Appealing Alternatives: Immigration Justice System Re-Imagined

By Angelo A. Paparelli and Ted J. Chiappari

If, as author Robert Sherrill maintained in his 1970 book, *Military Justice Is to Justice as Military Music Is to Music*, then immigration justice in 21st century America is as melodious as an atonal, off-pitch cacophony. The forms and forums for truth-seeking and dispute resolution under the U.S. immigration system are wide-ranging, largely counterintuitive and often too dysfunctional to mete out true justice. These include:

• The Executive Office of Immigration Review (EOIR), comprised of the Immigration Courts and the Board of Immigration Appeals (BIA), housed in the U.S. Department of Justice, with jurisdiction over the removal of foreign nationals from the United States;

• The Office of the Chief Administrative Hearing Officer (OCAHO), whose administrative law judges likewise are situated in the Justice Department, and who hear appeals involving charges of immigration-related discrimination, document fraud, Form I-9 (Employment Eligibility Verification) paperwork violations, and the unlawful employment of workers with knowledge that the employees lack work permission under the immigration laws.

• The Administrative Appeals Office (AAO)—a unit of U.S. Citizenship and Immigration Services (USCIS), itself a component of the Department of Homeland Security (DHS)—whose function is to review appeals and certifications of decisions by USCIS adjudicators in the agency's district offices and regional service centers;

• The Admissibility Review Office (ARO) of U.S. Customs and Border Protection (CBP), another DHS component, which reviews decisions made by inspecting officers at ports of entry to determine whether the port officer's determination of inadmissibility was correctly decided, and if not, the ARO (as a component of CBP headquarters) will enter a superseding determination.

• The Board of Alien Labor Certification Appeals (BALCA), within the U.S. Department of Labor, which decides appeals denying applications by employers for temporary (H-2) or permanent labor certification—a labor-market-testing prerequisite to the employment of certain nonimmigrant and immigrant workers;

• The Labor Department's administrative law judges and its Administrative Review Board (ARB), which reviews decisions involving alleged violations of Labor Department rules protecting U.S. workers and foreign employees in various nonimmigrant visa categories, including professional (specialty occupation) employees (under the H-1B, H-1B1 and E-3 visa categories);

• Federal district courts and circuit courts of appeal, with limited jurisdiction over immigration-related claims arising from decisions and actions (or inactions) of the Executive Branch agencies, seeking, for example, review of removal orders, habeas corpus, mandamus, and other forms of injunctive and declaratory-judgment relief, judicial naturalization and statute-specific forms of review, such as the Administrative Procedure Act, the Regulatory Flexibility Act, and the Paperwork Reduction Act;

• The Visa Office, within the State Department's Bureau of Consular Affairs, which can issue "advisory opinions" overturning visa refusals by consular officers based on questions of law (fact-based determinations being virtually immune from review under the doctrine of "consular nonreviewability," or as immigration lawyers and professors describe it, "consular absolutism"), while consular decisions to grant visas can be overturned by the Secretary of Homeland Security on grounds of national security; and

• The U.S. Supreme Court which can review decisions of all of these subordinate bodies either by appeal or the grant of a petition for certiorari.

The attentive student of immigration process will note that most immigration appeals occur within departments of the Executive Branch, while comparatively few cases are decided by the Judicial Branch. This proliferation of special purpose administrative "courts" engenders havoc for those seeking justice and agency adherence to the rule of law. Although the Immigration and Nationality Act (INA) is the primary statute under which most immigration appeals arise, and "determination[s] and ruling[s] by the Attorney General with respect to all questions of law shall be controlling" under §103 of the INA, each of the various administrative agencies and departments interpret their respective regulations and offer a plethora of dubious legal authorities in the form of press releases, FAQs, interpretive guidance and Web postings.

While most of the administrative appellate bodies have published rules of practice and procedure, appoint lawyers as administrative law judges and grant standing and the right of representation to a wide range of parties with distinct legal interests, one "tribunal" stands out. The AAO is staffed by non-lawyers and operates without rules of court, from within the same agency (USCIS) that issued the initial decision.

The subspecialty of immigration law has spawned multiple Johnny and Jane One Notes, lawyers pursuing subspecialities that focus narrowly on family immigration, employment-based immigration, labor certification practice, removal defense, waiver practice, border law, immigration compliance defense, or appellate and litigation practice. Worse yet, the pro bono participation of lawyers who practice outside the immigration field is hampered because the overly cryptic subspecialities of immigration law and the panoply of administrative forums make mastery of the subject matter unnecessarily daunting. As a result, the salutary role of lawyers in zealously advancing the articulation of new legal interpretations and in upgrading the professionalism of the bar is needlessly impeded.

Elements of Reform

As Congress contemplates comprehensive immigration reforms, it would indeed be derelict were it to allow this harmful contagion of faux immigration justice to continue untreated. Here is what Congress should enact:

• An Article I Immigration Court. Judicial independence is the touchstone of true justice. No matter how committed to render blind justice, administrative law judges with caseloads, working conditions, careers and pensions tied to the same administrative agency whose rulings are challenged unnecessarily suffer the fear, if not the fact, of subtle pressure to mold their decisions in favor of their overlords. Like the Bankruptcy Court, the judges of the Immigration Court should hold tenure for 14 years, with an extension possible, absent cause for dismissal or non-renewal, for a like term.

• A Court of Review With Jurisdiction Over all Immigration Appeals. Precedent in the federal judiciary for a subject-specific tribunal abides with the Tax Court and the Bankruptcy Court. Like these other specialty courts, the establishment of an Immigration Court would allow its judges to gain mastery of the INA, a statutory edifice resembling "'King Minos's labyrinth in ancient Crete,' and…'second only to the Internal Revenue Code in complexity.'" *Chan v. Reno*, 1997 U.S. Dist. LEXIS 3016,*5 (S.D.N.Y. 1997) (citations omitted), harmonize its interpretation over disparate federal departments and tribunals, and reduce the burden on the federal district courts and Courts of Appeal.

• Constitutional Interpretation, Judicial Canons, Injunctive, Contempt and Disciplinary Powers. Administrative tribunals are barred from (a) issuing immigration law rulings that would hold an act of Congress or an agency rule or practice unconstitutional, (b) subjecting its judges to customary judicial canons of ethics and professional responsibility, (c) enjoining unlawful or harmful acts, (d) holding parties and their counsel, governmental and private litigants and their respective attorneys, in contempt for flouting clear orders of the court; or, in some cases, (e) supplanting the bar disciplinary authority now exercised by the various immigration administrative agencies. Justice demands that judges of the newly established Immigration Court possess, and where warranted, wield, all these powers.

• Elimination or Minimization of *Chevron* deference. Since the judges of the Immigration Court will have attained mastery over the immigration laws, unlike current federal court judges who must rule on virtually all areas of law, the traditional deference accorded to the presumed expertise of the disparate administrative agencies whose jurisdiction touches upon immigration would be eliminated, or allowed only in narrow, clearly justified circumstances. See, *Chevron United States v. Natural Resources Defense Council*, 467 U.S. 837 (1984)(if an act of Congress is silent or ambiguous, federal courts may not substitute a judicial interpretation of a provision if an administrative agency, presumably specialized in the subject matter, construes the statute reasonably), and *National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 980 (2005) (a permissible construction of a statute need not be the best interpretation or the interpretation that the reviewing court would adopt had the agency never offered its interpretation).

• Published Precedent Decisions and Expanded Participation of Amici Curiae. Immigration law today is plagued with a mushrooming body of immigration lore—administrative agency

communications and utterances of uncertain legal authority. Precedent decisions with binding effect are haphazardly issued. Non-binding agency decisions are published by immigration Web portals and bar associations, and argued and relied upon at the proponent's peril with little assurance that their rationales will carry the day. As with other federal courts, the new Immigration Court should have the power to designate precedent decisions and still publish rulings that are expressly not designated for publication.

Moreover, the authority of the Attorney General and other immigration administrative agencies and bodies to designate precedents would no longer be needed, and therefore would be eliminated. Further, except for matters under seal or barred by law from disclosure, the existing PACER system of Public Access to Electronic Court Records at www.pacer.gov would make Immigration Court pleadings and rulings widely available, thereby allowing interested organizations and parties to submit Friend of the Court briefs.

• A Uniform Set of Rules Unless Exceptions Are Manifestly Necessary. No longer should immigration lawyers and pro bono counsel be required to master several discrepant sets of court rules and special procedures depending on the administrative forum where the cause arises. The Federal Rules of Civil Procedure and of Evidence should apply in the new Immigration Court, subject to that court's power and oversight by superior judicial authorities to provide any special rules that immigration law may require. Thus, confidentiality protections and dispensation from the strict hearsay rule would apply in asylum cases where the subject matter is private and personal and the availability of evidence of persecution under strict evidentiary requirements exceedingly difficult to procure. On the other hand, imposition of a civil exclusionary rule barring the admission of evidence and fruit of the poisonous tree procured through governmental or private-litigant misconduct would be appropriate.

• Expansive Legal Standing. No longer would the immigration courthouse door be closed to parties with a clear legal interest in the outcome. Thus, current USCIS regulations precluding appeals—by, for example, the beneficiary of an immigration petition, applicants for adjustment of status or extension of nonimmigrant status, so-called "Regional Centers" approved by USCIS to accept investor funds under the EB-5 green card program, or successor employers whose foreign workers invoke nonimmigrant or immigrant portability of employment—would be abolished.

• Cost-Effective, Technology-Enabled, Efficient and Speedy Justice. The Immigration Court to be established by Congress need not entail substantial additional costs to the government or to litigants. Indeed, with the elimination or narrowing of the jurisdiction of several administrative appellate bodies, the associated expenditures can be reallocated to the account of the Immigration Court, thereby producing a possible cost savings. Moreover, as occurs now with the immigration judges, their removal proceedings are capable of digital audio- and video-recording.

Advances in artificial intelligence such as the automated transcription of hearings through the use of extremely accurate word-to-text software could allow the Immigration Court judges and the parties to obtain speedy, lower-cost recordings and transcripts of the proceedings. Moreover, depending on the legal interest at stake or the primacy of speed over formality in a given

situation, Congress could allow the Immigration Court to permit proceedings below to be streamlined or accelerated as appropriate.

Conclusion

As can be seen, immigration justice today is unmelodious and painful to sit through. With a new Immigration Court as orchestral director, however, the several administrative agencies and immigration stakeholders sitting in musicians' chairs could render a tour de force ensemble production, a command performance to delight Lady Justice and all citizens, foreign and domestic alike, who care deeply for her continued health and well-being.

Angelo A. Paparelli *is a partner in Seyfarth Shaw in New York and Los Angeles.* **Ted J. Chiappari** *is a partner at Satterlee Stephens Burke & Burke in New York City.*