



**Federal Bar  
Association**

**Briefing:  
FBA Model Bill to  
Establish an Article I  
U.S. Immigration Court**

# HISTORY OF FBA PROPOSAL

- 2010: The Federal Bar Association's Immigration Law Section formally votes to create a proposal to restructure the immigration courts into an Article I framework
- 2013 to present: At the recommendation of the Immigration Law Section, the FBA includes the following policy statement in the FBA's annual Issues Agenda:

“The Federal Bar Association supports the transfer of responsibilities for the adjudication of immigration claims from the Executive Office of Immigration Review within the Department of Justice to a specialized Article I court, as established by Congress, for the adjudication of claims under the Immigration and Naturalization Act.”
- 2017 (revised 2019): The FBA produces a model bill as a legislative vehicle for achieving the transfer of adjudication responsibilities:

<http://www.fedbar.org/Image-Library/Government-Relations/FBA-Model-legislation-Establishing-an-Article-I-Immigration-Court.aspx>

<http://www.fedbar.org/Image-Library/Government-Relations/Summary-of-Model-Legislation-for-an-Article-I-Immigration-Court.aspx>
- 2018: The National Association of Immigration Judges endorses the FBA model bill

# EARLIER PROPOSALS/ANALYSES

- 1981: Select Commission on Immigration and Refugee Policy calls for “creat[ion of] an immigration court under Article I of the Constitution . . . with the necessary support to reduce existing backlogs”
  - See Final Report and Recommendations at xxviii-xxix, 245-250 (Mar. 1, 1981)
- 1982 & 2016: Judicial Conference of the United States takes no position on the merits of an Article I immigration court but opposes locating such a court in the judicial branch of government or requiring the Judicial Conference and the Administrative Office of the U.S. Courts to provide administrative support to the court  
<http://www.fedbar.org/Image-Library/Government-Relations/Judicial-Conference-Policy-Regarding-Proposed-Article-I-Immigration-Court.aspx>
- 1983: Attorney General assigns the responsibilities of the Department of Justice for “immigration judicial review programs” to a newly created Executive Office for Immigration Review (EOIR), 48 Fed. Reg. 8038 (Feb. 25, 1983)  
[https://www.justice.gov/sites/default/files/eoir/legacy/2013/10/02/48\\_Fed\\_Reg\\_8038\\_02251983.pdf](https://www.justice.gov/sites/default/files/eoir/legacy/2013/10/02/48_Fed_Reg_8038_02251983.pdf)

# EARLIER PROPOSALS/ANALYSES (CONT.)

- 1982-99: Series of Article I immigration court bills introduced in Congress by Representative Bill McCollum (R-FL)
  - *See, e.g.*, H.R. 185, 106th Cong.  
<https://www.congress.gov/106/bills/hr185/BILLS-106hr185ih.pdf>
- 2002: EOIR remains within DOJ when other immigration-related functions are transferred to a new Department of Homeland Security:
  - Homeland Security Act, Pub. L. No. 107-296, § 1101, 116 Stat. 2135, 2273 (Nov. 25, 2002) (codified at 6 U.S.C. § 521)
- 2017: Government Accountability Office report, “Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges”
  - GAO 17-438, June 2017  
<https://www.gao.gov/assets/690/685022.pdf>

# FBA POLICY GOALS

- Create an independent Article I immigration court to perform adjudicative functions heretofore carried out within EOIR
- Ensure that the new court is fully supported and able to operate in an impartial, nonpartisan manner
- Address only the “nuts and bolts” of immigration court structure and operation in legislation that—
  - Can be enacted either as a stand-alone bill or (with a few minor changes) as part of more comprehensive immigration legislation
  - Contains no substantive reforms to immigration law
  - Makes no significant changes in the jurisdiction currently exercised by EOIR’s immigration courts and Board of Immigration Appeals
  - Preserves existing Article III forums for judicial review of legal issues

# MODEL BILL – STRUCTURAL FEATURES: U.S. IMMIGRATION COURT

- Modeled essentially on the existing Article I courts that Congress established during the 20<sup>th</sup> century in the areas of federal taxation (U.S. Tax Court, 26 U.S.C. §§ 7441-7487), veterans' benefits (U.S. Court of Appeals for Veterans Claims, 38 U.S.C. §§ 7251-7299), and military justice (U.S. Court of Appeals for the Armed Forces, 10 U.S.C. §§ 941-946a)
- Two components: an Appellate Division (successor to EOIR's Board of Immigration Appeals) and a Trial Division (successor to EOIR's Office of the Chief Immigration Judge/immigration courts and Office of the Chief Administrative Hearing Officer)

# **MODEL BILL – STRUCTURAL FEATURES: APPELLATE DIVISION**

- 21 judges (or other number equivalent to then-existing BIA membership) appointed by the President by and with the advice and consent of the Senate
- Staggered 15-year judicial terms, with one-third of the judges appointed every 5 years, and appointments made without regard for political ideology or affiliation based on solid professional credentials and attributes
- Chief judge not separately appointed; instead, the responsibilities of chief judge are rotated among the judges according to seniority every five years or until a judge reaches age 70
- Cases heard by the division en banc or before a smaller panel or a single judge, as the court determines

# MODEL BILL – STRUCTURAL FEATURES: TRIAL DIVISION

- Judges appointed by the en banc Appellate Division for 15-year terms using a merit selection process with local selection panels akin to those employed by the federal district courts and courts of appeals in selecting U.S. magistrate judges and bankruptcy judges
- Chief judge responsibilities rotated (according to seniority every 5 years or until a judge reaches age 70) among the judges in each region/other geographic area served by the court (akin to the service areas of the existing immigration courts)
- Trial judges can be assigned temporarily to sit on the Appellate Division as the latter's workload requires

# CHOICES

- Article III judicial review
- Maintains review by the respective regional (numbered) circuits versus centralized review in the Federal Circuit

<http://www.fedbar.org/Image-Library/Government-Relations/Centralized-Article-III-Appellate-Review-of-Immigration-Court-Decisions.aspx>

- Adjudicative process in the new court
  - Single judge vs. multi-judge panel vs. en banc appellate review
  - Publication of decisions
  - Rules of court
  - Collective/Individual judge management vs. top-down supervision
- No government funding of appointed counsel

# MODEL BILL – IMMIGRATION COURT JURISDICTION

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8 **“SEC. 113.—JURISDICTION; FINALITY OF DECISIONS.**

9 “(a) APPELLATE DIVISION.—The appellate division of the  
10 Immigration Court shall have jurisdiction to hear and decide the  
11 following matters:

12 “(1) appeals from decisions by immigration trial judges as  
13 permitted in section 121(b) of this Act;

14 “(2) review of decisions by the United States Department of  
15 Homeland Security on visa petitions filed under section 204 of this Act  
16 to classify an alien described in sections 201(b)(2)(A)(i) and 203(a) of  
17 this Act;

18 “(3) original proceedings and appeals in disciplinary matters  
19 concerning practitioners before the Court; and

20 “(4) review of decisions involving (including the mitigation  
21 of) administrative fines and penalties imposed by the United States  
22 Department of Homeland Security under the Act.

23 “(b) TRIAL DIVISION.—The trial division of the Court shall have  
24 jurisdiction to hear and decide the following matters:

25 “(1) removal proceedings (including such applications for  
26 relief or protection from removal as may be cognizable) under

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1 sections 238 and 240 of this Act, and deportation and exclusion  
2 proceedings initiated under prior law;

3 “(2) rescissions of lawful permanent residence status referred  
4 for review under section 246 of this Act;

5 “(3) credible fear determinations reviewable under section  
6 235 of this Act, applications for asylum referred by the United  
7 States Department of Homeland Security where the applicant is  
8 barred from being placed in removal proceedings under section  
9 240 of this Act, and referrals for protection under section  
10 241(b)(3) of this Act where the individual is not in removal  
11 proceedings and is barred from asylum under this Act;

12 “(4) proceedings arising under sections 274A, 274B, and  
13 274C of this Act;

14 “(5) determinations relating to bond, custody, or detention of  
15 any alien who is in removal proceedings under section 240 of  
16 this Act and in the custody of the United States Department of  
17 Homeland Security;

18 “(6) determinations of whether administrative actions arising  
19 from applications filed during the pendency of removal  
20 proceedings under section 240 of this Act have been unlawfully  
21 withheld or unreasonably delayed;

22 “(7) disciplinary matters concerning practitioners before the  
23 Court; and

24 “(8) any other proceedings authorized under title II of this  
25 Act to be conducted before an immigration judge immediately  
26 before the effective date of the United States Immigration Court  
27 Act.

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1 “(c) LIMITATION.—The jurisdiction of the Court shall be subject  
2 to subsection (g) of section 242 of this Act, and shall not extend to any  
3 decision or action of the Attorney General or the Secretary of  
4 Homeland Security, the authority for which is specified under title II of  
5 this Act to be in the discretion of the Attorney General or the Secretary  
6 of Homeland Security, other than granting relief from removal,  
7 including where appropriate any related waiver available under the  
8 authority of the Attorney General immediately before the effective date  
9 of the United States Immigration Court Act.

10 “(d)(1) FINALITY AND APPELLATE REVIEW.—Decisions by the  
11 trial division are subject to review as provided in 121(b) and 122 of  
12 this title.

13 “(2) Decisions by the appellate division are subject to review  
14 as provided in sections 122 and 142 of this title and, unless  
15 subsequently modified or reversed by the appellate division, the court  
16 of appeals for the respective judicial circuit, or the Supreme Court, are  
17 binding on all immigration trial judges and all officers and employees  
18 of executive agencies (as defined in section 105 of title 5, United  
19 States Code) with powers, functions and duties under this Act and  
20 other laws relating to the immigration and naturalization of aliens.

# MODEL BILL – SCOPE OF IMMIGRATION COURT REVIEW

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15 **“SEC. 122.—SCOPE OF REVIEW.**

16 “(a)(1) IN GENERAL.—In any proceeding before either division of  
17 the Immigration Court, to the extent necessary to its decision and when  
18 presented with respect to matters within its jurisdiction, the  
19 immigration trial judge or, as the case may be, the appellate division  
20 shall—

21 “(A) consider de novo all relevant questions of law, the  
22 interpretation of constitutional, statutory, and regulatory  
23 provisions, and the meaning or applicability of the terms of any  
24 administrative action;

25 “(B) compel administrative action unlawfully withheld or  
26 unreasonably delayed;

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1 “(C) when reviewing administrative decisions, findings of  
2 fact, conclusions of law, rules, and regulations, hold unlawful  
3 and set aside administrative action found to be—

4 “(i) arbitrary, capricious, an abuse of discretion, or  
5 otherwise not in accordance with law;

6 “(ii) contrary to constitutional right, power, privilege,  
7 or immunity;

8 “(iii) in excess of statutory jurisdiction, authority, or  
9 limitations, or in violation of a statutory right; or

10 “(iv) without observance of procedure required by law;

11 and

12 “(D) review de novo all findings of fact made in reaching  
13 an administrative decision.

14 “(2) When appropriate to the resolution of matters arising  
15 within the jurisdiction of the Court, the appellate division shall request  
16 from the Attorney General a determination or ruling on a question of  
17 law as described in the proviso in section 103(a)(1) of this title.

18 “(b) REVIEW BY APPELLATE DIVISION.—(1) In considering an  
19 appeal from an immigration trial judge decision, the appellate  
20 division—

21 “(A) shall not review de novo the factual findings of the  
22 immigration trial judge, but shall, if factual findings are  
23 challenged, determine whether such findings are clearly  
24 erroneous; and

25 “(B) shall conduct its review of the decision based on the  
26 trial record upon which the decision was made.

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1 “(2) Apart from taking judicial notice of commonly known  
2 facts, such as current events and the contents of official documents, the  
3 appellate division shall not engage in fact finding in the course of  
4 deciding appeals from an immigration trial judge. If a party asserts that  
5 the appellate division cannot properly resolve a matter without further  
6 fact finding, the party must file a motion for remand and the appellate  
7 division, if it determines that additional fact finding is required, may  
8 remand the proceeding to the immigration trial judge.

# MODEL BILL – ARTICLE III JUDICIAL REVIEW OF IMMIGRATION COURT DECISIONS

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25 **“SEC. 142.—REVIEW BY THE COURT OF APPEALS.**

26 “(a) IN GENERAL.—After a decision of the United States  
27 Immigration Court is entered by the appellate division in a proceeding,

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1 a party to the proceeding may obtain review of the decision, by the  
2 United States court of appeals for the judicial circuit wherein venue  
3 lies, as provided in title II of this Act. Review of any such decision by  
4 the court of appeals shall be limited to determination of whether the  
5 Immigration Court validly relied on a rule of law or of any statute or  
6 regulation or any interpretation thereof (other than a determination as  
7 to a factual matter) in making the decision.

8 “(b) SCOPE OF REVIEW.—The United States court of appeals shall  
9 have exclusive jurisdiction to review and decide any challenge to the  
10 validity of any statute or regulation or any interpretation thereof  
11 brought in accordance with this section, and to interpret constitutional  
12 and statutory provisions, to the extent presented and necessary to a  
13 decision. The judgment of such court shall be final subject to review  
14 by the Supreme Court upon certiorari, in the manner provided in  
15 section 1254 of title 28, United States Code.

16 “(c)(1) REVIEWABLE QUESTIONS.—The court of appeals shall  
17 decide all relevant questions of law, including interpreting  
18 constitutional and statutory provisions. The court shall hold unlawful  
19 and set aside any finding or conclusion (other than a determination as  
20 to a factual matter), or rule or regulation or interpretation thereof, that  
21 was relied upon in the decision of the Immigration Court that the court  
22 of appeals finds to be—

23 “(A) arbitrary, capricious, an abuse of discretion, or  
24 otherwise not in accordance with law;

25 “(B) contrary to constitutional right, power, privilege, or  
26 immunity;

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1 “(C) in excess of statutory jurisdiction, authority, or  
2 limitations, or in violation of a statutory right; or

3 “(D) without observance of procedure required by law.

4 “(2) Except to the extent that an appeal under this chapter  
5 presents a constitutional issue, the court of appeals shall not review—

6 “(A) a challenge to a factual determination, or

7 “(B) a challenge to a law, rule, or regulation as applied to  
8 the facts of a particular case.

9 “(3) Nothing in this section or any other provision of this  
10 chapter shall be construed to permit the court of appeals or any other  
11 court to exercise jurisdiction that exceeds the limits set forth in section  
12 242 of this Act.

13 “(d)(1) REVIEWING COURT AUTHORITY AND RULES.—Upon  
14 review in accordance with this section, the court of appeals shall have  
15 power to affirm or, if the decision of the Immigration Court is not in  
16 accordance with law, to modify or reverse the decision of the  
17 Immigration Court or to remand the matter, as appropriate.

18 “(2) Rules for review of decisions of the Immigration Court  
19 shall be those prescribed by the Supreme Court under section 2072 of  
20 title 28, United States Code.

# MODEL BILL – ENHANCED IMMIGRATION COURT: JUDICIAL AUTHORITY

- Rulemaking authority (similar to that held by the federal courts generally) to prescribe its own rules of practice and procedure (including evidence), and regulatory authority under the INA (transferred from the Attorney General) to spell-out details of its adjudicative proceedings to the extent not explicitly covered in the INA as amended by this legislation
- Mandamus-like authority in ongoing cases to compel agency action unlawfully withheld or unreasonably delayed
- Civil contempt authority (via imposition of money penalties)
- Case management firmly under judicial control (not administrative oversight as in EOIR)

# MODEL BILL – ENHANCED IMMIGRATION COURT: ADMINISTRATIVE AUTHORITY

- Administrative authority to govern its own bar (i.e., regulate and, where necessary, sanction those who practice before it)
- Ability to manage its own budget, with funding requests exempt from OMB review
- Authority to procure necessary goods and services
  - Includes ability to enter into inter-agency agreements for administrative support and services from other federal entities (e.g., other Article I courts, the Article III judiciary, executive agencies)

# **MODEL BILL – ENHANCED IMMIGRATION COURT: PERSONNEL MATTERS**

- Judges removable only for good cause (i.e., gross misconduct, neglect of duty, incompetence, outside practice of law, or disability)
- Authority to obtain staff support for court and chambers, subject to availability of funds
- Judges collectively or individually supervise and direct their chambers and court staff
- Salaries of appellate and trial judges equivalent to those paid to district judges and magistrate judges, respectively
- Eligibility of retired judges for recall service and retirement/survivor benefits akin to those of judicial officers in the federal district courts and existing Article I courts

# CONSTITUTIONAL CONCERNS: APPOINTMENTS CLAUSE

- U.S. Const. art. I, § 2 cl. 2:

“[The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”

- Broadly stated, this clause requires all federal government “officers” to receive their appointments from the President (alone or with Senate confirmation) or from officers appointed by the President with Senate confirmation who serve either as judges or department heads and are authorized by law to make such appointments. Among other things, this means that officers cannot be appointed by Act of Congress or by congressional leaders (see *Buckley v. Valeo*, 424 U.S. 1 (1976))

# CONSTITUTIONAL CONCERNS: APPOINTMENTS CLAUSE (CONT.)

- The clause applies only to “officers of the United States”—judicially defined as individuals who hold “continuing” positions established by law and exercise “significant authority pursuant to the laws of the United States,”
  - Officers are distinguishable from the “broad swath” of employees who serve as “lesser functionaries” in the federal workforce.
  - Individuals who perform adjudicative functions with authority that is roughly comparable to that of federal district judges are officers. *See Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044 (2018)
- The broader category of officers can be subdivided into “principal” officers (those appointed by the President with Senate confirmation) and “inferior” officers (those appointed by the President alone, the courts, or department heads). Inferior officers must be appointed and supervised by the President or by a principal officer (i.e., a judge(s) of a court, a department head).

# CONSTITUTIONAL CONCERNS: APPOINTMENTS CLAUSE (CONT.)

- In light of these principles, the FBA model bill–
  - Treats Appellate Division judges as principal officers (since they are appointed by the President with Senate confirmation) and Trial Division judges as inferior officers (since they are appointed and supervised by the Appellate Division—a “court of law” composed of principal officers)
    - Cf. *Freytag v. Commissioner*, 501 U.S. 868 (1991)(upheld appointment of Tax Court “special trial judges” by the chief judge on behalf of the entire court)
  - Requires judges of both divisions to be freshly appointed following a four-year transition in which EOIR’s pre-existing BIA members, immigration judges, and administrative law judge serve temporarily on the new court.
    - Precedent for this approach: the 1982 legislation creating the U.S. Court of Federal Claims authorized the non-Article III “commissioners” of the predecessor Court of Claims to serve on the new court for a four-year transition period instead of the 15-year term that was otherwise applicable.

# CONSTITUTIONAL CONCERNS: SEPARATION OF POWERS

- The “admission and exclusion of foreign nationals is a ‘fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control’ and ‘is vitally and intricately interwoven with . . . the conduct of foreign relations [and] the war power.’”
  - *See Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (deferring to the President’s broad discretion under the INA to restrict entry of aliens into the U.S.)
- By vesting the appellate judges’ appointment and removal in the President, the model bill maintains a line of authority between the executive power (for which immigration control is a fundamental responsibility) and the new Article I court (which continues to have jurisdiction over discretionary executive actions exempt from Article III court review). The alternative of having the Article III judiciary appoint the court’s judges (as with the bankruptcy courts) would sever that connection—potentially exposing the court to legal challenge.

# **DISCUSSION AND QUESTIONS**