OVERSTEPPING: U.S. IMMIGRATION JUDGES AND THE POWER TO DEVELOP THE RECORD

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In 1952, Congress established a new federal position to be filled by "special inquiry officers" charged with overseeing deportation cases. These *immigration judges*—as they eventually came to be called—were assigned to work within the executive branch, namely, the Department of Justice, and they were to be answerable ultimately to a political appointee, the attorney general. Importantly, they received specific statutory authority allowing them to "develop the record" during an immigration case. This power enabled immigration judges to assemble evidence and call, "interrogate, examine, and cross-examine . . . any witnesses."

Given that many immigrants who appear in immigration court do so pro se, it is certainly understandable why Congress believed arming the judge with this power would be beneficial. After all, in the absence of counsel, who else might safeguard these immigrants' interests? Moreover, the federal courts have uniformly found this statute to be legally valid and normatively valuable as well.

But assume that the immigrant *has* a lawyer. Should the immigration judge still be able to develop the record in the same way? On this question, the federal courts have not reached a consensus. This Article argues that the answer should be no and proposes an approach to address this situation—one that allows the lawyer and immigrant-client to opt out of having the immigration judge intervene. The analytical model offered here is especially necessary at this moment because, given the intense political pressure on immigration judges, they frequently overstep and encroach upon the lawyer-client relationship, often adversely affecting the immigrant's legal representation.

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INTRODUCTION

Imagine a scenario in which an undocumented immigrant is appearing in front of a judge responsible for determining whether this immigrant can stay in the United States. The immigrant speaks little English and is seeking asylum—but has no lawyer. The government, however, is moving to deport, claiming that the individual has committed an aggravated felony, which is typically a barrier to gaining asylum.[1]

This story will hardly sound remarkable to anyone familiar with the U.S. deportation process.[2] Formally known today as a "removal" proceeding, this situation is complicated even more so by the fact that the presiding judge works within the Department of Justice (DOJ) rather than as an Article III adjudicator.[3] Given that the prosecution of the immigrant is also conducted by officials from another executive branch office—the Department of Homeland Security (DHS)—it is not difficult to see why many critics view the removal process as heavily tilted in favor of the government.[4]

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1. 8 U.S.C. § 1158(b)(2)(B)(i).

2. For excellent discussions on asylum in the U.S., see, for example, JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM (2009); Stephen Meili, *Asylum Under Attack: Is It Time for a Constitutional Right?*, 26 BUFF. HUM. RTS. L. REV. 147 (2020).

3. For work on this point, see generally Jayanth K. Krishnan, *Judicial Power – Immigration Style*, 73 ADMIN. L. REV. 317 (2021), which also notes that observers have alternatively called upon Congress to make immigration judges Article I adjudicators. *See also* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635 (2010) (advocating for converting immigration judges into administrative law judges with more independence); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 383–87 (2006) (discussing the lack of judicial independence in deportation cases); *ABA Signs Joint Letter to Congress on Establishing an Independent Immigration Court System*, AM. BAR ASS'N (July 9, 2019), https://www.americanbar.org/news/abanews/aba-news-archives/2019/07/aba-signs-joint-letter-to-congress-on-establishing-an-independen/ (noting that immigration judges have an "inherent conflict of interest" because they report to the United States Attorney General); Am. Immigr. Laws. Ass'n, *It's Time for Immigration Court Reform*, YOUTUBE (Jan. 31, 2020), https://www.youtube.com/watch?time_continue=4&v=8fkt-g4XG_A&feature=emb_logo [https://perma.cc/X6PL-P63M] (noting the "fundamental flaw of having a court system that is structured within the Justice Department").

4. For discussion of this point, see sources cited *supra* note 3. *See also* Catherine Y. Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1, 17–19 (2018); Shoba Sivaprasad Wadhia, *The Immigration Prosecutor and the Judge: Examining the Role of the Judiciary in Prosecutorial Discretion Decisions*, 16 HARV. LATINO L. REV. 39, 40–42 (2013); Leonard Birdsong, *Reforming the Immigration Courts of the United States: Why Is There No Will to Make It an Article I Court?*, 19 BARRY L. REV. 17, 29–30 (2013); Dana Leigh Marks, Opinion, *I'm an Immigration Judge: Here's How We Can Fix Our Courts*, WASH. POST (Apr. 12, 2019), https://www.washingtonpost.com/opinions/im-an-immigration-judge-heres-how-we-can-fix-our-courts/2019/04/12/76afe914-5d3e-11e9-a00e-050dc7b82693_story.html [https://perma.cc/Q4KC-F2TH]; Kevin R. Johnson, *An*

Sticking with this above scenario, consider that according to a 1996 amendment to the main immigration statute, the 1952 Immigration and Nationality Act (INA),[5] the immigration judge is under a legal obligation to engage in what might be thought of as "active judging."[6] The judge is required to "administer oaths, receive evidence, and interrogate, examine, and cross-examine the [noncitizen] and any witnesses."[7] This same statutory provision also states that "[t]he immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence."[8]

An appellate body within the DOJ known as the Board of Immigration Appeals (BIA) oversees the immigration judge.[9] Since 1997, the BIA has held that this statute places a responsibility upon the immigration judge to ensure that all relevant information is made available to the noncitizen as part of the proceeding.[10] Similarly, there is "broad consensus" among the federal appellate courts[11]—which hear appeals from the BIA[12]—that when the noncitizen does not have a lawyer, "immigration judges have a legal duty to fully develop the record in the cases that come before them."[13]

The rationale underlying this position is that the immigration judge is assumed to be the official best able to seek out the truth and provide a just

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Immigration Gideon *for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2399–2402 (2012).

5. 8 U.S.C. §§ 1101–1537.

6. Linda M. Harris, *The One-Year Bar to Asylum in the Age of the Immigration Court Backlog*, 2016 WIS. L. REV. 1185, 1242 n.250 (referencing Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647 (2017)).

7. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, 589 (codified as amended at 8 U.S.C. § 1229a(b)(1)).

8. *Id.*

9. *See* Krishnan, *supra* note 3, at 322–23.

10. *See In re S-M-J-*, 21 I. & N. Dec. 722, 727–30 (BIA 1997). However, "the applicant does not prevail by default" if the judge fails to perform this duty. *Id.* at 730 n.3. Also, immigration adjudication falls fully within the DOJ's Executive Office for Immigration Review. *See* Exec. Off. of Immigr. Rev., *About the Office*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/about-office [https://perma.cc/DF5M-S6YK] (last visited Feb. 5, 2022).

11. *See Quintero v. Garland*, 998 F.3d 612, 626 (4th Cir. 2021).

12. The particular federal circuit court of appeals to which a BIA case is appealed is based on the jurisdiction where the original immigration court hearing took place. *See* Krishnan, *supra* note 3, at 323; *see also* Jayanth K. Krishnan, *The Immigrant Struggle for Effective Counsel: An Empirical Assessment*, 2022 U. ILL. L. REV. (forthcoming).

13. *Quintero*, 998 F.3d at 626; *see also* John R. Mills, Kristen M. Echemendia & Stephen Yale-Loehr, *"Death Is Different" and a Refugee's Right to Counsel*, 42 CORNELL INT'L L.J. 361, 365–66 (2009). *Cf.* Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 659, 659–62 (2006).

outcome, both for the unrepresented noncitizen and the government.[14] But it is undeniable that there are competing pressures that the immigration judge faces.[15] One observer has noted that "[t]he immigration judge is required to walk a fine line . . . [with] the special obligation to develop the record more directly when the applicant appears *pro se*."[16]

What happens, though, when a noncitizen comes before an immigration judge and *has* a lawyer? Here, consensus among the federal appellate courts is lacking. As the Fourth Circuit recently commented, "[S]ome circuits have deemed . . . [the] duty to develop the record to be generally applicable regardless of whether the noncitizen is represented by counsel, [while] others have recognized it only in the *pro se* context . . . ."[17]

The Fourth Circuit itself has found that the immigration judge must fulfill the duty to develop the record, even when the noncitizen has a

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14. *See* discussion *infra* Part II; *see also* Christina P. Greer, Note, *Safeguards for Mentally Disabled Respondents in Removal Proceedings*, 23 HEALTH MATRIX: J.L. & MED. 279, 283, 302–03 (2013).

15. *See* Greer, *supra* note 14, at 283; *see also* Kevin R. Johnson, *Trump's Latinx Repatriation*, 66 UCLA L. REV. 1442, 1482 (2019) (noting how the Trump administration "imposed a controversial quota system on immigration judges tied to annual performance reviews, which could be expected to encourage the judges to close cases by ordering removals").

16. *See* Scott Rempell, *Credibility Assessments and the REAL ID Act's Amendments to Immigration Law*, 44 TEX. INT'L. L.J. 185, 220 (2008); *see also* Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1988–90 (1999); Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 870 (2009); David Hausman & Jayashri Srikantiah, *Time, Due Process, and Representation: An Empirical and Legal Analysis of Continuances in Immigration Court*, 84 FORDHAM L. REV. 1823, 1840 n.75 (2016); Alice Clapman, *Hearing Difficult Voices: The Due Process Rights of Mentally Disabled Individuals in Removal Proceedings*, 45 NEW ENG. L. REV. 373, 397–99 (2011); Brent S. Wible, *The Strange Afterlife of Section 212(c) Relief: Collateral Attacks on Deportation Orders in Prosecutions for Illegal Reentry After* St. Cyr, 19 GEO. IMMIGR. L.J. 455, 488–89 (2005).

17. *See Quintero*, 998 F.3d at 626–27 (noting that these pro se-only circuits have not "expressly rul[ed] out the possibility of a general duty"). The *Quintero* court further delineated the circuit court split:

> Some circuits have deemed this duty to be generally applicable in all immigration court proceedings. *See, e.g.*, *Islam v. Gonzales*, 469 F.3d 53, 55 (2d Cir. 2006); *Hasanaj v. Ashcroft*, 385 F.3d 780, 783 (7th Cir. 2004). Others have recognized it only in cases involving *pro se* respondents, although none of those courts has expressly foreclosed the possibility of a general duty. *See, e.g.*, *Al Khouri v. Ashcroft*, 362 F.3d 461, 464–65 (8th Cir. 2004); *Jacinto v. INS*, 208 F.3d 725, 734 (9th Cir. 2000). Then there are some circuits that have not specified whether the duty applies generally or only in the *pro se* context. *See, e.g.*, *Mekhoukh v. Ashcroft*, 358 F.3d 118, 129–30 & n.14 (1st Cir. 2004); *Toure v. Att'y Gen. of U.S.*, 443 F.3d 310, 325 (3d Cir. 2006).

Id. at 622–23 n.8.

lawyer.[18] The question this Article seeks to answer is whether this position is correct. In evaluating this issue, the thesis put forth below is that there must be a re-imagination of the immigration judge's duty toward a noncitizen when that noncitizen is represented by a lawyer.[19] Resolving this issue in an equitable and just manner is vital because how the immigration proceeding functions goes to the very heart of the noncitizen's liberty interest—namely, whether that individual can have an opportunity to live within the United States.[20]

This Article proceeds as follows. Part I provides a history and overview of the circuit split that presently exists on this subject. Parts II and III are the core of this study. To begin, there will be an examination of the way the executive branch's Social Security Administration (SSA) conducts judicial proceedings. As this discussion will show, the administrative law judge (ALJ) at an SSA hearing wears multiple hats, serving as an adjudicator but also as an inquisitional court officer, investigator, and at times as an advocate for the claimant bringing the case, even when the claimant has a lawyer.[21] Raising this comparison is necessary because several federal courts of appeals have likened the role of this ALJ to that of the immigration judge and have found that because the ALJ has a duty to develop the record in all instances, the immigration judge has such a duty as well.[22]

As this Article shows, however, this analysis overlooks an important reality. For one, immigration judges (IJs) are *not* the same as ALJs governed by the Administrative Procedure Act.[23] Rather, immigration judges are "Article II adjudicators"[24] whom "the Attorney General appoints . . . [and who are] subject to such supervision and shall perform such duties as the Attorney General shall prescribe."[25] Certainly, under the DOJ's guidelines, immigration judges are expected to "exercise their independent judgment and discretion" and act "in a timely and impartial manner."[26] But given their position and the highly charged nature of immigration politics today, to mandate that they *must* fulfill the duty to develop the record when a noncitizen is represented by counsel worries

18. *See id.* at 626–27.

19. In fact, one study that discusses why rethinking this issue is crucial, especially because immigration judges are understaffed and overworked, is Andrew Tae-Hyun Kim, *Rethinking Review Standards in Asylum*, 55 WM. & MARY L. REV. 581 (2013).

20. For an important book on how the immigration process needs to be fair and equitable, see HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW (2014).

21. For a discussion of these cases, see *infra* Part II.

22. *See infra* pp. 74–76.

23. For a discussion of this point, see Krishnan, *supra* note at 3, at 325.

24. *Id.* (noting that this is "common parlance").

25. *Id.* (citing 8 U.S.C. § 1101(b)(4)).

26. 8 C.F.R. § 1003.10(b) (2021).

many immigrant-rights advocates who fear judicial bias in favor of the government.

Of course, to cast all immigration judges as acting contrary to the interests of the immigrant and their lawyer would be unfair.[27] At the same time, it would be naïve and unrealistic to think that politics is completely absent within the immigration courtroom.[28] Thus, recognizing the complexity and nuance involved and reflecting on what the judicial duty to develop the record should be when a noncitizen has counsel, this Article proposes an alternative approach that will be referred to as LODE—*Lawyer Opt-Out with Discretionary Evaluation*.[29]

At the heart of this model is the notion that noncitizens, through their representative counsel, can "opt out" of receiving judicial assistance. There may be various reasons for an opt-out request. For example, the lawyer and noncitizen may believe that such assistance is unnecessary because the representing lawyer has the requisite expertise. Or the two may be worried about the judge's temperament or reputation for being "pro-government." Or, because there is an established, trusted relationship already present, the noncitizen simply may not wish to have anyone but the lawyer develop the record.[30]

Yet the LODE model also contemplates the scenario in which the lawyer handling the case is underperforming but nevertheless is encouraging or even pressuring the noncitizen to opt out.[31] In this type of situation and after evaluating the circumstances, the judge, under the

27. For an excellent treatment of the immigration prosecutor (who works within the Department of Homeland Security), see Sivaprasad Wadhia, *supra* note 4.

28. There have been decades of research on how and to what extent attitudes, ideology, and politics shape judicial decision-making. For a brief sampling, see, for example, Lee Epstein, *Some Thoughts on the Study of Judicial Behavior*, 57 WM. & MARY L. REV. 2017 (2016) (providing a review of the literature); Lee Epstein & Jack Knight, *Reconsidering Judicial Preferences*, 16 ANN. REV. POL. SCI. 11 (2013); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002); CHARLES G. GEYH, COURTING PERIL: THE POLITICAL TRANSFORMATION OF THE AMERICAN JUDICIARY (2016); LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME (2000); Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305 (2002).

29. For a discussion of this model, see *infra* Section III.B.

30. *See infra* pp. 76–79. It should be noted that, not infrequently, a judge's development of the record may involve more benign, pro forma-type aspects, including adding various government reports to the file. I am grateful to Sean Santen for this point.

31. For a discussion of "Judicial Controls over Adversarial Abuses," see generally DEBORAH L. RHODE, DAVID LUBAN, SCOTT L. CUMMINGS & NORA FREEMAN ENGSTROM, LEGAL ETHICS ch. 7 (8th ed. 2020).

LODE approach, could intervene as a means of safeguarding the noncitizen's interests.[32]

Again, such discretionary evaluative authority may concern those who fear the potential for excessive judicial interference. But as the Article explains below, there would be a check.[33] While this model would not prohibit the immigration judge from asking clarifying questions or shepherding the process along in an efficient but fair manner, any detailed, substantive intervention beyond that would be allowed only after receiving permission from an overseeing Article III appellate court.[34]

Additionally, a practical, self-enforcing check also would be present. Immigration judges are so overwhelmed with cases on their dockets that they simply do not have the time, capacity, or desire to expend extra energy where it is not needed.[35] Adopting the LODE approach, therefore, would offer a welcome respite to the already overworked immigration judge; judicial intervention would likely be triggered only where there is obvious, incontrovertible neglect by the noncitizen's lawyer.[36]

Undoubtedly, there will be a range of potential questions observers will ask regarding the LODE model. The end of this Article addresses these queries, including what the standard of review should be when the immigration judge asks the federal appellate court for approval to develop the record. As the final part of this argument makes clear, federal appellate courts generally should employ de novo review.[37] That these requests would be scrutinized closely seems only appropriate given that the personal liberty of some of society's most vulnerable individuals is at stake.

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32. *Id.* (drawing upon the notion that the judge may need to intervene when witnessing bad lawyering).

33. For a discussion of this point in the model, see *infra* pp. 81–83.

34. *See infra* pp. 82–83.

35. *See, e.g.*, *C.J.L.G. v. Barr*, 923 F.3d 622, 636 (9th Cir. 2019) (Paez, J., concurring) ("[T]he volume of cases on an IJ's docket severely limits the IJ's capacity to develop the record.").

36. *See infra* p. 87 (discussing the frequency with which immigration judges will actually have to seek appellate review to intervene in cases of inept lawyering).

37. For a discussion of this point in further detail, see *infra* note 190 and accompanying text.

I. THE JUDGE'S DUTY TO DEVELOP THE RECORD—EVEN WHEN A LAWYER IS PRESENT

A. The Affirmative Case

In 2004, the Seventh Circuit issued a well-known immigration judgment in the case of *Hasanaj v. Ashcroft*.[38] The facts involved an Albanian citizen (Hasanaj) who sought asylum and withholding of deportation because he feared persecution for his political opinions if he were returned home.[39] Both the immigration judge and the BIA rejected his petition.[40] In the immigration court, Hasanaj was represented by counsel,[41] but the judge nevertheless played an active role in overseeing the case.[42] Hasanaj claimed that this judicial involvement was excessive and violated his due process rights.[43] As the Seventh Circuit summarized, Hasanaj's argument was "that the IJ's conduct during questioning amounted to 'hectoring, pressuring or abusing the witness . . . abandoning all appearance of impartiality.'"[44]

Furthermore, according to Hasanaj and his lawyer, the immigration judge's interference prevented the lawyer from being able to put forth an effective case.[45] For example, during the hearing the lawyer began to question her client "about the current conditions in Albania."[46] The lawyer wanted to offer context, from Hasanaj's perspective, as to how dangerous it would be for Hasanaj to return.[47] As the direct examination began, however, "the IJ stated that he would give little weight to such testimony as an authoritative historical account."[48]

For the Seventh Circuit, the immigration judge's decision was not unreasonable.[49] As the court noted, the judge did allow the testimony to go forward and was simply previewing his analysis before handing down

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38. 385 F.3d 780 (7th Cir. 2004).

39. *Id.* at 781.

40. *Id.*

41. *Id.* at 784. The lawyer was Marketa Lindt, who currently is a partner in the Chicago office of Sidley Austin LLP. *See Marketa Lindt*, SIDLEY, https://www.sidley.com/en/people/l/lindt-marketa [https://perma.cc/XE4D-CWL3] (last visited Feb. 5, 2022). According to Lindt's LinkedIn page, she started at Sidley in 1999. Marketa Lindt, LINKEDIN, https://www.linkedin.com/in/marketa-lindt-033a579 (last visited Feb. 5, 2022). The court also noted that Lindt represented Hasanaj from 1997 to 1998. *Hasanaj*, 385 F.3d at 784–85.

42. *Hasanaj*, 385 F.3d at 783–85.

43. *Id.* at 783.

44. *Id.* at 783–84.

45. *Id*.

46. *Id.* at 784.

47. *Id.*

48. *Id*.

49. *Id*.

a ruling.[50] Moreover, the judge rightly supplemented the lawyer's questions with his own.[51] The judge's interrogation of the alternative possibilities Hasanaj could have taken to better secure his safety and the immigration judge's probing on other factual issues were justifiable and complied with the statutory requirement to "develop the record [completely] . . . in order to make a fully informed decision."[52] Thus, because there was not "substantial evidence"[53] showing that the immigration judge abused his discretion, the Seventh Circuit agreed that Hasanaj should be deported.[54]

Two years later, in *Islam v. Gonzales*,[55] the Second Circuit similarly examined the role of the immigration judge where a lawyer was present. As in *Hasanaj*, the petitioner sought asylum and withholding of deportation.[56] The petitioner's claim was that if sent back to his home country of Bangladesh, he would be persecuted for his political opinions.[57]

The Second Circuit opened its decision by directly addressing the responsibilities of an immigration judge.[58] It observed that the immigration judge "is not merely the fact finder and adjudicator, but also has an obligation to establish and develop the record."[59] Yet this responsibility does not mean that the judge can abandon their role as "a neutral, impartial arbiter."[60] Interestingly, throughout its discussion, the Second Circuit did not question whether there might be a conflict in trying to satisfy both objectives.[61]

But then consider how, in this particular case, the court proceeded to issue a harsh rebuke of the way the immigration judge had carried out his duties.[62] In essence, the judge was found to have crossed the line by exhibiting contemptuous behavior and using demeaning language toward the petitioner.[63] By engaging "in an argumentative, sarcastic, impolite, and

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50. *Id*.

51. *Id.*

52. *Id.* (noting that the judge was both "thorough and fair in his obligation to the Petitioner").

53. *Id.* at 781 (citing *Balogun v. Ashcroft*, 374 F.3d 492, 498 (7th Cir. 2004)).

54. *Id.* at 785.

55. 469 F.3d 53 (2d Cir. 2006).

56. *Id.* at 54. The petitioner also sought protection under the Convention against Torture. *Id.*

57. *Id.* at 55–56 n.1.

58. *Id.* at 55.

59. *Id.*

60. *Id.*

61. *Id.* ("During the course of developing a sound and useful record, an IJ must, when appropriate, question an applicant in order, for example, to probe inconsistencies and develop the relevant facts. But it is precisely because of the IJ's responsibility to develop the record during asylum proceedings that the IJ must remain impartial.").

62. *Id.*

63. *Id.* 55–56.

overly hostile manner that went beyond fact-finding and questioning,"[64] the judge all but became the second prosecuting arm of the government. In fact, the lawyer for the petitioner went on record to state, "I believe that . . . a hostile environment was created here today where by [sic] my client was intimidated and maybe prevented from fully testifying completely as to his . . . grounds for asylum."[65]

Ultimately, the Second Circuit remanded the case and ordered that a new immigration judge hear the matter.[66] In reaching its conclusion, the court noted that it typically reviews such cases by looking at whether there is substantial evidence that the judge erred on the reading of the facts; otherwise the court defers.[67] In this case, however, the court opted to conduct a de novo review because questions involving both law and fact were involved and because, according to the court, the judge had a history of belligerence.[68]

In both the Seventh and Second Circuit cases, the respective petitioners complained that the presiding immigration judges intervened too aggressively, resulting in unfair and unconstitutional hearings.[69] And while the outcomes differed between the two circuits, the commitment to having immigration judges engage in active adjudication was kept firmly in place.[70] Put differently, both courts remained wedded to the principle that the immigration judge always had a duty to develop the record, even

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64. *Id.* at 55.

65. *Id.* at 56 n.2.

66. *Id.* at 57.

67. *Id.* at 55.

68. *Id.* at 55–56. In an essay published in 2010, Professor Mark Hurwitz documented how the appellate court subsequently "took the extraordinary step of removing two immigration judges from cases for evincing inappropriate behavior and conduct towards asylum seekers in their courts." Mark S. Hurwitz, *Removing Judges: The Cases of Immigration Judges Jeffrey Chase and Noel Ferris*, 31 JUST. SYS. J. 114, 114 (2010). One of the judges was this particular judge, Jeffrey Chase. *Id.* at 114–15. In *Islam,* the Second Circuit bluntly stated that "[u]nfortunately, this is not the first time that the courtroom conduct of IJ Chase has been later questioned by this Court. By our count, this is the seventh time that we have criticized IJ Chase's conduct during hearings." *Islam*, 469 F.3d at 56. For a narrative on Chase that includes a more sympathetic account on his behalf, see Nina Bernstein, *U.S. Relieves Judge of Duties in Courtroom*, N.Y. TIMES (Mar. 13, 2007), https://www.nytimes.com/2007/03/13/nyregion/13judge.html [https://perma.cc/AE56-2MV5].

69. *See Hasanaj v. Ashcroft*, 385 F.3d 780, 783–84 (7th Cir. 2004); *see also Islam*, 469 F.3d at 55–56.

70. For cases in other circuits where this issue was litigated, see *Handoko v. Att'y Gen.*, 260 F. App'x 519, 521 (3d Cir. 2008) (rejecting the noncitizen's claim that the immigration judge excessively interrupted the proceeding and deprived the noncitizen of due process); *Thu v. Ashcroft*, 103 F. App'x 56, 57 (8th Cir. 2004) (rejecting the argument that the immigration judge was biased, "[e]ven though [he] frequently interrupted Thu's counsel and ultimately asked a majority of the questions"). For two other similar types of cases, see *Sharan v. Wilkinson*, 850 F. App'x 878, 880 (5th Cir. 2021) and *Arias-Hernandez v. Sessions*, 685 F. App'x 372, 374–75 (6th Cir. 2017).

when there was a lawyer, and that failure to comply with that duty would result in the case being remanded.[71]

Then, there was a series of other cases in which the appeals were based on how the immigration judges *did not intervene enough* on behalf of the noncitizens represented by counsel. In these matters, the noncitizens stipulated that the immigration judges had the power to intercede during the proceedings but that the judges did not fulfill this statutory obligation. In other words, the noncitizens affirmatively sought help from the judges but claimed that the judges did not provide sufficient assistance. In reviewing these petitions, the circuit courts have reached varying conclusions. For example, in *Pramanik v. Attorney*,[72] the Third Circuit rejected the noncitizen's claim that the immigration judge was too lax in developing the record; according to the appellate court, the immigration judge steered the proceeding in an appropriate direction.[73] The noncitizen had "counsel [who] was not prevented from asking additional non-leading questions to present new facts."[74] The simple fact that the noncitizen did not like the outcome and wished that the immigration judge had done more to develop the record did not mean that the judge necessarily should have done so.[75]

By contrast, in *Zolotukhin v. Gonzales*,[76] the Ninth Circuit chastised the immigration judge for not being active enough in developing the record.[77] There, the judge refused to call certain witnesses, ask about particular legal claims, and amass vital pieces of evidence.[78] The appellate court was concerned about the excessive deference given to the government's prosecutors and "that the IJ was not acting as a fair and impartial arbiter."[79] The court thus remanded the case for a new hearing.[80]

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71. *See Hasanaj*, 385 F.3d at 783, 785; *see also Islam*, 469 F.3d at 55–57.

72. 822 F. App'x 69 (3d Cir. 2020).

73. *Id.* at 73.

74. *Id.*

75. *See id.* at 73–74 ("The IJ acted properly in instructing Petitioner's counsel not to ask leading questions of his own witnesses . . . [and although] Petitioner points to the IJ's alleged 'failure to develop the record' as prejudicial, he has not explained why the IJ's actions, specifically, affected the outcome of the proceedings."). For similar outcomes involving noncitizens represented by counsel, see *Martinez Soriano v. Holder*, 366 F. App'x 733, 775–76 (9th Cir. 2010); *Zhong Zheng v. Dep't of Homeland Sec.*, 222 F. App'x 22, 23 (2d Cir. 2007); *Shunfu Li v. Mukasey*, 529 F.3d 141, 148 n.5 (2d Cir. 2008) (holding that the immigration judge's duty to develop the record is satisfied by making sure "to identify and probe perceived inconsistencies").

76. 417 F.3d 1073 (9th Cir. 2005).

77. *Id.* at 1075–76.

78. *Id.* at 1075–77.

79. *Id.* at 1075 n.2.

80. *Id.* at 1077.

In an earlier Ninth Circuit case, *Shoafera v. I.N.S.*,[81] the court found that the immigration judge similarly did not act with enough care.[82] In this matter, an Ethiopian citizen filed for asylum, claiming that she had a well-founded fear of being sexually assaulted upon return to Ethiopia based on her Amharic ethnicity.[83] After she testified about these fears, the judge explicitly stated that he would disregard her claims because they were too speculative.[84] The appellate court criticized the judge for not providing a substantive explanation, *on the record*, for why he made this determination; the court thereafter remanded the case.[85]

Thus, in situations in which the immigration judge has acted too brazenly or not vigorously enough, the appellate courts have not hesitated to remand the matter for reconsideration. Nevertheless, these decisions also illustrate an underlying acceptance of, and deference toward, the INA's provision requiring the immigration judge to develop the record during the course of an immigration hearing. The law itself is assumed to be fundamentally protective of the noncitizen's interests and rights. And where there is a problem, the problem is considered to be, not with the law, but instead with judges who exhibit bias or laxness.

But, this standard analysis fails to recognize an important reality: the open-ended way that the law has been written too readily invites bias and hostility or, alternatively, inaction, which demonstrates that the line between the language in the statute and the judge's behavior is in fact more blurred than stark.

B. Cause for Concern?

To this last point above, occasionally an appellate court will express worry about the broad powers the developing-the-record statute grants immigration judges. For example, in the well-known case of *Jacinto v. I.N.S.*,[86] the Ninth Circuit issued a remand order in a case in which an immigration judge had refused to grant asylum to a Guatemalan citizen.[87] The facts were straightforward: The unrepresented petitioner spoke little English and was unfamiliar with the immigration hearing process.[88] As the transcript from the proceeding showed, the judge repeatedly interrupted the petitioner, was rude, and did not allow her to offer evidence to support

81. 228 F.3d 1070 (9th Cir. 2000).

82. *See id.* at 1076.

83. *Id.* at 1072, 1074–75.

84. *Id.* at 1075.

85. *Id.* at 1075–76.

86. 208 F.3d 725 (9th Cir. 2000). The petitioner also asked for withholding and voluntary departure. *Id.* at 727. The BIA had affirmed the immigration judge's order. *Id.*

87. *Id.*

88. *Id.* at 735.

her claims.[89] For the Ninth Circuit, the judge failed to satisfy his obligation under the statute to properly develop the record on the petitioner's behalf.[90] The appellate court held that because of the judge's behavior, "Jacinto did not receive a full and fair hearing, . . . she suffered prejudice, and thus was denied due process."[91]

A similar set of circumstances occurred in a case involving an El Salvadorian soccer player looking to "escape violence at the hands of the notorious Mara Salvatrucha gang, commonly known as MS13."[92] The petitioner in this case had asked for asylum, withholding, and Convention-against-Torture protection.[93] And just as there was pressure from the judge in *Jacinto*, here, too, according to the Third Circuit, hostility permeated this hearing.[94]

For example, the Salvadorian petitioner did not have a lawyer, but instead of providing him with legal assistance as she was statutorily obliged to do, the immigration judge did the opposite.[95] The judge exhibited bias, did not permit the petitioner to present his testimony in full, insulted him, and rushed through the proceeding.[96] In effect, the judge developed the record in a way most favorable to the government. Citing its earlier precedent as support,[97] the Third Circuit ruled that the petitioner's due process rights had been violated, finding that

> the pervasiveness and egregiousness of the other problematic conduct here—the IJ's interrupting and cabining Serrano-Alberto to "yes or no" answers during critical testimony, honing in on various and sundry irrelevant details, making findings contradicted by the record, and maintaining a condescending and belligerent tone throughout the hearing . . . —evinced bias and created an intolerable atmosphere of intimidation.[98]

Both of these cases illustrate the real-life consequences of overly aggressive immigration judges flaunting their power and flouting their duty to be fair, just, and thoughtful adjudicators. It is hardly a stretch to

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89. *Id.* at 728, 731–32 (noting that petitioner also was not advised that "she could be a witness for" her son who also was facing removal).

90. *Id.* at 733–35.

91. *Id.* at 735 (ruling "not [to] decide the merits of Jacinto's application for asylum").

92. *See Serrano-Alberto v. Att'y Gen.*, 859 F.3d 208, 211 (3d Cir. 2017).

93. *Id.*

94. *Id.* at 214–19.

95. *Id.*

96. *Id.*

97. *Id.* at 221–23 (citing *Wang v. Att'y Gen.*, 423 F.3d 260, 269–71 (3d Cir. 2005), *Cham v. Att'y Gen.*, 445 F.3d 683, 690–91 (3d Cir. 2006), and, for contrast, *Abdulrahman v. Ashcroft*, 330 F.3d 587 (3d Cir. 2003)).

98. *Id.* at 224 (citation omitted).

think that the INA, which gives these judges the power to develop the record, emboldened them to behave in ways that worked a great disservice to the noncitizens who appeared in their courtrooms. Fortunately for these particular petitioners, the circuit courts of appeals served as the necessary backstops and rectified the abuses that had occurred. But just how much judicial malpractice has gone *uncorrected*?

In the Third Circuit's view, many "IJs diligently comport with their constitutional and statutory obligations, and . . . it is only on rare occasion that . . . an IJ's conduct crosses the line."[99] When it comes to pro se petitioners, if the choice is between no judicial assistance or providing such petitioners the opportunity to receive sound judicial assistance (with the chance that the judge will overstep on occasion), the choice is an easy one for the Third Circuit to make.

But should this calculus be the same when a noncitizen has counsel? From the previous Section, we know that the presence of a lawyer will not always deter bad judicial behavior. Another recent and pronounced example is that of former judge Nicholas Ford.[100] Ford was "a criminal court judge in Cook County, Illinois, before being named to the [San Francisco] immigration court bench in 2019 by then-Attorney General William Barr."[101] During his tenure as an immigration judge, Ford sparked numerous complaints about his hostile and unfair conduct toward noncitizens and lawyers who appeared before him.[102]

Ford's most vocal critic was the National Lawyers Guild (NLG).[103] The NLG submitted an eleven-page letter to the DOJ, followed by some 200 pages of additional materials, which sought to demonstrate Ford's unfitness. In particular, the letter had a dedicated section that discussed Ford's "aggressive, demeaning, and unprofessional [attitude] with [respect to] counsel for simply fulfilling their ethical requirements of representation."[104] As the NLG documented, Ford also sought to intimidate lawyers who came before him by using berating and dismissive language and even "implicitly threaten[ing]" them at times.[105]

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99. *Id.* at 221.

100. *See Immigration Judge, Subject of Complaint by Lawyers, Retires*, ABC NEWS (Apr. 18, 2021, 12:30 PM), https://abcnews.go.com/US/wireStory/immigration-judge-subject-complaint-lawyers-retires-77140566 [https://perma.cc/32R2-MYL6].

101. *Id.*

102. *Id.*

103. *See* Nat'l Laws. Guild, Complaint Regarding San Francisco Immigration Judge Nicholas R. Ford (Nov. 12, 2020), https://drive.google.com/file/d/1tuNk_14qeGGNpgLOsOdbMRwGoKbgV2Ee/view [https://perma.cc/45C6-GPBL].

104. *Id.* at 5.

105. *Id.* at 4–5.

Perhaps most importantly, though, Ford appeared to view his statutory powers as grants of unfettered authority.[106] The NLG complaint analyzed a number of instances in which Ford actively tried to "discredit" expert witnesses and play "a prosecutorial role instead of an impartial one."[107] In fact, Ford even went so far as to state to "another attorney that he could 'rule by fiat' if he wanted."[108]

Approximately five months after the NLG filed its complaint, Ford retired from the bench.[109] He did not address the charges against him. Rather, his departure letter focused on the structural problems of the immigration adjudication system, impliedly criticizing his DOJ higher-ups for the manner in which they supervised their subordinate judges.[110]

In sum, these examples of judges behaving well beyond their appropriated powers lead us to ask the following questions:

1. Are there other non-Article III judges who have a similar power to develop the record?
2. If so, have the federal appellate courts compared these other judges to immigration judges when examining the parameters of this power?
3. Might this INA provision regarding judicial authority need to be examined from a new perspective?

For each of these questions, the answer is yes.

II. DRAWING COMPARISONS: THE SOCIAL SECURITY ADMINISTRATION

Even as certain federal appeals courts have admonished immigration judges for overstepping, there continues to be strong support for upholding the developing-the-record statute. In reviewing the caselaw, these courts frequently reference how the Social Security Administration's Office of Hearings and Appeals functions. Twenty-five years ago, Jeffrey Wolfe and Lisa Proszek wrote a rich and detailed article on the SSA's adjudication process.[111] As they observed, "Overwhelmingly, the number of

106. *See id.* at 4–6.

107. *Id.* at 5.

108. *Id.*

109. *See Immigration Judge, Subject of Complaint by Lawyers, Retires*, *supra* note 100.

110. *Id.* (noting that Ford's letter stated that his "managers [constituted] a fearful community whose primary interest has never been the growth of those they oversee but rather their continued employment").

111. Jeffrey S. Wolfe & Lisa B. Proszek, *Interaction Dynamics in Federal Administrative Decision Making: The Role of the Inquisitorial Judge and the Adversarial Lawyer*, 33 TULSA L.J. 293, 294 (1997) ("As of March, 1996, 1,310 Administrative Law Judges and 33 Senior Administrative Law Judges served in various agencies of the United States government; 1,060 (with 33 Senior Administrative Law Judges) with the Social

proceedings before United States Administrative Law Judges occur[red]"[112] within the SSA forum. Today, the situation remains the same. "There are nearly 2,000 ALJs employed by 28 agencies in the federal government,"[113] with "more than 1,500"[114] of them working for the SSA, who annually "render over 650,000 decisions at the hearing level."[115]

Wolfe and Proszek's account carefully explains the role of the judge in an SSA hearing.[116] To begin, the cases typically involve individuals claiming benefits for issues relating to different disabilities they have and for which they are seeking to receive assistance under the Social Security Act.[117] These matters can be extremely technical; not surprisingly, ALJs rely upon experts to give specialized opinions.[118]

It is important to note that at the SSA hearing stage, claimants are having their cases reviewed for the third time.[119] During the first two instances, the matter is not in front of a judge.[120] Instead, up "[t]o that point the individual has applied for benefits and has been denied by [a civil servant in] the State Disability Determination Service ("DDS") twice—once initially, and again on reconsideration."[121] When a case reaches the

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Security Administration. In the first quarter fiscal year 1997, a total of 518,862 Social Security cases were pending, awaiting administrative hearing.") (footnotes omitted).

112. *Id.* at 294. For a valuable recent article on the SSA adjudication system and its relevance to immigration adjudication, see Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097 (2018).

113. Jack Beermann, *The Future of Administrative Law Judge Selection*, REGUL. REV. (Oct. 29, 2019), https://www.theregreview.org/2019/10/29/beermann-administrative-law-judge-selection/ [https://perma.cc/2QVQ-4A9S].

114. *Information About SSA's Hearings and Appeals Operations*, SSA: HEARINGS & APPEALS, https://www.ssa.gov/appeals/about_us.html [https://perma.cc/CLS6-FNUU] (last visited Jan. 28, 2022).

115. *Id.*

116. *See* Wolfe & Proszek, *supra* note 111, at 294–95.

117. *Id.*

118. *Id.* at 295. The head of the SSA is known as the commissioner. This individual, operating through the ALJ, has the burden of showing that the claimant is not disabled and thus should not receive benefits. *See* 20 C.F.R. § 404.1520 (2020). If the claimant proves the disability and inability to work in their previous job, the commissioner has the burden of showing that there is "other work" the claimant can perform in order to deny the benefit. *Id.* § 404.1520(a)(4)(v). At this point experts frequently are called upon to provide assistance to the ALJ. I am grateful to Sean Santen for his insights on these points.

119. Wolfe & Proszek, *supra* note 111, at 296 (noting that an ALJ hears and reviews a case de novo).

120. *Id.*

121. *Id.* Note that, if the Commissioner is going to deny benefits, the statute requires the SSA to compile all relevant medical records for at least the twelve months prior to the point at which the application was filed. 42 U.S.C. § 423(d)(B)(5); 20 C.F.R. § 404.1512(b)(1) (2020). Again, thanks to Sean Santen for his insights on these points.

ALJ, more than eighty percent of claimants have legal representation.[122] This is significant because research has shown that in these forums, "having a lawyer nearly doubled applicants' chances of getting benefits."[123] Furthermore, unlike in the immigration context, where the government is represented by DHS prosecutors, in the SSA hearing, the government is not present, having prevailed below.[124] Thus, perhaps as a way both to provide balance and to safeguard the interests of the government, the Code of Federal Regulations gives the ALJ quite sweeping powers:

> A hearing is open to the parties and to other persons the administrative law judge considers necessary and proper. At the hearing, the administrative law judge looks fully into the issues, questions . . . [the claimant] and the other witnesses, and . . . [a]ccepts as evidence any documents that are material to the issues[. Additionally, the ALJ] may stop the hearing temporarily and continue it at a later date if he or she finds that there is material evidence missing at the hearing[,] and may reopen the hearing at any time before he or she mails a notice of the decision in order to receive new and material evidence. The administrative law judge may decide when the evidence will be presented and when the issues will be discussed.[125]

Nevertheless, the claimant's lawyer is still expected—and empowered—to be a zealous advocate for the client.[126] All of the features that are found in a traditional litigation/courtroom context with respect to the obligations of the "adversarial lawyer"[127] are present in the SSA hearing as well.[128] Therefore, the difference between the traditional

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122. Wolfe & Proszek, *supra* note 111, at 295 (noting that this representation is done "either by counsel or non-lawyer 'representatives'").

123. *Compare* NOLO, *Survey Statistics: Is a Social Security Disability Lawyer Worth It?*, DISABILITYSECRETS, https://www.disabilitysecrets.com/resources/survey-statistics-is-social-security-disability-lawyer-worth-it.html [https://perma.cc/4JBV-QNWG] (last visited Jan. 29, 2022) ("60% were ultimately approved for benefits, compared to 34% of those who didn't have a lawyer's help."), *with* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-37, SOCIAL SECURITY DISABILITY: ADDITIONAL MEASURES AND EVALUATION NEEDED TO ENHANCE ACCURACY AND CONSISTENCY OF HEARINGS DECISIONS 24 (2017), https://www.gao.gov/assets/gao-18-37.pdf [https://perma.cc/2HF2-6CMD] (finding that disability applicants who used either legal or non-legal representatives were allowed benefits 2.9 times as often as those who did not).

124. Wolfe & Proszek, *supra* note 111, at 295.

125. *See* 20 C.F.R. § 404.944 (2020).

126. *See* Wolfe & Proszek, *supra* note 111, at 296–97.

127. *Id.*

128. For regulations governing ethics and conduct within the SSA hearing, see 20 C.F.R. §§ 404.1700–.1799 (2020). For the equivalent within the Executive Office for

courtroom and the SSA hearing is really in the role played by the judge. In the latter, the judge is expected to be affirmatively "active."[129]

The SSA ALJ's responsibilities as a fact finder[130] resemble those of judges in many civil law countries.[131] As an "inquisitorial jurist,"[132] the ALJ questions, investigates, examines, and evaluates witnesses and finally forms opinions based on the information, data, and evidence gathered.[133] At the same time, there is an SSA regulation in place stating that the "judge shall not conduct a hearing if he or she [or they] is prejudiced or partial with respect to any party or has any interest in the matter pending for decision."[134]

Naturally, the query that emerges is whether these seemingly opposing responsibilities can be reconciled.[135] In his essay entitled "The Adversary System," Lon Fuller argued that the answer was a resounding

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Immigration Review, see 8 C.F.R. §§ 1003.101–.111 (2021). My thanks to Sean Santen for his insights here.

129. Wolfe & Proszek, *supra* note 111, at 297–99.

130. *Id.* at 311, 314, 316, 326.

131. For a discussion of this point, see HERBERT JACOB, ERHARD BLANKENBURG, HERBERT M. KRITZER, DORIS MARIE PROVINE & JOSEPH SANDERS, COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE (1996).

132. *See generally* Wolfe & Proszek, *supra* note 111, at 302–07 (explaining the role of the "inquisitorial jurist" as "an 'active' participant in the solicitation of evidence critical to the fact-finding process").

133. For a thoughtful summary of the ALJ's duty to develop the record, see RICHARD MURPHY & CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 5:25 (3d ed. 2021) ("The administrative judge is pivotal to the fact-finding function of an evidentiary hearing and hence, unlike a trial judge, an administrative judge has a well-established affirmative duty to develop the record. . . . Even in cases in which the claimant is represented by counsel, the administrative judge has the ultimate duty to develop the record fully and fairly. Administrative judges have an affirmative duty to elicit the facts necessary to determine the interest of the public as well as the private parties. They must develop a record comprehensive and accessible record [sic] so that the agency and ultimately a court can review the whole case with minimal difficulty. . . . However an administrative judge may not go too far. The administrative judge must not go so far in developing the record so as to take on the aspects of a litigant with a decided point of view. An active role does not mean that the administrative judge can take the place of a witness.").

134. 20 C.F.R. § 404.940 (2020). Somewhat curiously, the regulation initially allows the ALJ to decide whether such prejudice exists. If the claimant loses on this point, they may file an appeal. *Id.* ("If you object to the administrative law judge who will conduct the hearing, you must notify the administrative law judge at your earliest opportunity. The administrative law judge shall consider your objections and shall decide whether to proceed with the hearing or withdraw. If he or she withdraws, the Associate Commissioner for Hearings and Appeals, or his or her delegate, will appoint another administrative law judge to conduct the hearing. If the administrative law judge does not withdraw, you may, after the hearing, present your objections to the Appeals Council as reasons why the hearing decision should be revised or a new hearing held before another administrative law judge.").

135. *See* Wolfe & Proszek, *supra* note 111, at 299–301, 310, 317, 329.

"no."[136] For Fuller, the notion that the adjudicator could zealously and copiously fact-find *and* concurrently stay neutral in the adjudication phase was unrealistic.[137] Further complications arise if the claimant's lawyer clashes with the judge while the judge is wearing their inquisitor's hat. When there is such a conflict, it is easy to imagine how the claimant's lawyer might receive retribution, for after all, it is the judge who also wields the final decision-making power in the case.[138]

Still, despite this undeniable tension, the adjudication system within the SSA remains. And all of this information is relevant for our current immigration study. The reason is that the federal appellate courts, in reviewing whether immigration judges have abused their power, have routinely pointed to the SSA hearings as the prototype for how such forums should operate. Recall, for example, *Jacinto v. I.N.S.*, discussed above. In ruling that the immigration judge exhibited bias and failed to develop the record properly, the Ninth Circuit referenced ALJs in the SSA context as the ideal model.[139]

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136. *See* Lon L. Fuller, *The Adversary System*, *in* TALKS ON AMERICAN LAW 35 (Harold J. Berman ed., rev. ed. 1972).

137. *Id.* at 36. Others over the years have also made the argument that the inquisitorial system has a greater potential for bias than adversarial systems. *See, e.g.*, John Thibaut, Laurens Walker & E. Allan Lind, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386 (1972); Rogelio A. Lasso, *Gladiators Be Gone: The New Disclosure Rules Compel a Reexamination of the Adversary Process*, 36 B.C. L. REV. 479 (1995); GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 120 (1978). Separately, but relatedly, some have criticized Fuller for his interpretation of how judges apply law, particularly his description of the positivist school of thought on the matter. For a powerful and persuasive critique, see Brian Leiter, *The Demarcation Problem in Jurisprudence: A New Case for Scepticism*, 31 OXFORD J. LEGAL STUD. 663 (2011). For another excellent analysis, see Leslie Green & Thomas Adams, *Legal Positivism*, STAN. ENCYC. OF PHIL. (Dec. 17, 2019), https://plato.stanford.edu/entries/legal-positivism/ [https://perma.cc/VPP7-HXFY].

138. For a discussion of how the ALJ must develop the record when a lawyer is present or in pro se situations, see Jon C. Dubina, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceeding*, 97 COLUM. L. REV. 1289, 1302 nn.58–59 (1997) (citing for support *Vaughn v. Heckler*, 741 F.2d 177, 179 (8th Cir. 1984), *Coulter v. Weinberger*, 527 F.2d 224, 229 (3d Cir. 1975), *Heckler v. Campbell,* 461 U.S. 458, 471 (1983) (Brennan, J., concurring), *Higbee v. Sullivan*, 975 F.2d 558, 561–62 (9th Cir. 1992), *Cruz v. Sullivan*, 912 F.2d 8, 11 (2d Cir. 1990), and *Currier v. Sec'y of Health, Educ. & Welfare*, 612 F.2d 594, 598 (1st Cir. 1980)); Jennifer J. Dickinson, *Square Pegs, Round Holes, and the Myth of Misapplication: Issue Exhaustion and the Social Security Disability Benefits Process*, 49 EMORY L.J. 957, 963–65 (2000); Stephen Loffredo & Don Friedman, Gideon *Meets* Goldberg*: The Case for a Qualified Right to Counsel in Welfare Hearings*, 25 TOURO L. REV. 273, 336 n.201 (2009) (quoting *Hankerson v. Harris*, 636 F.2d 893, 895 (2d Cir. 1980)).

139. *See Jacinto v. INS*, 208 F.3d 725, 733 (9th Cir. 2000) (noting that these two "administrative settings have the common feature of determining the applicant's eligibility for certain benefits" and how "both social security and deportation hearings are likely to be unfamiliar settings for the applicant," which requires that the judge fairly and justly look out for the interests of the party seeking redress).

Other federal appellate courts have made similar observations. In *Yang v. McElroy*,[140] the Second Circuit heard a case involving a Chinese citizen who claimed that he would be subject to persecution based on protests and anti-government activities he organized as a student in Fujian, China.[141] The immigration judge ordered him removed for failing to establish a well-founded fear of persecution, and the BIA affirmed.[142] The Second Circuit, however, remanded the case for further investigation.[143] In doing so, it directed the BIA (and, implicitly, the immigration judge) to study the ALJ context to best determine how an asylum proceeding should properly function.[144]

The Sixth Circuit has also found comparability between the two forums. In *Mendoza-Garcia v. Barr*,[145] the court upheld an order by an immigration judge who ruled against a Guatemalan citizen's petition for asylum and withholding of removal.[146] In rendering its judgment, the Sixth Circuit explained that it "ha[d] fleshed out the duty to develop the record in the context of social security hearings," implicitly suggesting that because the duty was appropriate there, it was acceptable in immigration cases as well.[147]

And the Fourth Circuit, too, has explicitly recognized "the duties of immigration judges to be analogous to those of Social Security administrative law judges."[148] Indeed, the court has even gone further. It has declared that within its circuit, "immigration judges are charged with a duty to fully develop the record in *all* cases before them," including when claimants have lawyers.[149]

Thus, although the Supreme Court has yet to opine on the comparison between the two proceedings, several circuit courts have. Unfortunately, however, these courts have failed to critically analyze the issues inherent in obliging the immigration judge to be both a fact finder and neutral arbiter. Instead, the immigration judge's bifurcated role is simply accepted and, furthermore, deemed valuable for the immigration adjudication

140. 277 F.3d 158 (2d Cir. 2002).

141. *Id.* at 160–61.

142. *Id.* at 161.

143. *Id.* at 162–63.

144. *Id.* at 162.

145. 918 F.3d 498 (6th Cir. 2019).

146. *Id.*

147. *Id.* at 504–05. This case is also discussed in *Quintero v. Garland*, 998 F.3d 612, 623–25 (4th Cir. 2021) ("[O]ther circuits, while not explicitly drawing analogies between the immigration and Social Security contexts, have relied on *Jacinto*, *Yang*, and *Richardson* in recognizing immigration judges' duty to develop the record.") (citations omitted).

148. *See Quintero*, 998 F.3d at 626.

149. *Id.* at 627 (emphasis added).

process.[150] Yet the inherent conflict at play when an "inquisitorial judge" presides over immigration cases should be a matter of serious public concern—one that deserves enhanced scrutiny.

III. LAWYER OPT-OUT WITH DISCRETIONARY EVALUATION (LODE)

A. Placing the LODE Model Within the Literature

One way to help correct the imbalance present within immigration court proceedings would be to allow the noncitizen's lawyer to serve as a check on the immigration judge. This idea of the *empowered lawyer* has its roots in a larger literature that dates back many decades. Over one hundred years ago, for example, Louis Brandeis published a lecture he gave calling upon lawyers to be forceful litigators against big businesses.[151] As Brandeis noted then, "We hear much of the 'corporation lawyer,' and far too little of the 'people's lawyer.'"[152] Subsequent scholarship documented changes to the legal *and* political landscapes sparked by lawyers willing to challenge the institutional status quo.

In the 1950s and early 1960s, for instance, Willard Hurst published three landmark books on how "law and social process" in the United States had evolved because of the role lawyers played within the courts and within society writ large.[153] And around this same period, Clement Vose wrote his famous account of the NAACP lawyers who strategically and aggressively used the courts to advance the cause of civil rights.[154]

During the 1970s and 1980s, however, various works began to ask whether lawyers were hijacking the litigation movement for their own self-interested purposes.[155] Too often, as different studies pointed out, individual clients or rank-and-file members of social movements were

150. *Mendoza-Garcia v. Barr*, 918 F.3d 498, 504 (6th Cir. 2019).

151. *See* LOUIS D. BRANDEIS, *The Opportunity in the Law*, *in* BUSINESS—A PROFESSION 313, 321–27 (1914).

152. *Id.* at 321.

153. *See* JAMES WILLARD HURST, LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY (1960); JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES (1956); JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS (1950). For a critical review of Hurst's scholarship, see Stephen Diamond, *Legal Realism and Historical Method: J. Willard Hurst and American Legal History*, 77 MICH. L. REV. 784 (1979).

154. *See* CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES (1959).

155. For an overview of this point, see MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994); Michael McCann & Helena Silverstein, *Rethinking Law's "Allurement," in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 261 (Austin Sarat & Stuart Scheingold eds., 1998); *see also* SUSAN M. OLSON, CLIENTS AND LAWYERS: SECURING THE RIGHTS OF DISABLED PERSONS (1984).

disregarded by the lawyers who represented them.[156] One of the most famous critiques came from Derrick Bell, who argued that lawyers hyper-emphasized both courtroom litigation and the acquisition of rights on paper.[157] Reflecting on the aftermath of *Brown v. Board of Education*,[158] Bell suggested that more focus and resources needed to be devoted to substantively aiding the educational experience and overall educational enterprise for Black children.[159]

In response to Bell and others, several writers, particularly during the 1990s and into the 2000s, sought to rebut this perspective with research findings of their own. Notably, Austin Sarat and Stuart Scheingold were two prominent leaders in an emerging field that took a more "protean and heterogeneous"[160] view as to how such activist-lawyers operated.[161] As they contended, lawyers who affirmatively opted to embrace the passions and political positions of their clients needed to be thought of as "cause lawyers," or advocates whose professional obligations and personal commitments to the issues on which they worked were inseparable.[162]

Two key contributors who worked with Sarat and Scheingold focused their efforts on immigration cause lawyering. Susan Sterrett examined

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156. *See, e.g.*, Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1061–63 (1970); JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 31–32 (1978); JACK KATZ, POOR PEOPLE'S LAWYERS IN TRANSITION 32–33 (1982).

157. *See* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

158. 347 U.S. 483 (1954).

159. Bell, *supra* note 157, at 512–16. For other researchers who have expressed skepticism of lawyer-led, rights-based campaigns, see GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); Marshall J. Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. REV. 281 (1982); Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 26 (1984); Neal Milner, *The Dilemmas of Legal Mobilization: Ideologies and Strategies of Mental Patient Liberation Groups*, 8 LAW & POL'Y 105 (1986); Nikolas Rose, *Unreasonable Rights: Mental Illness and the Limits of Law*, 12 J.L. & SOC'Y 199 (1985); GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992); MARY ANN GLENDON, A NATION UNDER LAWYERS 270–72 (1994).

160. *See* STUART SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 2, 4 (2004).

161. *Id.* at 2–4. Note that the cause-lawyer school emerged in part as a response to William Simon's classic article that argued for zealous lawyer advocacy while simultaneously asking the lawyer to stay neutral, above the fray, and dispassionate. *See* William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.

162. *See* SCHEINGOLD & SARAT, *supra* note 160, at 2–4. These two scholars published a series of cause lawyering volumes. *See, e.g.*, CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES, *supra* note 155; CAUSE LAWYERING AND THE STATE IN THE GLOBAL ERA (Austin Sarat & Stuart Scheingold eds., 2001); THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE (Austin Sarat & Stuart Scheingold eds., 2005); CAUSE LAWYERS AND SOCIAL MOVEMENTS (Austin Sarat & Stuart A. Scheingold eds., 2006).

how immigration lawyers played a counter-balancing role to judges who frequently took hostile positions toward the immigrants appearing before them.[163] And Susan Coutin highlighted the ways immigration lawyers "sought legal recognition of their clients' realities" by confronting aggressive judicial authority within the courtroom and engaging in legal awareness advocacy outside of it.[164]

Moreover, separate from Sarat and Scheingold's project, Marisol Orihuela recently has written on immigration lawyering specifically in the area of "crimmigration."[165] As Orihuela puts it, "For too long, lawyering theory has treated . . . [immigration] and criminal lawyering as wholly distinct areas of practice."[166] Orihuela draws upon and then synthesizes different strands of scholarship from these two fields to craft a sophisticated approach immigration lawyers can use to meet both the institutional challenges they face in court and what "is happening in residential neighborhoods and workplaces when raids are executed with the cooperation of local law enforcement cooperation."[167]

The LODE model fits within—and adds another layer to—these studies. The model places those clients who have lawyers in a relatively better position vis-à-vis the government than they were in before. And it

163. *See* Susan Sterett, *Caring About Individual Cases: Immigration Lawyering in Britain*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES, *supra* note 155, at 293 (focusing her study on the situation of members of the U.K.'s South Asian community, who, despite often losing in court, nevertheless had strong lawyers advocating on their behalf and taking their claims outside of the courtroom—to Parliament and the media).

164. *See* Susan Bibler Coutin, *Cause Lawyering in the Shadow of the State: A U.S. Immigration Example*, *in* CAUSE LAWYERING AND THE STATE IN THE GLOBAL ERA, *supra* note 162, at 117, 132–36. For a comparative example, see Stephen Meili, *U.K. Refugee Lawyers: Pushing the Boundaries of Domestic Court Acceptance of International Human Rights Law*, 54 B.C. L. REV. 1123 (2013).

165. Marisol Orihuela, *Crim-Imm Lawyering*, 34 GEO. IMMIGR. L.J. 613 (2020).

166. *Id.* at 661; *see also* Kit Johnson, *A Cost-Benefit Analysis of Federal Prosecution of Immigration Crimes*, 92 DENV. U. L. REV. 863 (2015) (providing further insights into lawyering theory treating criminal and immigration lawyering as distinct areas of practice).

167. *See* Orihuela, *supra* note 165, at 662. Note that throughout the article, Orihuela deftly highlights how scholarship on community lawyering, movement lawyering, lawyering and social movements, criminal defense lawyering, and public interest lawyering all have a crucial role to play in understanding the complicated nature of crim-imm lawyering in today's political environment. Orihuela, *supra* note 165. Additionally, an important part of her research emphasizes the work of Scott Cummings and Ingrid Eagly, two scholars who work in the public interest and crimmigration spaces. *See, e.g.*, Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001); Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645 (2017); *see also* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1 (2015) (discussing the importance of lawyers in the immigration courtroom setting).

helps provide a modicum of much-needed integrity to a process that most attuned observers view with both skepticism and frustration.[168]

B. Operationalizing the LODE Approach

For years, there have been calls on Congress to move the immigration courts out of the Department of Justice.[169] This author's own work has strongly supported this position as well.[170] At the same time, the reality is that there is little likelihood that a mass overhaul of the immigration adjudication process will occur in the near future. Accordingly, the question to ask, as it relates to the issue of immigration judging, is whether the system can be improved—even partly.

The LODE model offers one such step in this direction. Recall the INA's provision, §240(b)(1), which is at the heart of the debate here:

> The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the [noncitizen] and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this chapter.[171]

As we have seen, the federal courts of appeals have uniformly held that this provision requires that the immigration judge look after the interests of noncitizens who appear pro se.[172] But where counsel is present, under the LODE approach the *lawyer* would take the lead.

How might this model play out if it were adopted? Consider several scenarios in which this proposal could improve immigration adjudication.

Scenario One: A noncitizen is represented by a competent lawyer who is—in the famous words of Marc Galanter—a "repeat player."[173] The lawyer here would be one who works in the immigration courts frequently and is both experienced and well-regarded within the legal community. In this situation, the lawyer would be extremely familiar with how best to present and defend the noncitizen's case.

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168. For a study that directly and squarely calls into question the independence of the immigration judge, see Lilibet Artola, *In Search of Uniformity: Applying the Federal Rules of Evidence in Immigration Removal Proceedings*, 64 RUTGERS L. REV. 863 (2012).

169. For a review of many of these works, see Krishnan, *supra* note 3, at 325–28.

170. *Id.*

171. 8 U.S.C. § 1229a(b)(1).

172. *See supra* notes 11–13 and accompanying text.

173. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974).

Moreover, the lawyer would have fully developed the record on behalf of the noncitizen in preparation for the hearing. Additionally, assume that the presiding immigration judge has a reputation for being hostile to noncitizen claims and for using § 240(b)(1) as a means to undermine the sought-after relief.[174] (This hostility may come from the judge being generally a hostile person or from political pressure placed upon the judge—or both.) The LODE approach would allow for the lawyer, under these circumstances, to opt out of having the judge develop the record. In other words, the lawyer would be saying something to the effect of, "I can handle this matter; we're good. No need, Judge X, for your assistance here. Thank you, though."

Scenario Two: Assume that the lawyer in this situation is the same lawyer present in the first scenario. The difference, however, is that the judge here is not hostile, but is instead fair and equitable, willing to thoughtfully consider the noncitizen's petition. Under these facts, if the lawyer seeks to opt out of having the judge serve as the main inquisitor, ideally the "fair judge" should graciously accede. And it makes sense why the judge would do so. After all, the "fair judge" should have confidence that this talented lawyer would represent the client's interests in a competent fashion and be able to rebut the government's case when needed.

The proposition that the judge would place such trust in the lawyer, and potentially even be susceptible to the ensuing advocacy, draws upon the classic work of Charles Epp in the 1990s.[175] Epp examined judicial systems within democratic societies that had litigators skilled in strategizing and promoting their clients' interests. As Epp found, the presiding judges who heard these cases often followed the lead of these advocates who came before them.[176] Under scenario two, the LODE approach envisions something similar—namely, an effective and competent lawyer advocating on behalf of the noncitizen's interests while the fair judge wears the hat of the contemplative decision-maker, open to hearing the claims the lawyer is making.[177]

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174. For a discussion of immigration judges who have a propensity to act in this type of "harsh" manner against noncitizen claims, see David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177, 1179–80 (2016).

175. *See* CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998).

176. *Id.* Indeed, Epp focuses on four such democratic societies: Britain, Canada, India, and the United States. As he shows, even in an "inhospitable environment," such as Britain, where judges historically have proven to be very conservative, such judges can be persuadable if there is a strong "support structure for legal mobilization," including a coordinated, bottom-up campaign of lawyers who work toward a common goal in a strategic fashion. *Id.* at 119–20, 138–41, 145.

177. *See supra* notes 154, 159–63 and accompanying text.

Scenario Three: In this situation, suppose the lawyer is ineffective, incompetent, or unable to represent the noncitizen in an adequate manner. Note that in a recent, large-scale empirical study, this author examined 1,615 BIA cases involving ineffective assistance of counsel.[178] The standard by which ineffective lawyering is typically evaluated by the immigration courts focuses on whether the legal advice was "'deficient' in nature" and whether the representation "resulted in prejudice to the noncitizen."[179] For analytical purposes here, the LODE model adopts this definition of ineffective lawyering.[180]

Now, suppose that the judge is fair and has a reputation for being thoughtful and impartial. Under this scenario, allowing only the lawyer to develop the record would work a disservice to the noncitizen. The LODE approach thus would embrace interpreting § 240(b)(1) to allow for the judge to intervene under certain conditions.

Specifically, this approach would look to a process used in civil procedure law as a type of analog. In particular, 28 U.S.C. § 1292(b) states,

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he [she or they] shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless

178. *See* Krishnan, *supra* note 12.

179. *Id.* (manuscript at 13) (discussing the influence of *Strickland v. Washington*, 466 U.S. 668 (1984) on *In re Lozada*, 19 I. & N. Dec. 637 (BIA 1988)); *see also* Michael S. Vastine, *Is Your Client Prejudiced? Litigating Ineffective-Assistance-of-Counsel Claims in Immigration Matters Arising in the Eleventh Circuit*, 62 U. MIA. L. REV. 1063, 1067–68 (2008) (explaining the elements of what makes counsel "effective" under the Sixth Amendment).

180. Typically, ineffective counsel manifests in immigration court in two ways: failure to produce necessary evidence and failure to pursue a legal avenue or argue a viable legal theory that might bring about relief for the client. My thanks to Sean Santen for noting these points and, regarding the latter, for highlighting how in the asylum context ineffective assistance could specifically manifest in the lawyer failing to properly categorize the noncitizen as a member of a "particular social group"—which could be the basis for relief—if there was a well-founded fear of persecution by having such membership.

> the district judge or the Court of Appeals or a judge thereof shall so order.[181]

That is, during a civil action in which a federal district court judge believes that an important, outstanding "question of law"[182] needs to be resolved because it could hasten "the ultimate termination of the litigation," the judge may request that the federal circuit court of appeals hear the matter.[183]

The LODE approach proposes something similar with respect to scenario three. In this case, where the fair immigration judge believes that judicial intervention to develop the record is necessary to correct ineffective or incompetent lawyering, the judge would ask the overseeing federal circuit court of appeals to affirm this request.[184] A requirement that an independent Article III court review and approve this matter would give "cover" and legitimacy to the immigration judge if the request were

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181. 28 U.S.C. § 1292(b).

182. *Id.*

183. *Id.* For one scholar who has contributed significantly to the literature on this statutory provision, see Bryan Lammon, *Finality, Appealability, and the Scope of Interlocutory Review*, 93 WASH. L. REV. 1809 (2018); Bryan Lammon*, Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L.J. 423 (2013); Bryan Lammon, *Cumulative Finality*, 52 GA. L. REV. 767 (2018); and Bryan Lammon, *Dizzying* Gillespie*: The Exaggerated Death of the Balancing Approach and the Inescapable Allure of Flexibility in Appellate Jurisdiction*, 51 U. RICH. L. REV. 371 (2017). *See also* Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1650 (2011) (discussing the problems inherent in the absence of "appellate jurisdiction over most interlocutory [multidistrict litigation] orders"); Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1238–39 (2007) (highlighting the lack of reform—despite mounting criticism—of the "prevailing doctrine on appellate jurisdiction").

184. Admittedly, the interlocutory aspect provision of 28 U.S.C. § 1292(b) is in place primarily to decide an issue pending in front of the district court so that there is not a need to wait until a final judgment before an appeal can be launched. Under the LODE approach, the variation is that the immigration judge would be affirmatively seeking advice, approval, and authorization to develop the record, most likely during the course of the immigration proceeding, as a result of witnessing the inadequate lawyering. The parallel between the two, however, is still present in that there is a request for the Article III appellate court to help resolve an issue at a lower court level so that that lower court proceeding can move forward in as expeditious and fair a manner as possible.

granted.[185] Additionally, having this safeguard in place would provide a check on a hostile judge who wishes to exert unwarranted authority.[186]

Scenario Four: This last situation presupposes the presence of a lawyer who is like the one in scenario three (incompetent and ineffective) and a judge who is similar to the adjudicator from scenario one (hostile and aggressive). If the LODE approach were in place, it would be unlikely that this type of lawyer would want, request, or even know about the opt-out provision. Similarly, it would not be surprising for this type of judge to heap scorn and hostility upon the poorly represented noncitizen. As such, the question is whether the LODE model would help the noncitizen here.

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185. In addition to referring to 28 U.S.C. § 1292(b) as a comparative baseline, there are other analogs that are useful to consider. For example, under United States Supreme Court Rule 19,

> 1. A United States court of appeals may certify to th[e] Court a question or proposition of law on which it seeks instruction for the proper decision of a case. The certificate shall contain a statement of the nature of the case and the facts on which the question or proposition of law arises. Only questions or propositions of law may be certified, and they shall be stated separately and with precision.

SUP. CT. R. 19; *see also* Bennett Evan Cooper, *Certification of Questions of Law to State Supreme Courts*, REUTERS (June 22, 2021), https://www.reuters.com/legal/legalindustry/certification-questions-law-state-supreme-courts-2021-06-22/ (noting two key points: first, that "many [federal] courts are turning to [the] . . . states' high courts [for] the final say [on] state law" questions that come before them; and, second, that, "[w]hile the state court's opinion is binding precedent as to state law—the same as if it had been issued in a different case—and may, under state certification rules, be res judicata as to the parties—the federal court enters judgment as a matter of its own authority under federal law. . . [and that] certification is a creature of state statutes and court rules, not federal law; federal courts simply decide whether to avail themselves of this resource"); Margaret A. Upshaw, *The Unappealing State of Certificates of Appealability*, 82 U. CHI. L. REV. 1609 (2015) (discussing, in part, how under the 1996 Antiterrorism and Effective Death Penalty Act, a district court or a federal circuit court of appeals could rule against a defendant on a habeas claim but then issue a certificate of appealability to allow for the respective higher court to weigh in on a constitutional claim that is raised). Although not perfect analogs, each of these comparators nevertheless suggests that the LODE approach's proposal that an immigration judge look to the federal circuit court of appeals for advice and approval is neither extraordinary nor unreasonable. I am grateful to Tung Yin for his advice on these points.

186. A question that may immediately be raised is why a hostile judge would simply not repeatedly request circuit approval to be able to intervene. There are two reasons. First, immigration judges are completely overwhelmed with cases. *See C.J.L.G. v. Barr*, 923 F.3d 622, 636 (9th Cir. 2019) (Paez, J., concurring). Given the limited amount of time they have currently, it is hard to imagine that, under most circumstances, these judges—even hostile ones—would needlessly spend time filing for such permission unless they truly believed it was warranted. Second, filing frivolous or what might be seen as politically motivated, vindictive petitions could eventually result in harsh rebuke from the circuit courts, costing the immigration judge important social capital and the ability to hear certain cases if the circuit courts deemed it necessary. *See supra* note 28 and accompanying text.

On the one hand, the answer is no; the noncitizen's disadvantaged position is not improved to the extent that we see it occurring in the other scenarios. At the same time, however, this approach does not put the noncitizen in a worse off position than the current status quo, which is important to note. Moreover, if the immigration courts adopted and followed the LODE model, even in scenario four we might see a broader cultural change eventually occurring.

For example, assume that the LODE approach becomes the prevailing operating framework. If the noncitizen were to lose at the immigration court but gain new counsel on appeal who would argue that the initial lawyer was inadequate and the presiding immigration judge was hostile, in that situation it would not be unreasonable to expect the federal appellate court to more closely scrutinize such a claim. After all, the appellate court would be working under a model in which it would already have enhanced responsibility. If, on appeal, this noncitizen were to allege malpractice by the lawyer *and* the immigration judge, and if the LODE approach were in place, the federal appellate court may well be conditioned to take a closer look at the claim than it otherwise might under the present system.

The LODE approach thus offers a new way to imagine how immigration hearings could occur. The approach provides more balance to what is currently a highly imbalanced process. Figure 1 visually summarizes the theoretical model proposed here.

	Fair Judge	Hostile Judge
Competent, Effective Lawyer	Lawyer Allowed to Opt Out (Benefit to Noncitizen)	Lawyer Allowed to Opt Out (Benefit to Noncitizen)
Incompetent, Ineffective Lawyer	Judges Use Discretion to Intervene Contingent upon Fed. Cir. Court Approval (Benefit to Noncitizen)	Status Quo but Possibly Greater Scrutiny by a Fed. Cir. Court (Potential Benefit to Noncitizen)

Figure 1. Lawyer Opt-Out with Discretionary Evaluation Model (LODE)

In three of the four scenarios, the LODE approach offers an immediate, tangible benefit to the noncitizen. And in the fourth scenario, the model leaves the noncitizen no worse off than the noncitizen is under the status quo.

There is an additional point to be made. Recall that the Introduction referenced that the judge would not be precluded from asking clarifying

questions when needed. Under the LODE approach, the *factual* development of the record would be in the hands of the lawyer, while the model would allow for the judge to inquire so long as the intervention was on *matters of law*. Indeed, even if the lawyer believed that the judge's queries crossed the line into substantive development of the record, the presumption, under these narrow circumstances, would be in favor of the judge—for two reasons: First, the lawyer could always object on the record and then raise this issue on appeal, arguing that the judge overstepped and violated the LODE rules by improperly seeking to factually develop the record. Second, just from a practical perspective, it would not be feasible to expect the judge to obtain appellate approval every time the judge felt it necessary to clarify a legal question.

To summarize, then, consider the following example, which provides a brief review. Lawyer, L, has a well-regarded reputation for being highly skilled, talented, and attentive to client needs. L is appearing in front of an immigration judge who is considered to be an open and just adjudicator. The LODE model would deem L to be "competent/effective" and the IJ to be "fair." For this paired set, L would be able to opt out of having the IJ develop the record on behalf of the client.

But what if the IJ genuinely believed that L was acting in a reckless and incompetent fashion and thought that the only way to safeguard the client's interests would be to affirmatively invoke INA § 240(b)(1) and thereby fully and factually develop the record? And what if L honestly believed that if the IJ were to intervene, it would amount to a hostile and

abusive exercise of judicial power? [187] What should be done in this circumstance?[188]

Remember, built into the LODE model is the safety valve of looking to the appropriate federal appellate court for approval and guidance at certain times. If L decides not to object to having the IJ involved in developing the record, nothing would be done; the IJ could intervene as much or as little as they would like. If, however, L wishes to opt out of having this judicial intervention, L could indicate this preference either before or once the proceeding began.[189] At this point, if the IJ insisted on intervening, the IJ would need to file a request with the federal appellate court stating why L was not properly addressing the client's interests. L

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187. I am grateful to Tung Yin and Jeff Stake for helping me think through this aspect of the LODE model—namely, how it needed to consider the fact that the descriptors of the lawyer and judge in Figure 1 may not necessarily be binary. Relatedly, there is the question of what the standard of review ought to be when the noncitizen appeals and claims that there was excessive interference by the immigration judge (or perhaps not enough). As the Supreme Court discussed in *Guerrero-Lasprilla v. Barr*,

> The answer to the "proper standard" question may turn on practical considerations, such as whether the question primarily "require[s] courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard" (often calling for review *de novo*), or rather 'immerse[s] courts in case-specific factual issues' (often calling for deferential review).

140 S. Ct. 1062, 1069 (2020) (citing *U.S. Bank N.A. v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018)). Note that as it relates to mixed questions of law and fact, *Guerrero-Lasprilla* did "not directly address the standards of review in judicial review of removal orders . . . ." Am. Immigr. Council, Guerrero-Lasprilla v. Barr*: Implications for Judicial Review* 4 n.4 (Mar. 31, 2020), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/guerrero-lasprilla_v_barr_implications_for_judicial_review.pdf [https://perma.cc/FG5E-DHTL]. But since "the Court interpreted application of law to established facts as encompassed in questions of law under 8 U.S.C. § 1252(a)(2)(D), [in *Guerrero-Lasprilla*,] such questions [were] subject to de novo review." *Id.*

188. Back in the late 1990s, Patricia Ewick and Susan Silbey wrote a powerful book on "legal consciousness" with a particular emphasis on "how legality is experienced and understood by ordinary people as they engage, avoid, or resist the law and legal meanings." *See* PATRICIA EWICK & SUSAN SILBEY, THE COMMONPLACE OF LAW: STORIES FROM EVERYDAY LIFE 35 (1998). Their investigation led them to describe how law can shape and influence reality, but also how it can be shaped and influenced by the reality within which it operates. Given the authors' explicit interests, lawyers and judges were not a central focus. Nevertheless, what can be exported from their study to the LODE analysis is how they describe law as being *constitutive*. *Id.* at 34–35. Thus, under Ewick and Silbey's framework, it would hardly be extraordinary to observe that the self-perceptions of the immigration judge and the lawyer regarding who best is able to develop the record might be different from how they see each other's ability to properly perform this task. In addition, the reputation of these actors also may not necessarily be binary; how they are perceived within the broader community may vary depending on who is being asked.

189. In order to avoid potentially angering the IJ, the protocol would be that the lawyer would just need to check an opt-out box on a form the DOJ would make available to the lawyer. The lawyer would not need to provide a reason because there might be a risk that the judge could take offense, which could adversely affect the noncitizen client.

would then have an opportunity to reply, and the court would decide employing a de novo standard of review. (Requiring this standard would be important because it would provide external validation, greater integrity, and legitimacy to the process.[190])

Finally, there may be some who ask whether it is too cumbersome a task to mandate that the immigration judge first go to the appellate court before being able to intervene. For those judges who are fair and committed to ensuring that there is due process for every noncitizen, this is unlikely to be the case. Admittedly, however, for immigration judges who may be fair but lack motivation, it is possible that they could be discouraged from asserting themselves because they feel that this step is too onerous. But this latter situation has to be measured against the true number of instances in which a noncitizen actually has an inept lawyer, which would trigger the judge to act. As one recent study points out, in the vast majority of cases, lawyers for noncitizens tend to be serving their clients' needs in an appropriate fashion.[191] Hence, placing the onus on the immigration judge to seek appellate approval does not seem overly burdensome on balance.

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If adopted, the LODE model would have the potential to change the institutional culture of how immigration judging is conducted and how the federal circuit courts of appeals evaluate that judging.

CONCLUSION: LAWYERS MATTER—AND THEY SHOULD

The discussion above has sought to place into context the positive role lawyers can play in the immigration adjudication process. Although immigration judges have received the imprimatur of the federal courts to intervene during a pro se immigration hearing, the question as to what their role should be when a noncitizen has a lawyer has not yet been definitively resolved. This Article has argued that because of the way the immigration court system is structured—the noncitizen faces embedded disadvantages—having the lawyer take the lead on developing the record

190. It is important to note that, for the LODE model, the default of whether the judge should be able to intervene is a de novo standard of review. However, it is true that this question may involve both a legal standard (i.e., whether the lawyer is competent or not) *and* a factual one, namely, what facts prompt the judge to seek this permission. In circumstances such as these, the actual standard of review might vary. The general presumption is that if the record is tilted more in favor of law than fact, a de novo standard of review should be followed. But where the appellate court is reviewing a record of primarily fact-based issues raised by the judge with little law, the court may be inclined to give more deference to the judge, notwithstanding any rebuttal that the lawyer may offer. For a discussion of this point, see *United States v. McConney*, 728 F.2d 1195 (9th Cir. 1984) (en banc). I am grateful to Tung Yin for his observations on this part of the model.

191. *See* Eagly & Shafer, *supra* note 167, at 2.

is of paramount importance, especially for those who hope to improve current conditions.

The specific approach promoted here—the *Lawyer Opt-Out with Discretionary Evaluation* model—is one that is purposely lawyer-centric. It builds upon prior research showing how extremely crucial having a lawyer can be for claimants appearing in front of a judge.[192] In their investigation of over a million removal cases,[193] Eagly and Shafer note that "immigrants 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."[194] What the LODE approach does is to work under the premise that, more often than not, the lawyer will indeed be acting in the best interests of the client. As a result, the model privileges the lawyer as the primary figure who should be in charge of developing the record during a proceeding.

There is, of course, a natural question many observers may raise: What authority might make this theoretical construct a reality? One clear method would be for Congress to pass legislation codifying the LODE approach. Such a statute also could delegate the regulatory particulars to the Justice Department. Still, as history has shown, passing any type of federal immigration statute has proven to be immensely difficult over the years.[195]

Consequently, a second method might be for the BIA (or the attorney general directly) to issue a precedential decision adopting the elements set forth in the LODE model. From there, assuming that this decision were reviewed on appeal, a federal appellate court would decide whether interpreting INA § 240(b)(1) through the LODE approach was acceptable. To be sure, "the federal judiciary has continued to rely on the Supreme Court's 1984 *Chevron* precedent [of showing agency deference] when examining [statutory interpretation] rulings issued by the BIA."[196] Still, it may be a stretch to expect any federal circuit court of appeals to embrace a BIA judgment that there must be Article III appellate approval before an immigration judge can intervene to develop the record.

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192. *See id.*

193. *Id.*

194. *Id.*

195. *See* Krishnan, *supra* note 3, at 325–28.

196. *See* Jayanth K. Krishnan, *The 'Impractical and Anomalous' Consequences of Territorial Inequity*, 36 GEO. IMMIGR. L.J. (forthcoming 2022). Under *Chevron*, the first step is to look at whether the statute is unambiguous; if so, that stops any further analysis. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). If there is ambiguity, however, it is the court's responsibility to determine whether the agency's interpretation was a permissible construction of the statute. *Id.* For a recent example of the Supreme Court showing *Chevron* deference in an immigration setting, see *Scialabba v. Cuellar de Osorio*, 573 U.S. 41 (2014).

That then leaves one other possibility: the Supreme Court. The Court could step in and resolve the question whether the immigration judge should be able to develop the record when a noncitizen is represented by counsel. If the Court were to enter the debate, the LODE model might serve as a useful reference point for the Justices in setting forth, say, "instructions of conduct" on this question for both immigration judges and the federal appellate courts.

Ultimately, the hope is that this Article will prompt a broader inquiry into what the role of the judge should be during an immigration hearing. As the law currently stands, the immigration judge wields enormous, almost unfettered power. That the immigration judge belongs to the same branch of government to which immigration prosecutors are a part further accentuates the already glaring disadvantages the noncitizen faces. And while the ideal would be to create an immigration adjudication system with the same character and independence as, say, Article III (or even Article I) courts, the reality is that few observers are holding their breath in anticipation of this type of reform coming soon. That is not to say, however, that meaningful change cannot still occur. Allowing for competent lawyers to take the lead in developing the record on behalf of their clients is one such step that could significantly improve the status quo.