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A Synopsis of the Rules of Evidence In Immigration Removal Proceedings

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A SYNOPSIS OF THE RULES OF EVIDENCE IN IMMIGRATION REMOVAL PROCEEDINGS

I. Introduction

Although one uses the terms "court" and "judge" when discussing immigration removal proceedings, they are far removed from Article III courts. In fact, an Immigration Judge (IJ) is not even subject to the strictures of the Administrative Procedures Act (APA).[1] Until 1952, immigration proceedings maintained no appearance of impartiality. The person invested with the power to send an alien out of the United States was simply a regular immigration inspector, who "himself presented the government's evidence against the alien, interrogated witnesses, and prepared a decision."[2] Over the years this role became substantially more judicial. The Immigration and Nationality Act (INA) of 1952 and subsequent internal agency reforms separated the prosecutorial role from the judicial, removing the special inquiry officers (SIOs — the predecessor title for IJs) from direct reporting to superiors also responsible for enforcement and allowing SIOs

[1] *See* Dory Mitros Durham, Note, *The Once and Future Judge: The Rise and Fall (and Rise?) of Independence in U.S. Immigration Courts*, 81 NOTRE DAME L. REV. 655, 671 n.77 (2006) ("[A]dministrative law judges are subject to greater requirements for appointment and entitled to greater civil service protections, as well as greater independence from the enforcement agency whose cases they adjudicate than are their immigration judge counterparts."). In response to a Supreme Court decision requiring that deportation proceedings follow the APA's formal adjudicative requirements, *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), Congress specifically exempted immigration proceedings from the APA. Act of Sept. 27, 1950, ch. 1052, 64 Stat. 1044, 1048.

[2] Durham, *supra* note 1, at 663-64.

greater neutrality.[3] Regulations began terming the SIOs "judges" in 1972 and allowed them to wear black robes;[4] and in 1996 Congress required IJs to be licensed attorneys.[5]

The professional lives of IJs are much different than those of their Article III counterparts. IJs are given a relatively free hand in pursuing evidence; they are specifically permitted to question witnesses and establish the record.[6] They are appointed and may be removed from their positions, as may the members of the reviewing Board of Immigration Appeals (BIA). Indeed, in recent years much controversy has raged as to the political nature of both appointments and removals.[7] Even the precedent they follow is subject to alteration, as the Attorney

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[3] Pub. L. No. 82-414, 66 Stat. 163, §§ 236(a), 242(b); Durham, *supra* note 1, at 672-73. However, "the SIOs still remained a part of the district system for other realities of life - such as facilities, office space, and staff," and were thus vulnerable to in-kind reprisals by the prosecutorial wing of the agency for decisions regarded as too immigrant-friendly. *Id*.

[4] Immigration and Naturalization Service Definitions: Immigration Judge, 38 Fed. Reg. 8590, 8590 (Apr. 4, 1973) (amending 8 C.F.R. § 1.1); Linda Kelly Hill, *Holding the Due Process Line for Asylum*, 36 HOFSTRA L. REV. 85, 97 n.45 (2007).

[5] The Omnibus Consolidated Appropriations Act 371(a) amended INA § 101(b)(4), 8 U.S.C. § 1101(b)(4), by, *inter alia*, defining "immigration judge" as an attorney. Note that this had already been the agency's practice. *See* Durham, *supra* note 1, at 663 n.67.

[6] 8 U.S.C. § 1229a(b)(1) ("The immigration judge shall…interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence."); *Yang v. McElroy,* 277 F.3d 158, 162 (2nd Cir. 2002) (an IJ, "unlike an Article III judge, is not merely the fact finder and adjudicator but also has an obligation to establish the record.").

[7] The Washington Post reported that political hiring of IJs was endemic; "at least one-third of the immigration judges appointed by the Justice Department since 2004 have strong Republican affiliations and [] half lacked experience in immigration law." Hill, *supra* note 4, at 88 n.10. The Department of Justice itself "'expressed concerns' regarding the political screening of immigration judges and BIA members."). *Id*. at n.9. IJs felt pressured by the Bush administration to rule for the government, on pain of being removed from their positions. Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 373-75 (2006). Moreover, despite an enormous backlog of cases, Attorney General John Ashcroft cut the

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