able to re-litigate flawed factual determinations made at the initial proceeding, then the integrity of the process comes into serious question. Stated differently, the deck would continue to be stacked against the immigrant at this second stage of review unless the BIA could reexamine the facts anew.

Two additional points need to be mentioned. Under the AID model, the working assumption is that those immigrants who lost at their initial immigration hearing would welcome a follow-up chance to re-present their case in full, even with the way the current system is structured. It is better to have a

31. See *Jurisdiction of the Federal Circuit Courts*, MYATTORNEYUSA, <https://perma.cc/8CF7-NSKS> (last visited Oct. 31, 2022).

32. See Pazanowski, *supra* note 30. For the case that is referenced here from the Ninth Circuit, see *Vasquez Chavez v. Barr*, 804 F. App’x 633 (9th Cir. 2020) (unpublished opinion).

33. As will be discussed in Section IV, where the AID model is explained fully, there is, in fact, already an immigration procedure in place that precludes the government from being able to appeal in certain types of asylum cases. See T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, MARYELLEN FULLERTON, JULIET P. STUMPF & PRATHEEPAN GULASEKARAM, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 737 (9th ed. 2021).

34. This point will be discussed in Section IV.

35. *Id.*

second opportunity to make the case than no opportunity at all. Furthermore, on appeal, the BIA would operate with an explicit understanding that there would be no deference given to the immigration judge's findings. Immigrants could strenuously reiterate (now to a higher body) that they are entitled to remain in the country without fear that the government's victory below would carry some type of presumptive merit.

This study is structured in the following manner. Section II summarizes the one school of thought, prominently adhered to by the First Circuit, arguing that the BIA ought to have wide latitude to review decisions, including when the immigrant wins at the immigration trial level. Section III provides a rebuttal to this perspective, highlighting an alternative path that the Ninth Circuit has taken: granting great deference when it comes to determinations made at the initial immigration merits hearing.

Section IV then takes a step back. It reflects on this existing disagreement and then details the multi-stage process of how the AID approach can provide more analytical clarity to this situation. Finally, Section V concludes by noting that ultimately what is needed is a transformation of the structure of the immigration courts—making them less subject to political influence, which would fundamentally improve the fact-finding capabilities of immigration judges as well as enhance the due process rights of those currently in the system. Unfortunately, the lack of political will and the jaundiced nature of the national conversation on immigration render it unlikely that substantive change will occur anytime soon. Therefore, the AID model is proposed, in the indefinite interim, to raise the standard of justice in these proceedings to a much more acceptable level than presently exists.

II. ADEYANJU AND THE FIRST CIRCUIT'S APPROACH TO BIA REVIEW

A. *Balancing Equities*

As stated above, in his petition for discretionary relief, Adeyanju prevailed in front of the original immigration judge.³⁶ Thereafter, DHS, which was the prosecuting arm of the government and which was clearly “[u]nhappy with the IJ’s decision, . . . appealed to the BIA.”³⁷ The basis of DHS’s argument rested on a belief that the immigration judge had incorrectly assessed the existing factors, or what were referred to as “equities,” in deciding that Adeyanju deserved discretionary relief.³⁸

The immigration judge found that Adeyanju “had a number of positive equities weighing in his favor.”³⁹ Specifically, the judge looked approvingly

36. See *Adeyanju v. Garland*, 27 F.4th 25, 36 (1st Cir. 2022).

37. *Id.* at 35.

38. *Id.* at 356.

39. *Id.* at 34.

upon the length of time that Adeyanju had been in the United States (seven years).⁴⁰ He also was gainfully employed, dutifully paid taxes, and had strong social connections to his community as well as to his daughter who was an American citizen.⁴¹

For its part, the BIA acknowledged that generally when the immigration judge makes factual findings, only in cases of clear error can it intervene.⁴² But, in this situation, the BIA stated that each of the equities involved questions of law; as such, it was completely within its jurisdiction to review them in a *de novo* fashion.⁴³ The First Circuit accepted this rationale by the BIA, despite these equities being undergirded by factual content.⁴⁴ The First Circuit then went on to summarize the BIA's rejection of the immigration judge's analysis.⁴⁵

To begin, it noted that the BIA disputed the assertion that Adeyanju was a model citizen. The BIA cited his arrests on kidnapping and sexual assault charges as a factual basis for deeming him to have "bad character."⁴⁶ The BIA conceded the immigration judge's finding that "Adeyanju hadn't been convicted of any crimes."⁴⁷ Nevertheless, the BIA concluded that the charges against him ought to be interpreted as "a serious negative factor."⁴⁸

From there, the BIA focused on Adeyanju's visa application to the United States. As part of his documentation, Adeyanju stated that he was to be married to a woman who resided in Nigeria.⁴⁹ The BIA found this claim to be false, and furthermore, it deemed the information he provided regarding a first marriage of his to be fraudulent in nature as well.⁵⁰ Note, the immigration trial judge had found there to be insufficient evidence to make such conclusive determinations, especially given that there was direct evidence offered by Adeyanju rebutting these charges.⁵¹ Still, the BIA ruled that, on balance, there were not enough positive factors in favor of Adeyanju that

40. *Id.*

41. *Id.* The judge also noted that Adeyanju had "two lawful-permanent-resident sisters and a U.S. citizen brother."

42. *Id.* at 35.

43. *Id.*

44. As will be discussed in Section IV, this faux distinction of viewing the different equities/factors that the immigration judge evaluates as being 'non-factual' is a major conceptual problem, but one that the BIA as well as the federal circuit courts continue to repeat as a justification for whether there should be deferential, as opposed to a more involved review process on appeal.

45. *See Adeyanju*, 27 F.4th at 36.

46. *Id.*

47. *Id.*

48. *Id.* (Indeed, for the immigration judge, the lack of a conviction as well as an affirmative defense by Adeyanju that there was consent, rather than assault, led the judge to find that the "positive equities outweighed the negative equities." *Id.* at 35).

49. *Id.* at 36.

50. *Id.*

51. *Id.* at 35 (noting, however, that the immigration judge did recognize that "Adeyanju's having a child out of wedlock was 'evidence of immoral and bad behavior.'" *Id.* However, even with this finding, the other evidence that Adeyanju provided to the judge (*see id.* nn.127–28) leaned in favor of making an "inconclusive" determination on whether Adeyanju was intent to commit fraud.)

justified allowing him to adjust his status. Subsequently, it ordered that he be deported from the United States.⁵²

B. *Applying the Proper Review Standard*

When the case ultimately reached the First Circuit, the court began its analysis by examining an important 2010 BIA precedent known as *Matter of H-L-H & Z-Y-Z*.⁵³ The BIA believed that this decision allowed it to take a *de novo* approach to the immigration judge's balancing of the different equities in Adeyanju's case.⁵⁴ For his part, Adeyanju asked the First Circuit to "abrogate"⁵⁵ that precedent, arguing that the BIA was using it to engage in otherwise prohibited fact-finding.

The First Circuit was unmoved by Adeyanju's petition. The court stated that the BIA could only reverse factual determinations by the immigration judge if there was clear error. Otherwise, the BIA could not use its own authority to reevaluate the original evidence even if there were other reasonable interpretations of that evidence.⁵⁶ The First Circuit also noted that it was not alone in seeing this type of distinction.⁵⁷ Additionally, other circuits have allowed the BIA to consider evidence that may have been missed by the immigration judge upon initial review, an option that the First Circuit embraced as well.⁵⁸ The court also noted that when the BIA draws different conclusions from the immigration judge by analyzing evidentiary factors, it is making a determination based on *law*, not fact.⁵⁹ According to the court, this is exactly the role that the BIA should play.⁶⁰

Take, for instance, the immigration judge's finding that Adeyanju was a "credible"⁶¹ witness and that he did not engage in marriage fraud. Now a natural question might be: do we consider these determinations to be factual in nature or ones that are more equity-based? According to the First Circuit, "[t]he BIA will not engage in *de novo* review of findings of fact determined by an immigration judge. . . . Rather, facts determined by the immigration judge,

52. *Id.* at 35–36.

53. *See* 25 I. & N. Dec. 209 (B.I.A. 2010).

54. *See Adeyanju*, 27 F.4th at 41.

55. *Id.* at 39.

56. *Id.* at 40 (noting how a "clear-error standard does not restrict the BIA's authority to 'analyze[] the evidence that had been presented in the immigration court,' but rather constrains it from 'supplementing the record by considering new evidence.'" (quoting *Rotinsulu v. Mukasey* 515 F.3d 68, 73 (1st Cir. 2008))).

57. *Id.* at 40–41 (citing *Padmore v. Holder*, 609 F.3d 62, 68 (2d Cir. 2010); *James v. Barr*, 756 F. App'x 97, 98 (2d Cir. 2019); *Nathanial v. Holder*, 433 F. App'x 22, 24 (2d Cir. 2011); *Efimova v. Mukasey*, 292 F. App'x 118, 120 (2d Cir. 2008); *Andrickson v. U.S. Att'y Gen.*, 433 F. App'x 124, 126 (3d Cir. 2011)).

58. *Id.* (noting that in *James*, 756 F. App'x at 98, the Second Circuit held that the BIA "didn't engage in *de novo* fact-finding by identifying an additional conviction not found by the IJ but supported by the respondent's own testimony.")

59. *Id.* at 41.

60. *Id.* at 42 (citing *Guevara v. Gonzales*, 472 F.3d 972, 975 (7th Cir. 2007) and *Delgado-Reyuna v. Gonzales*, 450 F.3d 596, 598, 599–600 (5th Cir. 2006)).

61. *Id.* at 45.

including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.”⁶²

Or alternatively, the immigration judge had concluded that certain past acts by Adeyanju were not criminal in nature; the First Circuit found that these did not amount to *per se* factual determinations.⁶³ Therefore, on these issues, the BIA could reweigh its determinations in its discretionary review.⁶⁴

From there, the First Circuit then addressed Adeyanju’s other arguments. It rejected his contention that separate BIA case law ran counter to *H-L-H & Z-Y-Z*.⁶⁵ And, in the court’s reading of the BIA’s regulations, it found the plain meaning of the regulatory language *not* to prohibit the BIA from engaging in what it did in this case.⁶⁶

To recap, the First Circuit stated that: a) the BIA could conduct a *de novo* review of the positive and negative factors (i.e., equities) that the immigration judge had to balance before reaching a decision; and b) the BIA could “pull[] from the undisputed record additional underlying facts not spotted by the IJ.”⁶⁷

However, the court almost immediately thereafter reverted to espousing classic doctrine: that when the BIA examines “certain factual issues relevant to the equities,”⁶⁸ the BIA must find clear error on the part of the immigration judge in order to overturn. The issue, though, is that this distinction between weighing factors and reaching factual determinations is more blurred and artificial than conceptually obvious and apparent.

For example, the BIA evaluated a 2019 arrest of Adeyanju. It concluded that this arrest was evidence of worsening behavior and thus justification for denying him the relief he sought.⁶⁹ By contrast, the immigration judge had considered this arrest and found that there were other aspects to this incident that mitigated its “significance.”⁷⁰ Illustrating this difficulty between weighing factors and arriving at factual determinations, the First Circuit this time sided with the immigration judge and declared that the BIA could “not substitute its own factual judgments”⁷¹ for that of the immigration judge. Similarly, on another issue, the court again held that the immigration judge was justified

62. *Id.* at 33 (emphasis added).

63. In a rather unorthodox manner, the IJ referred to his behavior, not as criminal in nature, but instead as “creepy.” *Id.* at 47. On this point, the court asked the BIA to take a further look and offer its opinion, because the issue had not been fully briefed by the petitioner to the First Circuit’s case.

64. *Id.* at 48.

65. *Id.* at 39.

66. *Id.* at 42 (noting that the regulations do not preclude the BIA making “determinations of matters of law, nor to the application of legal standards, in the exercise of judgment or discretion.”).

67. *Id.* at 40.

68. *Id.* at 43.

69. *Id.* at 43–44.

70. *Id.* at 44.

71. *Id.* at 45 (noting that “[t]he BIA’s job . . . was to explicate why the finding “was ‘illogical or implausible,’ not substitute its own factual judgments.” (citing *Anderson v. Bessemer City*, 470 U.S. 564, 577 (1985))).

in finding that Adeyanju was not guilty of a separate visa infraction of which he had been charged and which the BIA had found that he had committed.⁷²

Ultimately, the First Circuit remanded the case to the BIA for further consideration.⁷³ At the time of this writing, the matter remains pending. Yet the court's conflicting rulings on these various issues raise deep concerns. One immediate, practical question to ask is what the difference is between a factual and discretionary decision. The First Circuit attempted to thread a needle by articulating a distinction between the two. But in scrutinizing the court's analysis, there is more mystifying hairsplitting than conceptual coherence. Perhaps for this reason, one federal appellate court that hears the largest number of immigration cases has directed the BIA to follow a more straightforward method of review. That competing approach is examined next.

III. THE NINTH CIRCUIT'S TAKE

For the Ninth Circuit, too often there is an unjustifiable blurring of the standard of review lines, where what the BIA claims to be doing, in terms of balancing equities, is actually a process of conducting a new factual analysis. Most recently, it articulated this concern in a 2020 case known as *Vasquez Chavez v. Barr*.⁷⁴ Vasquez Chavez was an immigrant who petitioned to adjust his status to that of a permanent resident.⁷⁵ The government had sought to remove Vasquez Chavez because of his multiple arrests and convictions for driving under the influence of alcohol.⁷⁶

In evaluating the matter, the immigration judge analyzed "Vasquez's testimony and . . . documentary evidence . . . [and] took 'into account the social and humane considerations presented in [his] favor and balance[ed] them against the adverse factors'"⁷⁷ Yet these were not the only assessments made by the judge.⁷⁸ Along with arriving at the necessary factual findings, the judge went one step further and issued a set of "predictive findings."⁷⁹ Highlighting the credible promises that Vasquez Chavez undertook, which included agreeing to seek therapy and ensuring that "he never drinks and drives again,"⁸⁰ the judge stated that he believed Vasquez Chavez would likely not violate these laws in the future. The judge, thereafter, granted the adjustment of status request.⁸¹

On appeal, the BIA reversed. It found that such considerations involving future, predictive behavior were within its purview to review in a *de novo*

72. *Id.* at 47.

73. *Id.* at 51–52 (instructing the BIA to provide a further justification for why it concluded Adeyanju's application failed to show *prima facie* eligibility for relief under the I-751 waiver.).

74. *Vasquez Chavez v. Barr*, 804 F. App'x 633 (9th Cir. 2020).

75. *Id.* at 634.

76. *See id.*

77. *Id.* at 634 (alteration in original).

78. *Id.* at 634–35.

79. *Id.*

80. *Id.*

81. *Id.*

fashion.⁸² While the immigration judge saw this aspect to be factual, for the BIA it was instead an equity issue that could be reevaluated in a fresh manner. Accordingly, because the BIA did not believe that Vasquez Chavez had demonstrated enough remorse or capability of reforming, after balancing the equities, it held that he was not deserving of discretionary relief from deportation.⁸³

On appeal, the Ninth Circuit reversed the BIA. The court emphasized that “[t]here is nothing unusual about an IJ making predictive, factual determinations about the likelihood that crimes will be committed in the future.”⁸⁴ Note what the court did here: it placed predictive assessments made by the immigration judge within the ambit of the fact-finding process. It then cited an important decision from the Third Circuit. In *Kaplun v. Attorney General*, the Third Circuit stated that “[f]acts include past events, but they are not restricted to historical events” and could comprise one’s “state of mind such as intentions and opinions.”⁸⁵ Moreover, and crucially, the Third Circuit found that “an assessment of a future event is what a decision-maker in an adjudicatory system decides . . . as part of a factual framework for determining legal effect.”⁸⁶

Based on this analysis, the Ninth Circuit held that the BIA substituted its own factual determinations of Vasquez Chavez’s criminal situation and used the wrong standard of review.⁸⁷ Put bluntly, just because the BIA engaged in the “invocation”⁸⁸ of labelling something as an equity—rather than as a fact—did not make it so.⁸⁹ If the agency wished to overturn a factual conclusion drawn by the immigration judge, it needed to find clear error, which was not present here.⁹⁰

To be sure, Adeyanju drew upon *Vasquez Chavez* during his appeal to the First Circuit. The court there was unpersuaded, remarking that it was an “unpublished disposition from the Ninth Circuit.”⁹¹ However, the Ninth Circuit did issue a parallel ruling in a 2012 case, *Lopez-Rodriguez v. Holder*, which had similar facts to *Vasquez Chavez* and which was classified as precedent worthy.⁹² That 2012 decision discussed the U.S. Supreme Court case of

82. See *id.* at 635 (“In reversing the IJ’s decision to grant adjustment of status, the BIA held that Vasquez’s ‘history of recidivism undermine[d] his claim of rehabilitation,’ that he ‘ha[d] not shown persuasive evidence of rehabilitation,’ and that he posed ‘a continuing risk to the public.’”).

83. *Id.* at 635.

84. *Id.* at 634.

85. See *Kaplun v. Att’y Gen.* 602 F.3d 260, 269 (3d Cir. 2010) (citing *Fact*, BLACK’S LAW DICTIONARY (9th ed. 2009)).

86. *Id.*

87. *Chavez*, 804 F. App’x at 635.

88. *Id.*

89. *Id.*

90. *Id.*

91. See *Adeyanju v. Garland*, 27 F.4th 25, 39 (1st Cir. 2022).

92. See *Rodriguez v. Holder*, 683 F.3d 1164 (9th Cir. 2012). In this case, the noncitizen, who was a truck driver for a Mexican company that did business in Arizona, had been accused by the Federal Government of being a drug dealer and distributor. The Government said that he transported drugs inside of his gas tank on a trip to the United States. The noncitizen denied this charge and provided testimony to

Anderson v. Bessemer City.⁹³ *Anderson* involved a sex discrimination lawsuit filed by a woman who claimed that she was passed over for a city government job in favor of a man.⁹⁴ The plaintiff prevailed at the district court level, but the Fourth Circuit overturned the ruling, and the Justices were asked to review whether that reversal was proper.⁹⁵

The relevance of the *Anderson* decision to the immigration context, according to the Ninth Circuit, was that the Supreme Court firmly established the parameters under which an appellate court could intervene on a factual finding by a lower court.⁹⁶ Quoting from *Anderson*, the Ninth Circuit stated:

“Th[e clear error] standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty . . . if it undertakes to duplicate the role of the lower court. . . . If the district court’s account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.*”⁹⁷

Thus, just as the Fourth Circuit in the *Anderson* case impermissibly interjected itself in reversing the district court decision,⁹⁸ the BIA in *Lopez-Rodriguez* (and later in *Vasquez Chavez*) did the same as it pertained to the immigration judge’s decision finding in favor of the noncitizen.⁹⁹

To review, the split between the First Circuit and Ninth Circuit’s approaches appears to be based on how much leeway each court believes that

that effect to the immigration judge. The judge believed him and allowed him to be admitted as a temporary worker and to continue his drives into the United States. The BIA, however, reversed, but the Ninth Circuit reversed the BIA and used the same type of rationale that the court in *Chavez* used. In this decision, the court also cited a string of precedents affirming its power to review, and reprimanded the BIA for excessive intervention on fact-finding conclusions by the immigration judge. *See e.g.*, *Tamang v. Holder*, 598 F.3d 1083, 1088 (9th Cir. 2010); *Brezilien v. Holder*, 569 F.3d 403, 413 (9th Cir. 2009); *see also* *Arteaga v. INS*, 836 F.2d 1227, 1228 (9th Cir. 1988) (abrogated on other grounds by *INS v. Elias-Zacarias*, 502 U.S. 478 (1992)); *Afridi v. Gonzales*, 442 F.3d 1212, 1218 (9th Cir. 2006) (holding that the court “can determine whether the BIA applied the correct legal standard in making its determination”), overruled on other grounds by *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1160 n.15 (9th Cir. 2008) (en banc); *Rodriguez*, 683 F.3d at 1169-70; *see also* 8 C.F.R. § 1003.1 (the regulation limiting the BIA’s review powers on factual determinations).

93. *See Rodriguez v. Holder*, 683 F.3d 1164, 1171 (9th Cir. 2012); *see also Anderson v. City of Bessemer City*, 470 U.S. 564, 577 (1985).

94. *Anderson*, 470 U.S. at 577.

95. *Id.*

96. *See Rodriguez*, 683 F.3d at 1171.

97. *Id.* (citing *Anderson*, 470 U.S. at 573-74).

98. *See Anderson*, 470 U.S. at 577.

99. *See Rodriguez*, 683 F.3d at 1172; *see also Chavez v. Barr*, 804 F. App’x 633 (9th Cir. 2020).

the BIA ought to have in terms of appellate intervention. The First Circuit appears to have effectively now allowed the BIA to have enhanced review powers under the seeming guise of *de novo* review, while the Ninth Circuit continues to give great deference to the purview of the immigration judge.

Here, however, is where a conceptual dilemma emerges. On purely factual determinations, both circuits agree that unless a clear error has been made by the immigration judge, the BIA cannot intervene. But regarding the immigration judge's evaluation of factors (i.e., equities) that help determine whether relief can be granted, the circuit split raises the question whether or not it is possible for the BIA to consider the equity factors separately from how the immigration judge calculated them.¹⁰⁰ And, regarding predictions on what the immigrant will do in the future, the BIA's weighing of the equities, at times, seems to reflect a factual determination process depending upon the circuit from which the case originally derived.

The problem is that equities and predictions, in this context, are not made in a vacuum. For that reason, it is important to contemplate an alternative framework to assess when the BIA should intervene and when it should not.

IV. ADJUDICATION OF IMMIGRATION DECISIONS – THE AID MODEL

A. *Setting the Background: Considering the Various Discretionary Relief Categories*

For those who appear in front of an immigration judge—and whose cases proceed on appeal to the BIA—the discretionary relief request that is made comes in four types. The most familiar of these is asylum, whereby individuals who arrive at the border, or who have been present within the United States but are afraid to return to their home country, petition to stay.¹⁰¹ This may involve a multi-stage process, sometimes with an application to an asylum officer who works for DHS.¹⁰² “Moreover, grants of asylum by asylum officers are not appealable”¹⁰³ by the government.¹⁰⁴ Frequently, however,

100. Note that the type of relief discussed in particular is “discretionary relief,” which will be addressed in detail in the next Section.

101. See 8 U.S.C. § 1158. If the individual is not at the border or in the country but wants to seek refuge in the United States., they can look to make such an application abroad as a refugee under 8 U.S.C. § 1101(a). For two key works on refugees, see Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007), and JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, *REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM* (2009).

102. See ALEINIKOFF, MARTIN, MOTOMURA, STUMPF & GULASEKARAM, *supra* note 33, at 737.

103. *Id.* at 737 (noting that “[a]sylum officers have the authority to grant asylum in applications that meet the statutory standards. Positive asylum decisions initially ran between 15 and 30 percent of affirmative filings. In 2013, asylum officers approved close to 50 percent. The approval rate hovered near 20 percent in 2015 and 2016, plummeted to approximately 10 percent in 2016 and 2017, and returned to roughly 20 percent in 2018 and 2019. See U.S. Citizenship & Immigration Servs., All Forms, Annual Reports, 2013-2019.”).

104. For an explanation of how asylum detention functions in the United States, see Christina Eleftheriades Haines & Anil Kalhan, *Detention of Asylum Seekers En Masse: Immigration Detention in the United States*, in IMMIGRATION DETENTION: THE MIGRATION OF A POLICY AND ITS HUMAN IMPACT 69-78 (Amy Nethery & Stephanie J. Silverman eds., 2015).

the asylum officer will refer the case to an immigration judge for consideration.¹⁰⁵

A second type of discretionary relief is cancellation of removal.¹⁰⁶ In this situation, either a permanent resident or someone who is in the United States on a temporary basis may ask the immigration judge to set aside the deportation order.¹⁰⁷ The rigor of the criteria that must be satisfied will depend upon the status of the noncitizen, including whether the person is a permanent resident or not.¹⁰⁸

The third type of discretionary relief is known as voluntary departure.¹⁰⁹ Under this category, noncitizens who are deportable request permission from the immigration judge to leave the country on their own accord, whereby they agree to pay for all costs to depart.¹¹⁰ If this permission is granted, then the noncitizen may be eligible to return to the United States at a later date.¹¹¹

Finally, there is adjustment of status.¹¹² This form of discretionary relief is generally invoked by the noncitizen who is seeking to move out of proper

105. *Id.* at 737-38. At this stage, it is not unusual to see the immigrant also apply for protection under the international agreement known as the Convention Against Torture (to which the United States is a party) and for a remedy known as withholding of deportation under 8 U.S.C. § 1231(b)(3)(A). These two claims are deemed to be mandatory rather than discretionary, meaning that if the immigrant meets the requirements set forth by each of the respective laws, then the immigrant is automatically entitled to remain in the country. Note that in order to prevail on an asylum claim, applicants, under the statute (8 U.S.C. § 1158), must show that they have a well-founded fear of persecution on the basis “of race, religion, nationality, membership in a particular social group, or political opinion.” *See* 8 U.S.C. § 1158. Compare this to applicants who are petitioning for relief under 8 U.S.C. 1231(b)(3)(A), which states that “the Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.” *See* 8 U.S.C. § 1231. Note that the categories of protection are the same for both asylum and withholding, but the Supreme Court has ruled that the threshold level for applicants to meet the asylum criteria is lower than for withholding applicants. *See* *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

106. *See* 8 U.S.C. § 1229.

107. *See* 8 U.S.C. § 1229a(b) (noting that the request must be granted, technically, by the Attorney General, but since the immigration judge works in the Justice Department, the latter is deemed to be the agent of the former).

108. *Id.* (noting that for permanent residents, cancellation of removal may be granted if the noncitizen: “(1) has been . . . lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony.” Whereas for the non-permanent resident, it may be issued if the noncitizen: “(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application; (B) has been a person of good moral character during such period; (C) has not been convicted of an offense under section 212(a) (2) . . . ; and (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien’s spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.”).

109. *See id.*

110. *Id.*

111. *Id.* For an explanation on the different amounts of time that a noncitizen, who has been granted voluntary departure, must remain outside of the United States before seeking to return, see *How to Apply for Voluntary Departure*, U.S. DEP’T OF JUST., <https://perma.cc/8KE2-9DEZ> (Oct. 2011).

112. *See* 8 U.S.C. § 1255 (“The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to

immigration status into the category of lawful permanent residence.¹¹³ This was the relief that Adeyanju wished to obtain, and which was granted by the immigration judge, but then was subsequently rescinded by the BIA.¹¹⁴

Understanding this background is important because, as we have seen, the decision by immigration judges to provide discretionary relief to immigrant petitioners is inextricably linked to factual circumstances.¹¹⁵ Once those facts are adjudicated, to then separate such findings from the so-called ‘equities’ of discretionary matters has serious conceptual problems.¹¹⁶ Thus, it is time to consider a new way to envision what the appeals process might look like once a decision on discretionary relief is given by the initial fact-finding immigration judge.

B. Operationalizing the AID Model

1. The First Stage

In reflecting on the best way to provide equity and justice to the immigrant who is looking for a way to avoid deportation, the proposed framework here offers a two-step approach. The first stage imagines the following example. Immigrant X is arrested by the police for committing a felony—illegal gambling. X is undocumented, but the local prosecutor’s office is both over-worked and surprisingly sympathetic to this individual and agrees to a plea deal whereby X is given a short sentence and asked to pay a fine.¹¹⁷ Subsequently, DHS learns about this case, and it decides to bring a removal proceeding against X.¹¹⁸

the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.”).

113. *See id.* Note, this form of relief is distinct from asylum or cancellation of removal of a non-LPR, since they too can result in granting the noncitizen LPR status.

114. *See supra* Section II.

115. *Id.*

116. Recall that the circuit split focuses on how a court like the First Circuit believes that the BIA should be able to review such appeals that involve weighing the equities in a *de novo* fashion; on the other hand, the Ninth Circuit believes that the only time that the BIA should intervene on an equities question is when clear error has been committed by the immigration judge.

117. Sec. 101(a)(43) of the INA provides a list of aggravated felonies, of which gambling is one such crime. *See* 8 U.S.C. § 1101.

118. There has been an important set of research on the interaction of local police and federal immigration officials when it comes to criminal prosecution and immigration enforcement. *See, e.g.,* Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010); Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L. REV. 675 (2000); Jennifer M. Chacón, *A Diversion of Attention?: Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 58 DUKE L.J. 1563, 1586–98 (2010); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1025 (2004); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. STATE U. L. REV. 965 (2004); Hiroshi Motomura, *Arguing About Sanctuary*, 52 U.C. DAVIS L. REV. 435 (2018); Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth M. McCormick & Juliet P. Stumpf, *Understanding “Sanctuary Cities”*, 59 B.C. L. REV. 1703 (2018); David A. Martin, *Resolute Enforcement Is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J. L. & POL. 401 (2015).

At this point, the immigrant is brought in front of an immigration judge. The government provides both evidentiary and statutory arguments in making its case. Assume, for the purposes of this scenario, the immigrant has legal representation. In testimony given by the immigrant and other witnesses, as well as additional evidence put forth by the lawyer, the judge hears how there would be great danger to the immigrant's life if this individual were forced to return home. After listening to both sets of parties, the judge issues a judgment in favor of asylum.¹¹⁹

Before proceeding to how the AID model would assess what should occur if the government were to appeal the original grant of asylum, there are two points worth noting for the sake of context. First, immigrants who appear in immigration court do not have a right to a government appointed lawyer. According to 8 U.S.C. § 1362, noncitizens “shall have the *privilege* of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings.”¹²⁰ As the American Immigration Council notes, what this means is that effectively only those with resources, or those who are fortunate enough to receive pro bono legal services, are generally the ones who appear in court with legal representation.¹²¹

That relatedly leads to the second point. Research has indicated that there is a significant win rate for those who have a lawyer, compared to those who do not.¹²² However, as the main, seminal study on this subject shows, “only 37 percent of all immigrants secured legal representation in their removal cases . . . [and] [o]nly 14 percent of *detained* immigrants acquired legal counsel, compared with two-thirds of non-detained immigrants.”¹²³

Thus, we see that many immigrants who go to court do so *pro se*. Moreover, while those who have lawyers tend to prevail more than those without,¹²⁴ the overall climate for immigrants within the legal system remains inhospitable. In fact, recent work documents showed cases of immigrants *and* their lawyers facing verbal abuse and serious courtroom aggression from immigration judges who have been hostile to discretionary relief claims brought in front of them.¹²⁵ Certainly then, when an immigrant has a lawyer, but especially when not, if an immigrant's petition is successful, the importance of that victory cannot be overstated.

119. It is important to note that it is not unusual for an immigrant to seek multiple forms of discretionary relief in a petition. For an empirical study on this front, see Krishnan, *supra* note 14.

120. See 8 U.S.C. § 1362 (emphasis added).

121. See Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL (Sept. 2016), <https://perma.cc/4TST-DXRK>.

122. See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 2 (2015) (“[I]mmigrants with attorneys fared far better: among similarly situated removal respondents, the odds were fifteen times greater that immigrants with representation, as opposed to those without, sought relief, and five and-a-half times greater that they obtained relief from removal.”).

123. See Eagly & Shafer, *supra* note 121, at 2 (emphasis added).

124. See Eagly & Shafer, *supra* note 122, at 2.

125. See Jayanth K. Krishnan, *Overstepping: U.S. Immigration Judges and the Power to Develop the Record*, 2022 WIS. L. REV. 57, 70 (2022).

This last point serves as the initial springboard for the AID model. Because of a climate of hostility and various challenges, as well as the degree of difficulty of prevailing in a discretionary relief application faced by the immigrant, the first stage of the model argues that where the immigrant wins, that would be the end of the matter. The government would not be able to appeal this outcome to the BIA.

Such a proposition would have two reference points of support to withstand potential skepticism. First, recall from above that in the asylum process, where an asylum officer, who is not part of the adversarial Justice Department adjudication process, determines that the immigrant is entitled to relief from deportation, the government is foreclosed from appealing that affirmative ruling.¹²⁶ Once this decision has been made, and after a certain amount of time has elapsed, the immigrant then has the opportunity to apply for permanent residency and eventually citizenship, assuming they meet certain statutory criteria. Effectively, this part of the AID model would extend that non-appealability component of the DHS hearing to the DOJ's immigration forum of first resort, where now a judicial factfinder would be overseeing the proceeding.

Indeed, such an expansion makes sense. After all, the immigration judge—even more so than the asylum officer (who does not need to be a lawyer)—has the legal training and responsibility to serve as the frontline examiner of the evidence, testimony, and overall merits of the immigrant's case.¹²⁷ Of all the people within the immigration court system, the immigration judge is in the best position to evaluate circumstances.¹²⁸ If this adjudicator believes that discretionary relief is warranted, then, from an equity perspective, the government should not be able to relitigate the matter on appeal for the sole purpose of stripping a positive, infrequently given, life-changing benefit.¹²⁹

There is a second justification that explains what occurs in the criminal justice space. Namely, in that context, once a criminal defendant is found not guilty on charges brought by the government, the double jeopardy clause of the Fifth Amendment prohibits any retrial on the same grounds.¹³⁰ Historically, the Supreme Court has long held that immigration hearings fall within the purview of the executive and legislative branches and are not criminal in nature, but rather civil.¹³¹ Hence, when an order of deportation is

126. See ALEINIKOFF, MARTIN, MOTOMURA, STUMPF & GULASEKARAM, *supra* note 33, at 796–97.

127. For background on the role of the immigration judge as adjudicator in this fashion, see Krishnan, *supra* note 125, at 58.

128. *Id.* at 59–60.

129. The model recognizes that the asylum officer process does not have the same type of adversarial nature to it that the immigration hearing has. However, the AID model draws upon the former as a means of improving access to justice for the immigrant in the latter forum.

130. See U.S. CONST. amend. V (“No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . .”).

131. See, e.g., *The Chinese Exclusion Case*, 130 U.S. 581, 599 (1889); *Nishimura Ekiu v. United States*, 142 U.S. 651, 663–64 (1892); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893); *Yamataya v. Fisher*, 189 U.S. 86, 100 (1903); *U.S. ex rel. Knauff v. Shaughnessy* 338 U.S. 537 (1950). A theme running throughout these cases is the great deference the Court gives to the plenary power doctrine,

issued, the Court has ruled that this outcome is not the same as a punishment received as a result of being found guilty of a crime.¹³²

For decades, however, observers have been critical of treating deportation and punishment in a separate fashion. As far back as 1958, Victor Navasky, who was then an advisor to Governor Mennen Williams of Michigan, wrote that this distinction was “a fiction so mammoth that it precludes the examination of constitutional safeguards and their relations to the powers and the problems”¹³³ associated with how immigration hearings are conducted. Many others over the years have made similar arguments.¹³⁴

For example, in the late 1990s, Javier Bleichmar provided a rich historical analysis of how the British, in their role as colonial rulers, viewed deportation, or what was called “banishment,”¹³⁵ as a form of punishment.¹³⁶ As Bleichmar found, the American Framers were influenced by this practice as well, to the point where those who today claim to be originalists in their viewing of the Constitution arguably ought to view deportation in the same manner.¹³⁷ A couple years later, Daniel Kanstroom described how throughout much of the twentieth century the Supreme Court effectively ignored and expressed great “unwillingness to grapple seriously with the argument that deportation is punishment in the constitutional sense.”¹³⁸

Then there is Lisa Mendel’s pointed argument that because deportation is seen as civil in nature, Congress has unfortunately avoided considering the human and civil rights implications of what this sanction really entails, something she sees as both unjust and inconsistent with due process.¹³⁹ And Beth

whereby it shows immense deference to the Executive Branch in carrying out the enforcement of the immigration policies it sets forth, as well as the immigration laws passed by Congress. For important work that has examined the way the Court has viewed immigration proceedings and the repercussions of a negative ruling against the immigrant, see David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 29 (2015); Gabriel J. Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of the Plenary Power*, in IMMIGRATION STORIES 7 (David A. Martin & Peter H. Schuck eds., 2005); Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Exceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 257 (2000).

132. See *Wong Wing v. U.S.* 163 U.S. 228, 236 (1896); see also ALEINIKOFF, MARTIN, MOTOMURA, STUMPF & GULASEKARAM, *supra* note 33, at 10–24, 580–82.

133. See Victor S. Navasky, *Deportation as Punishment*, 27 U. KAN. CITY L. REV. 213, 213 (1958–1959).

134. See *infra* notes 133–39.

135. See Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment*, 14 GEO. L.J. 115, 117 (1998) (also noting that “the history of banishment as punishment can be traced back at least to Roman times.”).

136. *Id.*

137. *Id.* (“The originalist argument is simple: the Framers at the time of the Constitutional Convention considered banishment to be a form of punishment for certain crimes, therefore, so should we.”).

138. See Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts on Why Hard Law Makes Bad Cases*, 113 HARV. L. REV. 1889, 1921 (2000).

139. See Lisa Mendel, *The Court’s Failure to Recognize Deportation as Punishment: A Critical Analysis of Judicial Deference*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 205, 222 (2000); see also Lupe S. Salinas, *Deportations, Removals and the 1996 Immigration Acts: A Modern Look at the Ex Post Facto Clause*, 22 B.U. INT’L L.J. 245 (2004).

Caldwell has examined this situation from a juvenile justice perspective.¹⁴⁰ As she contends, particularly for those who are not adults and who are deported to countries where there is a possibility that mistreatment may occur, the federal government's actions should be viewed as a potential violation of the Constitution's Eighth Amendment guarantee against state-sanctioned cruel and unusual punishment.¹⁴¹

From a judicial perspective, in 2010 the Supreme Court issued a pivotal decision that signaled a possible turning of the tide. In *Padilla v. Kentucky*, Justice John Paul Stevens, writing for the majority, held that criminal defendants who are not citizens have a Sixth Amendment right to be told of the immigration consequences of pleading guilty to a criminal charge.¹⁴² In this case, the lawyer for the defendant informed his client that he did not have to be afraid of deportation if he took a plea offer from the local prosecutor on a drug charge.¹⁴³ That advice was wrong, and following the acceptance of the deal, the federal government sought to have the defendant removed.¹⁴⁴ The Court, though, noted that "the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand"¹⁴⁵ that legal advice from a lawyer not just be effective but also affirmatively accurate.¹⁴⁶

Some subsequent decisions by the Court have also slowly begun to view deportation as more closely connected to sanctions imposed by the criminal justice process.¹⁴⁷ These cases have echoed the rationale set forth by Justice Stevens in *Padilla*—that deportation cannot be seen exclusively as a civil

140. See Beth Caldwell, *Banished for Life: Deportation of Juvenile Offenders as Cruel and Unusual Punishment*, 34 CARDOZO L. REV. 2261 (2013).

141. *Id.* For other relevant studies, see Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305 (2000); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289 (2008).

142. 559 U.S. 356 (2010).

143. *Id.*

144. *Id.*

145. *Id.* at 374.

146. *Id.* (rejecting the government's position and that of the concurrence written by Justice Alito, that defense lawyers' liability be restricted to just "affirmative misadvice." As Justice Stevens noted, such a ruling "would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. . . . Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available.").

147. See, e.g., *Lee v. United States*, 137 S. Ct. 1958 (2017) (holding in a 6-2 decision, reaffirming *Padilla*'s conclusion that "[d]eportation is always a 'particularly severe penalty,'" as cited in ALEINIKOFF, MARTIN, MOTOMURA, FULLERTON, STUMPF & GULASEKARAM, *supra* note 33, at 603); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010) (holding that a second, minor drug offense does not constitute grounds for mandatory removal, which was seen as too extreme a penalty for this type of misdemeanor crime); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1207 (2018) (holding that 18 U.S.C. § 16(b), which was known as the residual clause of the INA and which related to the INA's effort to define a crime of violence as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," was unconstitutionally vague because the penalty for being guilty of this provision was the severe sanction of deportation); see also *DHS v. Regents of the University of California*, 140 S. Ct. 1891 (2020).

punishment devoid of the real-life consequences that direly affect immigrants who are in this situation.¹⁴⁸

At the same time, however, the Court has issued other judgments that have refused to extend the full protections of the criminal justice system to the immigrant who has been ordered deported.¹⁴⁹ As such, because of this ongoing, precarious position in which immigrants find themselves, there is a crucial, second stage to the AID model that is offered next.

2. *The Second Stage*

Let us now consider a second hypothetical. Assume in this situation, Immigrant Y has been detained by the main DHS agency in charge of policing, known as ICE.¹⁵⁰ In this scenario, the immigrant has been charged with being in the country unlawfully, but unlike the first hypothetical above, no underlying criminal law violation has occurred. In other words, neither a state nor federal prosecutor has brought criminal charges against the immigrant.¹⁵¹

Thereafter, the immigrant's case is placed in front of an immigration judge. DHS asks that the immigrant be deported, but the lawyer representing the immigrant applies for cancellation of removal.¹⁵² After hearing both sides, the judge eventually rules against the immigrant and issues a removal order, which the immigrant's lawyer then appeals to the BIA.

It is here that the second stage of the AID model would be triggered. The proposal is that, going forward, the BIA would review the entire record in a *de novo* fashion. Of course, on matters of law and on mixed questions of law and fact, this type of standard of review would not be out of the norm.¹⁵³ However, under the AID model, even factual findings would be subject to *de novo* review. In other words, the government's position would not receive any deference from the BIA and instead would be reexamined afresh.

Now it is true that this proposal would run counter to what occurs within the criminal context, particularly as it relates to the Supreme Court's famous *Jackson v. Virginia* case from 1979.¹⁵⁴ There, petitioner Jackson was a criminal defendant who had been convicted in state court of first-degree murder.¹⁵⁵

148. *See id.*

149. *See, e.g.,* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959 (2020); *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021); *Sanchez v. Mayorkas*, 141 S. Ct. 180 (2021); *Johnson v. Guzman Chavez*, 141 S. Ct. 2271 (2021); *Patel v. Garland*, No. 20–979 (U.S. May 16, 2022); *Barton v. Barr*, 140 S. Ct. 1442 (2020).

150. For background on ICE, see U.S. IMMIGR. AND CUSTOMS ENF'T, <https://perma.cc/UC23-ZKLW> (last visited Oct. 25, 2022).

151. Immigration and Nationality Act, 8 U.S.C. § 1227 lists the “classes” of those who are deportable, including being in the country and being out of lawful status.

152. Formally, the lawyer in this hypothetical would be invoking the discretionary relief provision of the INA, under cancellation of removal. § 1229b.

153. For a discussion of the *de novo* review standard in immigration cases, see ALEINIKOFF, MARTIN, MOTOMURA, FULLERTON, STUMPF & GULASEKARAM, *supra* note 33 at 893. For additional support of the notion that the BIA has this authority on matters of law, see *Matter of A-M-*, 25 I. & N. Dec. 66 (B.I.A. 2009) (noting that “we [the BIA] have authority to review questions of discretion *de novo*.”).

154. 443 U.S. 307 (1979). I am grateful to Tung Yin for noting the relevance of this case to me.

155. *Id.*

After losing his post-conviction appeals, Jackson filed a habeas motion in federal court, arguing that no reasonable fact-finder could have found him having premeditation.¹⁵⁶

The federal district court agreed with Jackson and ordered him released on habeas grounds.¹⁵⁷ However, the prosecution appealed this decision to the Fourth Circuit, which is permitted in habeas cases and not seen to be violative of double jeopardy, and the court found in favor of the government. Thereafter, Jackson appealed to the Supreme Court, which agreed to hear the case.¹⁵⁸ In its decision, the Court affirmed the Fourth Circuit's holding and went on to say that the standard of review for appellate courts is to read the matter below "in the light most favorable to the prosecution [and that] shows that a rational factfinder could have found the petitioner[/defendant] guilty beyond a reasonable doubt"¹⁵⁹

Jackson is distinguishable from the AID model's proposal regarding the role of the BIA because immigration courts do not fall under Article III of the Constitution. Instead, they are bureaucratic, Article II, Justice Department courts. Consequently, under the AID framework, it would be permissible for there to be no presumption of validity afforded to the government on appeal. The BIA would take the case and there would be a non-deferential standard of review employed by the agency.¹⁶⁰

At this point, it might be reasonable for a skeptic to wonder whether there is an inconsistency in the AID model. Remember that in stage one, the BIA was removed from being able to intervene where the immigration judge had found in favor of the immigrant. However, in stage two, the BIA is asked to interject itself and to do so in a rather assertive manner. How can this discrepancy be squared?

One immediate reply would be to recognize a distinction between what might be seen as the model's efforts at trying to prevent a stripping of a benefit versus allowing for the possibility of a benefit to be granted. Consider [Figure 1](#), which offers a visual reiteration of the theory proposed here.

156. *Id.* He conceded he shot the victim but that it was in self-defense, or, in the alternative, that he was so inebriated prior to the shooting he could not have had the necessary *mens rea* to commit first-degree murder. For a classic work on the habeas appellate process, see Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963). For a more recent study, see NANCY J. KING & JOSEPH L. HOFFMANN, *HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT* (2011).

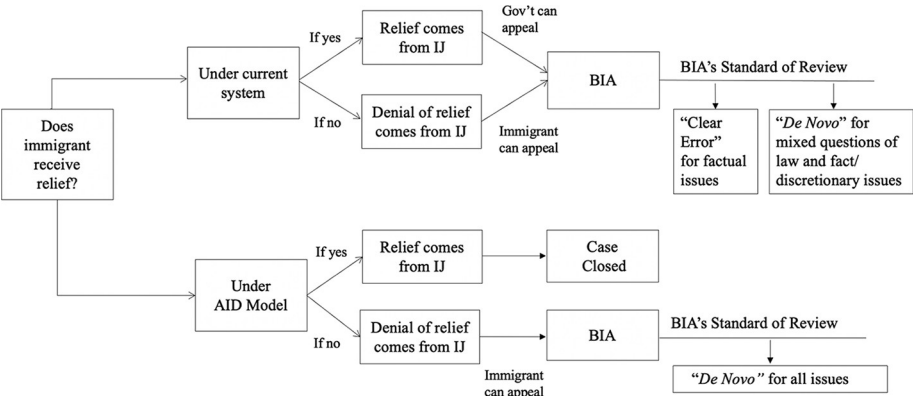
157. *Id.* For a valuable discussion of habeas in general, see Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to Teague v. Lane and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 AM. J. CRIM. L. 203 (1998).

158. See *Jackson*, 443 U.S. 307.

159. *Id.* The Court discussed at length two important precedents when deciding this case. The first was *Thompson v. Louisville*, 362 U.S. 199 (1960), which the defendant had argued was supportive of his claim that there was "no evidence" to support a claim of premeditation. The second case was *In re Winship*, 397 U.S. 358 (1970), which directly dealt with "whether the record evidence could reasonably support a finding of guilty beyond a reasonable doubt."

160. Once again, I am grateful to Tung Yin for helping me think through this part of the model.

Figure 1. Adjudication of Immigration Decisions (AID Model)



As we see, the top half of the diagram describes the process of what occurs currently, without the AID model in place: specifically, regardless of how the immigration judge rules, either side can appeal that decision to the BIA. Ostensibly, the BIA is supposed to use a clear error standard of review for factual determinations made by the immigration judge and a *de novo* standard for mixed questions of law and fact as well as for all discretionary decisions that have been rendered. From there, either side can appeal to a federal circuit court for further consideration.¹⁶¹ However, as we have seen, the efforts to separate factual and discretionary issues have been conceptually and practically problematic to operationalize.

Compare the alternative pathways that exist in the AID model. To begin, if the immigration judge grants the requested discretionary relief, then the proposal is that the case would be closed for the reasons stated within the discussion of stage one. If, however, the judge denies the immigrant’s petition, then, as opposed to stage one, the proposal *would* allow for the BIA to intervene. The reasoning here is straightforward and draws upon the work of normative theorists who have long argued that fairness, justice, and equity require that immigrants be treated in a humane manner.

Michael Walzer, for example, has famously argued that societies are reasonably entitled to determine who they admit and who they exclude.¹⁶² However, for countries that consider themselves democratic adherents to the rule of law, once individuals—regardless of how they have entered—

161. Figure 1 does not, obviously, focus on the role of the DHS officer who issues an asylum decision, per the discussion that took place in Part IV, Section A above. This diagram centers around what occurs during the immigration court adjudication process and potential subsequent appeals.

162. See generally MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983).

are part of the community, the state is “obligated to help [the] needy . . . if their need is acute and if the costs and risks of providing aid are comparably negligible.”¹⁶³

Building upon this work, Étienne Balibar, Sandro Mezzadra, and Ranabir Samaddar produced an important volume analyzing “how and why justice is meted out differently in different places.”¹⁶⁴ As they explain, treatment of immigrants often relates to the level of integration within a society.¹⁶⁵ The more immigrants that are on the margins or borders of where they live, the less likely they are to receive adequate justice from the state.¹⁶⁶ And Ayelet Shachar has narrated a cold reality: often the winners in a society—namely those who tend to receive repeated advantages from the state—are in the positions they are in mainly because they were lucky enough to hit the “birth-right lottery.”¹⁶⁷ They were born into relatively fortunate circumstances, while those (i.e., outsiders or immigrants) who struggle to achieve equity, dignity, and recognition do so because they have not had this type of luck on their side.¹⁶⁸

This research is pertinent to the AID model because, more often than not, immigrants are not winners at the immigration trial level. For those represented by counsel, their fate is in the hands of their lawyers who must think long and hard about whether appealing the denial of discretionary relief is worth expending valuable amounts of time and resources. For those who are unrepresented, undoubtedly this deliberation is even more stressful, as they face the unenviable task of trying to navigate the complex immigration appellate process on their own.¹⁶⁹

In light of these circumstances, the least that the appellate body deciding the fate of the immigrant can do is to provide a fresh review of the entire record below.¹⁷⁰ Recall that, as it stands currently, the BIA has the power to overturn a favorable discretionary relief decision rendered by the immigration judge, which effectively amounts to a granted benefit now being affirmatively stripped from the immigrant. By contrast, under the AID framework, there is no equivalent type of harm being done in a situation where the immigrant, who has lost at the immigration trial level, now is merely asking the BIA to fairly review all aspects of the case in a *de novo* manner in order to be considered eligible for relief.

163. See generally Shelly Wilcox, *The Open Borders Debate on Immigration*, 4 PHIL. COMPASS 1, 3 (2009) (discussing *id.*, particularly as it relates to duties owed to immigrants).

164. See generally ÉTIENNE BALIBAR, SANDRO MEZZADRA & RANABIR SAMADDAR, *THE BORDERS OF JUSTICE* (2012).

165. *Id.*

166. *Id.*

167. AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* 15 (2009).

168. *Id.*

169. For work on the represented versus unrepresented immigrant in immigration court, see Eagly & Shafer, *supra* note 122, at 6.

170. Ultimately, this is the underlying basis for stage two of the AID model.

Admittedly, as stated above, the adjudicators on the BIA are DOJ employees, just like the immigration trial judges below them.¹⁷¹ While DOJ regulations mandate that all of these judges act with impartiality and integrity,¹⁷² ultimately, the judicial decisions of immigration cases fall under the head of a political appointee: the Attorney General. As several observers have noted, particularly during the last two decades, the BIA has not been sympathetic to immigrants seeking relief from removal, regardless of the party to which the Attorney General belongs.¹⁷³

Yet the underlying assumption of the AID framework is that even given these conditions, immigrants who have been denied discretionary relief by the immigration judge would embrace the chance to re-litigate fully the merits of their case. The AID model mandates that the BIA provide no deference to the government on appeal. As a result, immigrants could strenuously reiterate on appeal that they should be able to stay in the United States without worrying that the government's victory below would carry some type of presumptive merit.¹⁷⁴

The bottom line is that the AID framework looks to improve what is clearly a flawed immigration adjudication system. There are two additional reasons why these internal fixes are important. First, the Supreme Court continues to require that the federal judiciary adhere to *Chevron*-type deference with respect to rulings issued by the BIA.¹⁷⁵ Given this reality, it is therefore especially important that the decisions coming out of the Justice Department's immigration courts be as correct and fair as possible. Second, the immigration courts in the United States, for all intents and purposes, are not going anywhere anytime soon. Until there is substantive immigration reform, which would include a re-examination of how the immigration adjudicatory process

171. For a discussion of this point, see Sections I and II.

172. See Krishnan, *supra* note 125, at 61 (noting that under 8 C.F.R. § 1003.10 (2021) (“[I]mmigration judges are expected to ‘exercise their independent judgment and discretion’ and act ‘in a timely and impartial manner.’”)).

173. See, e.g., Tara Watson, *Immigrant Deportations During the Trump Administration*, ECONOFACT (Mar. 25, 2021), <https://perma.cc/ET2K-RPR4>; John Gramlich, *How Border Apprehensions, ICE Arrests and Deportations Have Changed Under Trump*, PEW RSCH. CTR. (Mar. 2, 2020), <https://perma.cc/9HQB-GY8K>; Alex Nowrasteh, *Deportation Rates in Historical Perspective*, CATO INST. (Sept. 16, 2019), <https://perma.cc/SKS6-Y7PP>; Serena Marshall, *Obama Has Deported More People than Any Other President*, ABC NEWS (Aug. 29, 2016), <https://perma.cc/3FF7-K3TU>.

174. One point that might be raised is whether giving such *de novo* powers to the B.I.A. might actually make successful appeals at the federal circuit court level more difficult to obtain for the immigrant who loses at the B.I.A. However, since such appeals to the federal appellate courts are not as frequent as compared to other types of cases, overall, the AID model's efforts to provide greater equity to the immigrant argue in favor of the pathways sketched in Figure 1.

175. See *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 75 (2014) (plurality opinion) (noting that because of the B.I.A.'s specialty in immigration matters, the federal courts generally ought to be hesitant “to overturn the Board . . . [as the Court then] would assume as our own the responsible and expert agency’s role.”) In this case, Justice Kagan went on to say, resoundingly: “We decline that path, and defer to the Board.”) But see Jayanth K. Krishnan, *The ‘Impractical and Anomalous’ Consequences of Territorial Inequity*, 36 GEO. IMMIGR. L.J. 621, 639 (2022) (noting that in this particular case, which “involved whether the [Immigration and Nationality] statute allowed noncitizen children seeking visas to retain their original application filing date, even if they ‘aged-out’ by turning 21 during the process . . . Unfortunately for the plaintiffs in *Cuellar de Osorio*, such deference resulted in a loss.”).

works, immigrants and those who defend them will have to continue operating within the status quo. Thus, any suggestion that offers a way to make the current situation better should be on the table for discussion.

With that said, proposals on overhauling how immigration justice functions in the United States have been circulating for some time. Viewed in many quarters as too radical or unrealistic, these plans, put forth by proponents who have remained undeterred in their advocacy, have recently resulted in an innovative bill proposed within the House of Representatives.¹⁷⁶ It is extremely uncertain as to whether such a plan will ever come to fruition. Thus, the AID model provides an alternative framework that offers benefits to those who are presently in dire need.

V. CONCLUSION

Over the past several years, an important coalition has mobilized and pressured Congress for a significant restructuring of the Justice Department's immigration courts. Notably among these groups are the National Immigration Judges Association, lawyers from the ABA and American Immigration Lawyers Association, and other researchers.¹⁷⁷ The argument is straightforward. In a system where immigration prosecution and adjudication are part of the same branch of government, and where the adjudicator is ultimately answerable to a political appointee who can unilaterally overturn the adjudicator's rulings, any modicum of judicial independence is inherently compromised.¹⁷⁸

176. See H.R. 6577, 117th Cong. (2022).

177. See Ming Hsu Chen, *Bill Creating Independent Immigration Court Passes House*, IMMIGRATIONPROF BLOG (May 14, 2022), <https://perma.cc/WZ65-2WKY>. The main sponsor of the bill is Representative Zoe Lofgren (D-CA), who notes that there are other organizations as well that are supportive of this measure, including "the American Bar Association, . . . the Federal Bar Association, . . . the American Immigration Council, the Bipartisan Policy Center Action, Human Rights First, Kids in Need of Defense, the National Immigrant Justice Center, the National Immigration Law Center, Niskanen Center, and the Women's Refugee Commission." See Press Release, Zoe Lofgren, Chair, House Subcomm. on Immigr. and Citizenship, Lofgren Introduces Landmark Legislation to Reform the U.S. Immigration Court System (Feb. 3, 2022), <https://perma.cc/5SFW-3FYF>.

178. To be more precise, immigration prosecution at the immigration court level is conducted by lawyers within the DHS. On appeal, the DOJ's Office of Immigration Litigation handles the appeals on behalf of the government in front of the B.I.A. As stated above, both the immigration court and B.I.A. are within the DOJ. For important references on these points, see Krishnan, *supra* note 13, at 112–14, 135 (citing various sources, including: American Immigration Lawyers Association, *It's Time for Immigration Reform*, YOUTUBE (Jan. 31, 2020), <https://perma.cc/BXJ5-8MWV> (presenting commentary by Judge Ashley Tabaddor, Judge Paul W. Schmidt, and Professor Shoba Sivaprasad Wadhia); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 294–96 (2010); Shoba Sivaprasad Wadhia, *Demystifying Employment Authorization and Prosecutorial Discretion in Immigration Cases*, 6 COLUM. J. RACE & L. 1 (2016); Rebecca Baibak, *Creating an Article I Immigration Court*, 86 U. CIN. L. REV. 997 (2018); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 383–87 (2006). See generally Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635 (2010); Catherine Y. Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1, 5–6 (2018); and Dana Leigh Marks, *I'm an Immigration Judge: Here's How We Can Fix Our Courts*, WASH. POST (Apr. 12, 2019, 3:31 PM), <https://perma.cc/US62-82J9>).

There are additional stresses that these reformers highlight. The immigration courts are massively backlogged, with “over one million cases”¹⁷⁹ pending. Immigration judges also feel under constant pressure to resolve cases quickly or face negative professional consequences from Justice Department overseers.¹⁸⁰ And because immigration adjudication is so political, every time a new president comes to office, there is inevitably what one former immigration judge describes as “aimless docket reshuffling.”¹⁸¹ This is when the Attorney General sets forth new priorities as to what cases immigration judges should hear first, leading to significant inefficiencies and delays in the release of judicial rulings.¹⁸²

For these reasons, reformers have persisted in calling for the establishment of independent immigration courts, which would be fashioned in a way similar, in particular, to Article I adjudication forums (e.g., the U.S. Tax Court, U.S. Bankruptcy Courts, and the U.S. Court of Federal Claims).¹⁸³ In May 2022, the House passed a bill that adopted several of the positions long championed by these advocates. Entitled “The Real Courts, Rule of Law Act,” the proposed legislation moves the immigration courts out of the Justice Department and places them under the auspices of Congress.¹⁸⁴ Immigration trial courts would remain spread throughout the country,¹⁸⁵ with the addition of what would be called an “appellate division” replacing the current BIA.¹⁸⁶ This latter body would “consist of 21 appeals judges, one of whom . . . [would] serve as the chief judge.”¹⁸⁷

The proposed legislation overlaps with the AID model’s objectives in that both emphasize the promotion of judicial independence and the substantial reduction of the institutional biases that exist in favor of the government. For example, the twenty-one judges who are part of the appellate division would now be nominated by the President and need Senate confirmation before they

179. See Krishnan, *supra* note 13, at 113.

180. *Id.* (citing Marks, *supra* note 178).

181. See American Immigration Lawyers Association, *supra* note 178 (presenting speaker Paul W. Schmidt).

182. See generally Leonard Birdsong, *Reforming the Immigration Courts of the United States: Why Is There No Will to Make It an Article I Court?*, 19 BARRY L. REV. 17, 21 (2013).

183. See H.R. 6577. See, e.g., AILA Policy Brief: *Restoring Integrity and Independence to America’s Immigration Courts*, AM. IMMIGR. LAWS. ASS’N 1–2 (Jan. 24, 2020), <https://perma.cc/KZ8K-ZHEJ>. The other three types of Article I courts that exist are: the U.S. Court of Appeals for the Armed Forces, the Court of Military Commission Review, and the U.S. Court of Appeals for Veterans Claims. See Steve Vladeck, *The Difference Between Article I and Article III Questions in Al Bahul*, LAWFARE (July 20, 2016), <https://perma.cc/872Z-U8SG>; see also JAMES E. PFANDER, ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND JUDICIAL POWER OF THE UNITED STATES (2009).

184. See H.R. 6577.

185. *Id.* § 2.

186. *Id.*

187. *Id.* In addition, according to § 2 of the proposed law, there would be an administrative division, which would include “an administrative office and administrative council.” As this provision notes, the administrative division would be in charge of “[i]mplementing and administering the operational rules, policies, and procedures of the Immigration Courts established by the appellate division or the administrative council.” And this division would be “comprised of the chief judge of the appellate division and the chief trial judge of each court of the trial division.” *Id.*

could take their seats.¹⁸⁸ Additionally, their terms would be for fifteen years whereby they “may be reappointed for additional fifteen-year terms.”¹⁸⁹ The new trial level immigration judges would be appointed by these appellate judges and would similarly serve for fifteen years, with the possibility of reappointment as well.¹⁹⁰

Without question, if the Real Courts Act does ever come into existence, the immigration adjudication landscape would be altered in a seismic way. We can only hope that this bill will eventually become law. Sadly, though, today’s political climate makes it highly unlikely that this massive type of meaningful, legislative reform will materialize any time soon. After all, this proposed statute would involve completely re-shifting the balance of power in immigration cases away from the Executive Branch and towards a more independent adjudicatory system. This enormous restructuring would likely face great resistance from traditionalists who defend how the Justice Department currently runs the immigration courts and who have historically favored deference to the Executive Branch in cases involving removal.

The AID model, by contrast, offers a middle-ground, incremental approach that makes it more likely to be politically attainable. By simply suggesting that the standards of review for appeals need to be altered, what the model does is increase the odds that immigrants may be able to obtain much needed relief in a timely manner. Of course, the implementation of the AID model would need to be done through an amendment to the Immigration and Nationality Act for there to be regulatory changes made pursuant to standards set forth by the Administrative Procedure Act. But again, such reform is more likely to occur, in the short-run, than passage of the Real Courts Act, which could take several years, if not longer. Ultimately, the plea is for interested observers to recognize that the status quo cannot remain, and that change must be enacted soon, or else the suffering of those who are in desperate need of assistance will only be prolonged.

188. *Id.*

189. *Id.*

190. *Id.*