MITCHELL | HAMLINE School of Law

Mitchell Hamline Law Review

Volume 46 | Issue 4 Article 2

2020

The Immigration Judiciary's Need for Independence: Breaking Free from the Shackles of the Attorney General

Daniel R. Buteyn

THE IMMIGRATION JUDICIARY'S NEED FOR INDEPENDENCE: BREAKING FREE FROM THE SHACKLES OF THE ATTORNEY GENERAL AND THE POWERS OF THE EXECUTIVE BRANCH

Daniel Buteyn*

I. INTRODUCTION

President Donald Trump's strict immigration policies display the need to evaluate the country's judiciary proceedings on immigration. How exactly do immigration courts function compared to civil or criminal court

procedures? In short, the immigration courts are controlled by the executive branch of the United States government.

This note functions as a call to Congress to develop legislation that would make the immigration court system into an independent Article I court. The current system is broken, and it is time for the immigration courts to become an independent Article I court to eliminate unjust decisions based on policy rather than the merits of the case. In the past, Congress has created several Article I courts using its constitutional power with examples being the tax and bankruptcy courts.[1] Additionally, the Federal Bar Association has drafted proposed legislation to create an Article I immigration court because there is a consensus that the current immigration court system is broken.[2] We have reached the tipping point.

Immigration proceedings should not be determined by the Attorney General without due process. This note begins by providing the historical background of immigration adjudication dating back to the Immigration Act of 1891, when the United States immigration court system was enacted by

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* Daniel R. Buteyn, J.D. Candidate, Mitchell Hamline School of Law, 2022; B.A. English, University of Kansas, 2015. I would like to thank my sister, Cassondre Buteyn, and my brother-in-law, David Wilson—both successful immigration attorneys and William Mitchell alumni—for being my mentors and helping me with this fantastic topic selection. I would also like to thank Professor Steve Aggergaard for his wisdom and guidance throughout the writing process. Finally, I would like to thank my family—especially my wife, Julia Buteyn—for their constant love and support throughout my time in law school.

[1] The Federal Judicial Center distinguishes between Article I and Article III judges:

> Operating under its Article I, section 8 power to "constitute" federal tribunals, Congress has created several courts staffed by judges holding these protections who exercise the "judicial power" contemplated in Article III. These courts are commonly known as "Article III" or "constitutional" courts. The latter moniker can be confusing, as the Constitution does not oblige Congress to create any particular court and such courts routinely hear non-constitutional disputes.
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> . . .
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> Since the earliest days of the republic, Congress has also created separate "Article I" or "legislative" courts. Again, the nomenclature can be confusing as Article I does not specifically authorize these courts and they do not "legislate" in any traditional sense of the word. These courts range from independent federal tribunals staffed with judges who are not subject to the tenure and salary protection of Article III . . . Unlike other Article I judges (including bankruptcy, territorial and magistrate judges), for example, they are not administered by the Administrative Office of the United States Courts or governed by the Judicial Conference of the United States.

Courts: A Brief Overview, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/history/courts/courts-brief-overview [https://perma.cc/7DTK-Y68N].

[2] *Congress Should Establish an Article I Immigration Court*, FEDERAL BAR ASSOCIATION, http://www.fedbar.org/Advocacy/Issues-Agendas/Article-1-Immigration-Court.aspx [https://perma.cc/6JXF-59NG].

Congress.[3] The relevant history is outlined up to today's laws, noting any relevant changes to immigration adjudication. The history provides details on how the executive branch, specifically the role of the attorney general gained power.

Section III discusses the differences between federal and state judges compared to immigration judges.[4] Federal and state judges do not face the same pressures from the executive branch that immigration judges face.[5] This section also compares the similarities and differences between immigration trials and criminal and civil trials.[6]

Section IV discusses separation of powers and, specifically, how the executive branch's control of the immigration courts has created an unfair shift of power and an imbalance between the branches of the government.[7] To further increase the power of the executive branch, President Trump recently attempted to strip certain immigration judges of their right to unionize (or union bust)by targeting judges that do not share his views on immigration in general and removal proceedings, in particular.[8] This section moves to the issues involved with former Attorney General Jeff Sessions' unprecedented and increased use of self-certification to direct the Board of Immigration Appeal to refer cases to the attorney general for review.[9] This section will review four specific instances in which former Attorney General Sessions exercised this power.[10]

Section V discusses how this increase of power creates separation of powers issues among the three branches of the United States government.[11] The power to determine immigration cases oversteps the executive branch's bounds by entering into unconstitutional territory.[12]

Section VI provides recommendations and a firm call to action for immigration courts to become Article I courts[13] and therefore, out of the reach of the President's influence on immigration judges to rule on cases in accordance with his policy goals.[14] The final section summarizes that it is

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[3] *Infra* Section II.A. *Evolution of the U.S. Immigration Court System: Pre-1983*, THE UNITED STATES DEPARTMENT OF JUSTICE, https://www.justice.gov/eoir/evolution-pre-1983 [https://perma.cc/F6H5-R5YV].

[4] *See infra* Section III.A.

[5] *See infra* Section III.B.

[6] *See infra* Section III.B.

[7] *See infra* Part IV.

[8] *See infra* Section IV.A.

[9] *See infra* Section IV.B.

[10] *See infra* Part IV.

[11] *See infra* Section V.A.

[12] *See infra* Section III.B.

[13] *See infra* Section VI.A.

[14] *See infra* Section VI.B.

time to put an end to the executive branch turning its back on asylum seekers.[15]

II. HISTORICAL BACKGROUND OF IMMIGRATION ADJUDICATION

A. The Immigration Act of 1891

Since President Donald Trump took office on January 20, 2017, immigration law has increasingly become more of a hot-button issue in the United States.[16] In order to evaluate the controversy surrounding immigration issues today, it is helpful to look back at the history of immigration adjudication. The United States immigration court system dates back to when Congress enacted the Immigration Act of 1891,[17] which was the first law that placed immigration under federal control.[18] Prior to the Immigration Act of 1891, individual states were responsible for enacting and enforcing their respective immigration laws.[19] Congress passed the Act in an effort to increase border security and immigration enforcement in the United States.[20] The Act states, in part:

That the office of superintendent of immigration is hereby created and established, and the President, by and with the advice and consent of the Senate, is authorized and directed to appoint such officer . . . The superintendent shall be an officer in the Treasury Department under the control and supervision of the Secretary of Treasury . . . .[21]

By creating the Office of Immigration within the Department of Treasury, Congress placed enforcement of immigration law directly under the federal government's control; however, that was just the beginning. The Act also gave sole authority and discretion to inspection officers to examine and remove aliens wanting to enter the United States.[22] This trend of

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[15] *See infra* Part VII.

[16] *Presidents, Vice Presidents, & Coinciding Sessions of Congress*, HISTORY, ART & ARCHIVES UNITED STATES HOUSE OF REPRESENTATIVES, https://history.house.gov/Institution/Presidents-Coinciding/Presidents-Coinciding/ [https://perma.cc/RAH3-5XPJ].

[17] *Evolution of the U.S. Immigration Court System: Pre-1983*, *supra* note 3.

[18] *Id.*

[19] *Immigration Act of 1891*, IMMIGRATION TO THE UNITED STATES, https://immigrationtounitedstates.org/585-immigration-act-of-1891.html [https://perma.cc/FUN2-W7YQ].

[20] *Id.*

[21] 26 STAT. 1085, 51 CONG. CH. 551 (1891).

[22] The act outlines the inspecting officer's duty upon any immigrant's arrival:

That upon the arrival by water at any place within the United States of any alien immigrants it shall be the duty of the commanding officer and the agents of the steam or sailing vessel by

broadening the discretionary powers of inspection officers continues as immigration adjudication becomes more prevalent today.[23]

B. The Immigration Act of 1893

During the 1890s, wide-spread declining wages and economic concerns had created discontent among American citizens who blamed the recent wave of immigrants for the nation's financial concerns.[24] Just two years after the Immigration Act of 1891, Congress enacted a new law to further empower inspection officers.[25] The new Act of 1893 went as far as to invoke a "duty" on each inspection officer to question and detain "every person who may not appear to him to be clearly and beyond doubt entitled to admission."[26] When an individual was detained for "special inquiry," four inspection officers designated by the Secretary of Treasury or the

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which they came to report the name, nationality, last residence, and destination of every such alien, before any of them are landed, to the proper inspection officers, who shall thereupon go or send competent assistants on board such vessel and there inspect all such aliens, or the inspection officers may order a temporary removal of such aliens for examination at a designated time and place, and then and there detain them until a thorough inspection is made.

Id. (explaining how inspection officers may order removal of individuals and "detain them until a thorough inspection is made").

[23] *The U.S. Immigration Debate*, COUNCIL ON FOREIGN RELATIONS, https://www.cfr.org/backgrounder/us-immigration-debate-0 [https://perma.cc/LK7U-WELT]. Immigrants account for nearly 14 percent of the current U.S. population, which equates to around 44 million people. *Id.*

[24] *See Chinese Exclusion Act*, HISTORY.COM, https://www.history.com/topics/immigration/chinese-exclusion-act-1882 [https://perma.cc/8Z8C-28TA]; 27 STAT. 25, 52 CONG. CH. 60 (1892) (restricting immigration into the United States in an effort to mitigate declining wages).

[25] 27 STAT. 569, 52 CONG. CH. 206 (1893).

[26] Section 5 of the Act is quoted in full:

> That it shall be the duty of every inspector of arriving alien immigrants to detain for a special inquiry, under section one of the immigration act of March third, eighteen hundred and ninety-one, every person who may not appear to him to be clearly and beyond doubt entitled to admission, and all special inquiries shall be conducted by not less than four officials acting as inspectors, to be designated in writing by the Secretary of the Treasury or the superintendent of immigration, for conducting special inquiries; and no immigrant shall be admitted upon special inquiry except after a favorable decisions made by at least three of said inspectors; and any decision to admit shall be subject to appeal by any dissenting inspector to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury, provided in section eight of said immigration act of March third, eighteen hundred and ninety-one.

Superintendent of Immigration would conduct the investigation.[27] In order for an individual to be successfully admitted to the United States after a "special inquiry," they would need the approval of at least three inspecting officers.[28] Furthermore, any favorable decision to admit an individual would automatically be subject to an appeal by any dissenting inspection officer to the Secretary of the Treasury.[29]

The Immigration Act of 1893 created additional hurdles for those immigrating to the United States. Developing a process of "special inquiry," where appearances can be the basis of whether or not to detain an individual or family, is a wholly subjective approach. Immigration officers were given the power to decide admittance, and if admittance was granted, the dissenting officer could appeal to the Superintendent of Immigration "whose action shall be subject to review by the Secretary of Treasury."[30] Ultimately, the decisions of the immigration officers, the Superintendent, and the Secretary of Treasury all culminated into a determination on the subjectivity of immigration decisions.

C. Significant Changes to Immigration Adjudication up to 1983

Congress enacted significant changes to immigration policies at the start of the twentieth century.[31] Immigration responsibilities shifted to the Department of Labor (DOL), and the Immigration Act of 1917[32] codified and expanded deportation provisions.[33] With the combination of nativist[34] tendencies and the economic concerns following the Industrial Revolution, Congress looked to further limit access to the United States.[35] Congress enacted the Immigration Act of 1921,[36] creating the National Origins Quota

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[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] 29 STAT. 874, 64 CONG. CH. 29 (1917); 42 STAT. 5, 67 CONG. CH. 8 (1921).
[32] 29 STAT. 874, 64 CONG. CH. 29 (1917).
[33] *Evolution of the U.S. Immigration Court System: Pre-1983*, *supra* note 3.
[34] Nativism is the policy of favoring native inhabitants over immigrants. *Nativism*, MERRIAM-WEBSTER.
[35] Robbie Clark, Note, *Reaffirming the Role of the Federal Courts: How the Sixties Provide Guidance for Immigration Reform*, 17 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 463, 470 (2011).
[36] The act states, in part:

> That the number of aliens of any nationality who may be admitted under the immigration laws to the United States in any fiscal year shall be limited to 3 per centum of the number of foreign-born persons of such nationality resident in the United States as determined by the United States census of 1910.

42 STAT. 5, 67 CONG. CH. 8 (1921).

System which limited the number of immigrants into the United States by assigning a quota to each nationality.[37] The quota system was designed to maintain ethnic homogeneity in the United States by limiting the number of visas awarded to natives of a particular nation—most notably controlling the number of Asian immigrants.[38] Congress, as a means of rationalizing such blatant racial discrimination, pointed to the decreased need for cheap labor sources as a way to severely limit immigration from countries outside of Northern Europe..[39] The act temporarily shifted power to the Secretary of Labor, who created a Board of Review to evaluate appeals and make recommendations to the Secretary of Labor, although the power would eventually shift back to the Attorney General.[40]

In 1940, immigration matters moved from the DOL to the Department of Justice (DOJ) where the Attorney General regained decision powers.[41] The Board of Review was renamed the Board of Immigration Appeals, and sole responsibility was conferred to the Attorney General.[42] Previously, the Board of Review was able to make recommendations regarding immigration case appeals, but the newly created Board of Immigration Appeals was authorized to decide immigration case appeals on behalf of the Attorney General.[43] Immigrants wanting to appeal their cases were once again at the mercy of the political goals of the Attorney General and executive branch.

In 1952, Congress reorganized and modified existing immigrations laws into one body of text—the Immigration and Nationality Act.[44] They also

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[37] *Evolution of the U.S. Immigration Court System: Pre-1983*, *supra* note 3.

[38] Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C.L. REV. 273, 279–81 (1996).

[39] Clark, *supra* note 35 at 470–71.

[40] *Evolution of the U.S. Immigration Court System: Pre-1983*, *supra* note 3.

[41] *Id.*

[42] Regulations Governing Departmental Organization and Authority, 5 Fed. Reg. 3,502, 3,503 (Sept. 4, 1940) (codified at 8 C.F.R. §§ 90.1–.2).

[43] The Board of Immigration Appeals has authority:

> (a) To issue orders of deportation after proceedings in accordance with law and regulations; to order the cancellation of warrants of arrest issued in such proceedings; and in connection therewith to exercise such of the discretion conferred upon the Attorney General by law as is appropriate to the disposition of deportation proceedings;
>
> (b) To consider and determine appeals from decisions of boards of special inquiry in exclusion or pre-examination cases, and to exercise such of the discretion conferred upon the Attorney General by law as is appropriate to the disposition of such appeals . . .

Id. (codified at 8 C.F.R. § 90.3).

[44] *Evolution of the U.S. Immigration Court System: Pre-1983*, *supra* note 3.

eliminated the Special Inquiry Boards and, instead, appointed special inquiry officers to decide deportation cases.[45] The statute lays out the definition and responsibilities of these officers:

The term "special inquiry officer" means any immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings, in whole or in part, required by this Act to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General, individually or by regulation, to conduct such proceedings. Such special inquiry officer shall be subject to such supervision and shall perform such duties, not inconsistent with this Act, as the Attorney General shall prescribe.[46]

Indeed, the Attorney General decides who qualifies to conduct these important proceedings. The special inquiry officers "shall perform such duties . . . as the Attorney General shall prescribe."[47] The officers perform their duties with the intention of satisfying the Attorney General's ultimate goals—political or otherwise. The Immigration and Nationality Act essentially established the first set of immigration judges that were not part of the judicial branch of the United States government. This trend continues in the latter half of the twentieth century.

By 1973, regulations authorized special inquiry officers to adopt the title of "immigration judges" and to wear judicial robes.[48] Special inquiry officers were already conducting hearings as if they were judges, but the regulation made the title of "immigration judges" official. Immigration judges and the Board of Immigration Appeals would remain this way until the DOJ created an entirely new agency in 1983.[49]

D. The Creation of a New Agency

In an effort "to improve the management, direction and control of the immigration judicial review programs," the Attorney General created the Executive Office for Immigration Review (EOIR) in 1983.[50] Still within

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[45] 66 STAT. 163, 82 CONG. CH. 477 § 242(b) (1952).

[46] *Id.* at § 101(b)(4).

[47] *Id.*

[48] "The term 'immigration judge' means special inquiry officer and may be used interchangeably with the term special inquiry officer whenever it appears in this chapter." Immigration and Naturalization Service, Department of Justice, 38 Fed. Reg. 8,590, 8,590 (April 4, 1973) (codified at 8 C.F.R. § 1.1).

[49] *Evolution of the U.S. Immigration Court System: Pre-1983*, *supra* note 3.

[50] Immigration and Naturalization Service, 48 Fed. Reg. 8,038, 8,038 (Feb. 25, 1983) (codified at 8 C.F.R. Part 1).

A report titled *The Attorney General's Judges, How the U.S. Immigration Courts Became a Deportation Tool* provides a background of the creation of

the DOJ and under supervision of the Attorney General, the EOIR sought to consolidate "similar quasi-judicial functions within a similar organization and will result in a more effective and efficient operation of the Department's immigration judicial review programs."[51]

The EOIR has only gained authority since its creation. Following the enactment of the Immigration Reform and Control Act of 1986, which largely made it illegal for employers to knowingly hire an unauthorized immigrant,[52] new immigration issues began to arise. In 1987, within the EOIR, regulations were implemented to authorize the Office of the Chief Administrative Officer to decide cases related to illegal hiring, employment sanctions, and unfair immigration-related employment practices.[53]

Most importantly—and for purposes of this note—the EOIR adjudicates removal proceedings for aliens and their families.[54] In order for an alien to be removed, it must be established "by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence."[55]

On the outset, this statute sounds just because it guarantees the alien cannot be deported without cause—the case must be based on "reasonable, substantial, and probative evidence."[56] However, the issue remains that the EOIR and immigration judges are products of the Attorney General, so "reasonable, substantial, and probative evidence" become much more subjective. Importantly, the Attorney General is appointed by the

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> the EOIR: "Its development was a reaction to widespread critiques that the pre-existing system was under-resourced, overburdened, violative of procedural rights, and embedded in an enforcement-driven context. However, despite broad agreement on the need for systemic reform, Congress did not pass legislation to improve the immigration court structure." Instead, the EOIR was created "by regulation."

The Attorney General's Judges, How the U.S. Immigration Courts Became a Deportation Tool, SPLC SOUTHERN POVERTY LAW CENTER 7 (June 2019), https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf [https://perma.cc/7C2N-YKLH] [hereinafter *The Attorney General's Judges*].

[51] Immigration and Naturalization Service, 48 Fed. Reg. 8,038, 8,039 (Feb. 25, 1983) (codified at 8 C.F.R. Part 1).

[52] Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 274A(a)(1)(A), 100 Stat. 3,359, 3,360 (1986).

[53] Organization of the Department of Justice Executive Office for Immigration Matters, 52 Fed. Reg. 44,971, 44,971 (Nov. 24, 1987) (codified at 28 C.F.R. Part 0).

[54] "At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States. The determination of the immigration judge shall be based only on the evidence produced at the hearing." 8 U.S.C. § 1229a(c)(1)(A) (2019).

[55] *Id.* at (1)(A).

[56] *Id.*

President[57] and is privy to his political and policy leanings. "Reasonable, substantial, and probative" can be interpreted in a way that disfavors aliens and their families—all to satisfy the desires of the Attorney General and the President of the United States.

Federal and state judges, on the other hand, do not have the same type of political pressure. Even though federal judges are elected, they do not face the same type of scrutiny as immigration judges, who have the Attorney General breathing down their necks. As this note explores in the next section, there are vast differences between federal and state judges and immigration judges.

III. JUDICIARY COMPARISONS

A. Federal and State Judges

The *Model Code of Judicial Conduct* regulates the conduct of federal and state judges in the United States; the Code states that "[a] judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[58] If a judge does not uphold the standard according to the *Model Code of Judicial Conduct*, they are subject to discipline handed down by the American Bar Association (ABA). If a judge violates the Model Rules and receives a complaint, it is mandated that "[a] judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies."[59]

The Model Code and the ABA regulate the rules judges must follow. Judges have a moral obligation to rule on cases in an impartial way "that promotes public confidence in the . . . judiciary."[60] Further, "[a] judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment."[61] The comment to Rule 2.4 describes this obligation in detail:

> [1] An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision

[57] 28 U.S.C. § 503 (1966).
[58] MODEL CODE OF JUDICIAL CONDUCT CANNON 1 (AM. BAR ASS'N 2013).
[59] *Id.* at r. 2.16(A) (2014).
[60] *Id.* at r. 1.2 (2014).
[61] *Id.* at r. 2.4(B) (2014).

> making is perceived to be subject to inappropriate outside influences.[62]

Judges cannot make rulings based on influences from anyone and, relevant for this note, certainly cannot decide cases with influence from "government officials."[63]

Immigration judges, on the other hand, are at the mercy of the executive branch and can be pressured to rule in a way that aligns with the political views of the President. The creation of the EOIR was intended to "increase judicial independence and remove the appearance of prosecutorial bias"; however, these goals have not been accomplished due to the Attorney General's overbearing control and overbroad discretionary powers.[64] Of course, not all immigration judges are influenced in this way. This note is not an attempt to unfairly criticize immigration judges; rather, this note aims to aid the hard-working immigration judges in the United States by persuading Congress that immigration adjudication does not belong in the executive branch due to the obvious separation of powers issue. Immigration judges are currently limited in their opportunities to rule in a way that is fair to all.

Further, immigration judges and state and federal judges are defined differently because immigration judges are not appointed powers from the U.S. Constitution.[65] When compared to the better-known procedures of state and federal courts, it is clear that immigration judges have difficulties remaining impartial.

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[62] *Id.* at r. 2.4 cmt. 1 (2014).

[63] *Id.*

[64] *The Attorney General's Judges, supra* note 50, at 7. The Innovation Law Lab & Southern Poverty Law Center report discusses the overbearing control of the Attorney General:

> From the outset, the attorney general's control over the EOIR has undermined its independence by exposing immigration judges to prosecutorial and political pressures. The Department of Justice is, after all, the nation's leading prosecutor and law enforcement agency. It is not, by its very nature, a judicial agency. By keeping the immigration adjudication function inside the Department of Justice, the attorney general kept the EOIR under his unitary control.

Id.

[65] *Id.*

> Immigration judge's . . . authority does not derive from Article III of the U.S. Constitution, which established the judicial branch. Immigration judges are not even 'administrative law judges,' whose authority derives from Article I of the Constitution and who conduct proceedings under the Administrative Procedure Act. . . [I]mmigration judges are the attorney general's attorneys who decide immigration claims of individuals the government is trying to deport.

Id.

B. Comparison of Immigration Trials and Criminal Trials

1. Immigration Trials Generally

There are different circumstances that lead people to immigration court: refugees forced to flee their countries can apply for asylum in the United States;[66] people on the verge of deportation may request "cancellation of removal" allowing them to stay in the country;[67] and others may be pursuing citizenship.

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[66] "Refugee" is defined in the statute:

> The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . .

8 U.S.C. § 1101(a)(42) (2019).

[67] The statute first provides ways in which a permanent resident may be granted a cancellation of removal:

> (a) Cancellation of removal for certain permanent residents. The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—
> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
> (3) has not been convicted of any aggravated felony.

8 U.S.C. § 1229b(a).

Section (b) goes provides instances when cancellation of removal may be granted for nonpermanent residents:

> (b) Cancellation of removal and adjustment of status for certain nonpermanent residents.
> (1) In general. The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—
> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
> (B) has been a person of good moral character during such period;
> (C) has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3) [8 USCS § 1182(a)(2), 1227(a)(2), or 1227(a)(3)], subject to paragraph (5); and
> (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1229b(b).

These types of cases will be heard by one of the approximately 400 immigration judges in one of the sixty-three immigration courts in the United States.[68] In August 2019, there were over one million pending immigration cases, which equates to 2,500 cases per judge.[69] This backlog of cases is an unrealistic amount of work for just 400 immigration judges; there are simply too many cases to be heard and not enough time to hear them. Such delays can be construed as a violation of the judicial process that immigrants are due.[70]

In her article outlining how immigration courts work, Fatma Marouf, Professor of Law at Texas A&M University, compares immigration proceedings with criminal trials; however, she makes some important distinctions.[71] Immigrants, for example, do not enjoy the same Sixth Amendment[72] constitutional protections as a criminal defendant.[73] Though immigrants are not entitled to a court-appointed attorney, they are permitted to hire or accept one via pro-bono services.[74]

Immigrants who have been convicted of a crime are subject to mandatory detention during their hearings.[75] Marouf provides that convicted

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[68] *Office of the Chief Immigration Judge*, THE UNITED STATES DEPARTMENT OF JUSTICE, https://www.justice.gov/eoir/office-of-the-chief-immigration-judge [https://perma.cc/SMH6-2KQR].

[69] Judge Ashley Tabaddor, president of the National Association of Immigration Judges states: "If nothing else, the continuing rise of the backlog shows that the immigration court is broken . . . . Until we fix the design defect of having a court in a law enforcement agency, we will not be able to address the backlog in a fair and effective manner." Priscilla Alvarez, *Immigration court backlog exceeds 1 million cases, data group says*, CNN, https://www.cnn.com/2019/09/18/politics/immigration-court-backlog/index.html [https://perma.cc/933K-8QEH].

[70] U.S. CONST. amend. XIV, § 1. Courts have consistently held that immigrants are protected by the Constitution's right to due process.

[71] Fatma Marouf, *How immigration court works*, THE CONVERSATION, https://theconversation.com/how-immigration-court-works-98678 [https://perma.cc/RH8R-3RFN].

[72] The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST. amend. XI.

[73] Marouf, *supra* note 71.

[74] Marouf, *supra* note 71.

[75] The statute lists the circumstances when an alien faces mandatory detention:

immigrants "are often brought into the courtroom wearing a jumpsuit and shackles" even if they only committed a low-level offense.[76] Furthermore, an overwhelming majority of them have no choice but to appear without a lawyer.[77]

2. Trial Comparisons

Immigration trials lack additional constitutional defenses required in criminal trials beyond just the Sixth Amendment. To reiterate, immigration judges are part of the DOJ, which is overseen by the Attorney General. Additionally, it is relevant to discuss immigration trial prosecutors. These prosecutors are attorneys hired by the U.S. Immigration and Customs Enforcement—an agency of the Department of Homeland Security (DHS)—to represent the United States government.[78] The political goals of the DOJ and DHS are certainly of the same flavor because both departments are run by the executive branch.[79] Both departments are part of what the White House refers to as "the Cabinet"—"an advisory body made up of the heads of the 15 executive departments. Appointed by the President and confirmed by the Senate, the members of the Cabinet are often the President's closest confidants."[80]

The political views of immigration judges and prosecutors of immigration cases are of the same vein, which will undoubtedly yield unjust results for immigrants being tried. In a federal trial, judges are part of an independent judiciary, which is an entirely separate branch of the United

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> The Attorney General shall take into custody any alien who—
> (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
> (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence to a term of imprisonment of at least 1 year, or
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,
> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

8 U.S.C. § 1226(c)(1) (2019).

[76] Marouf, *supra* note 71.

[77] Marouf, *supra* note 71.

[78] Marouf, *supra* note 71.

[79] *The Executive Branch*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/the-executive-branch/ [https://perma.cc/3ZCT-Y6HT].

[80] *Id.*

States government.[81] There is a deliberate separation of powers between the three branches of government that is the backbone of the United States Constitution and was implemented as so to avoid tyranny and too much power for one particular branch.[82] In the Federalist Papers No. 51, James Madison writes that "the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights."[83] The separation of powers issue will be discussed further in Section V.

In a criminal trial, the judiciary is responsible for ruling in a just way on the merits of the case. Federal judges are not coerced into ruling one way or the other and do not face pressures from their superiors to rule in a way that satisfies a political agenda. State judges are elected and some of their decisions may influence their chances at being reelected; however, this does not carry the same pressure coming from a superior. Simply put, federal judges are impartial. In comparison, immigration judges are at the mercy of the Attorney General to get through as many cases as possible to decongest the already overwhelmed immigration courts.[84] The emphasis is on efficiency over justice and ruling on the merits of the case.[85] The situation often involves an unrepresented alien who has been convicted of a crime appearing in front of an immigration judge who faces pressure from the Attorney General to expedite cases.[86]

This note proposes that the National Association of Immigration Judges (NAIJ) seek independence with the creation of an independent court system specifically for immigration cases. Though, of course, this is easier said than done. The content of this note explains *why* the immigration judiciary would be better off as an independent court. One major reason for this call to action is the overbearing, unchecked powers of the executive branch.

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[81] Marouf, *supra* note 71.

[82] In the Federalist No. 47, James Madison writes about the particular structure of the new government and the distribution of power among its different branches: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47 (James Madison).

[83] THE FEDERALIST NO. 51 (James Madison).

[84] Marouf, *supra* note 71.

[85] Greg Chen, *DOJ puts its integrity in doubt by interfering with immigration courts*, THE HILL, (Feb. 27, 2020), https://thehill.com/opinion/immigration/484966-doj-puts-its-integrity-in-doubt-by-interfering-with-immigration-courts [https://perma.cc/2K4M-7K3G].

[86] Joel Rose, *Sessions Pushes To Speed Up Immigration Courts, Deportations,* NATIONAL PUBLIC RADIO, (Mar. 29, 2018), https://www.npr.org/2018/03/29/597863489/sessions-want-to-overrule-judges-who-put-deportation-cases-on-hold [https://perma.cc/8T35-ZJUH].

IV. THE EXECUTIVE BRANCH'S INCREASE OF POWER

A. The Trump Administration's Attempt at Union Busting

President Donald Trump's attempt to further increase the power of the executive branch comes at the cost of federal immigration judges. On Friday, August 9, 2019, the DOJ filed a petition with the Federal Labor Relations Authority to strip the rights of immigration judges to be represented by a union.[87] The DOJ justifies this by asserting that immigration judges are "management officials who formulate and advance policy."[88] Under the Federal Service Labor-Management Relations statute, a "management official" cannot be part of a union and is defined as "an individual employed by an agency in a position [that] require[s] or authorize[s] the individual to formulate, determine, or influence the policies of the agency . . . ."[89] Judge Ashley Tabaddor, President of the (NAIJ), responded to the petition:

This is nothing more than a desperate attempt by the DOJ to evade transparency and accountability, and undermine the decisional independence of the nation's 440 Immigration Judges. We are trial court judges who make decisions on the basis of case specific facts and the nation's immigration laws. We do not set policies, and we don't manage staff.[90]

As individual employees of the DOJ, immigration judges cannot speak out publicly and are prohibited from lobbying Congress or the DOJ.[91] The NAIJ is the recognized representative for collective bargaining for all United States immigration judges and therefore, is the only avenue by which immigration judges can speak independently to voice their interests.[92] If this

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[87] Doc. No. 19081303, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, (Aug. 13, 2019), https://www.aila.org/File/Related/19081303a.pdf [https://perma.cc/4S6C-M585]. *See also* Daniel M. Kowalski, *DOJ Attack on Immigration Judges 'Union Busting Plain and Simple,'* LEXISNEXIS LEGAL NEWSROOM, (Aug. 14, 2019), https://www.lexisnexis.com/legalnewsroom/immigration/b/outsidenews/posts/doj-attack-on-immigration-judges-union-busting-plain-and-simple [https://perma.cc/6J3C-3SR2].

[88] *Id.*

[89] 5 U.S.C. § 7103(a)(11) (2019).

[90] Richard Gonzales, *Trump Administration Seeks Decertification Of Immigration Judges' Union*, NATIONAL PUBLIC RADIO, (Aug. 12, 2019), https://www.npr.org/2019/08/12/750656176/trump-administration-seeks-decertification-of-immigration-judges-union [https://perma.cc/B38S-DC8N]. *See also* Adam Shaw, *Trump administration seeks to break up immigration judges' union*, FOX NEWS, (Aug. 9, 2019), https://www.foxnews.com/politics/trump-administration-looks-to-break-up-immigration-judges-union [https://perma.cc/2HKF-W6RJ].

[91] *About the NAIJ* , NATIONAL ASSOCIATION OF IMMIGRATION JUDGES, https://www.naij-usa.org/about [https://perma.cc/3W5K-MJ63].

[92] *Id.*

attempt by the DOJ to union bust was successful, immigration judges would have no practical way to advocate for their interests.[93] The DOJ is looking for any way to strip immigration judges' power to unionize, and, by being labeled "management officials," immigration judges would not be authorized to form a union.[94] The DOJ contends that the role of immigration judges is increasing because they are now determining immigration policies,[95] which would satisfy the "management official" requirements of the statute.[96]

The NAIJ was created to represent immigration judges in 1971.[97] In 2000, the NAIJ affiliated with International Federation of Professional and Technical Engineers (IFPTE), a larger union representing NASA rocket scientists, engineers employed by the U.S. Navy and the Army Corp of Engineers, and administrative law judges who hear cases involving Social Security claims.[98] President of IFPTE, Paul Shearon, also responded to the DOJ's petition on behalf of immigration judges:

This is nothing more than union busting plain and simple, and part of a disturbing pattern. The White House has signed a series of executive orders that limit the ability of federal unions to raise questions about abuses and inefficiencies, and they have tried to hinder a union's ability to fully represent federal workers who are often stuck in a bureaucratic maze. This administration doesn't want to be held accountable, and they especially don't want anyone looking over their shoulder on immigration issues.[99]

Tabaddor and Shearson are explicitly calling out the executive branch for abusing its power by trying to "hinder" the NAIJ's ability to fairly represent immigration judges.[100] To this point, the NAIJ has long advocated for immigration judges to be removed from the DOJ and placed in an independent agency much like the bankruptcy and tax courts.[101]

The petition was submitted to the Federal Labor Relations Authority, and both sides will have a chance to argue their case. If the

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[93] *Id.*

[94] 5 U.S.C. § 7103(a)(11) (2019).

[95] U.S. DOJ, Petition to F.L.R.A. on Executive Office for Immigration Review (EOIR), AMERICAN IMMIGRATION LAWYERS ASSOCIATION, (Aug. 9, 2019) https://www.aila.org/File/Related/19081303a.pdF [https://perma.cc/W76D-GFBF]. *See also* Shaw, *supra* note 90.

[96] A "management official" is ". . . an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency." 5 U.S.C. § 7103(a)(11) (2019).

[97] Shaw, *supra* note 90.

[98] Kowalski, *supra* note 86.

[99] Kowalski, *supra* note 86.

[100] Kowalski, *supra* note 86.

[101] Kowalski, *supra* note 86.

decertification is successful, the executive branch will gain more power by supervising immigration judges' work schedules, where judges are sent, and quotas for the amount of cases each judge should complete.[102] Without a union, the NAIJ would essentially be stripped of its voice and the ability to publicly disagree with the implementation of unfair policies. An example of one of these unfair policies comes at the hands of former Attorney General Jeff Sessions.

B. Former Attorney General Jeff Sessions' Review Process

President Trump's views on immigration are of no secret to anyone due to his drastic, wide-reaching policy changes. In tandem with former Attorney General Jeff Sessions, President Trump sought rapid deportations in the adjudication process. Regulations issued by the DOJ give power to the Attorney General to review Board cases that are referred to himself, the Board, or the Secretary of Homeland Security.[103] This review mechanism has been widely criticized for good reasons. First, the Attorney General power is able to review cases in which he lacks subject matter expertise compared to members of the Board.[104] Second, he is able to review cases without meaningful participation by the parties and without notice to the parties.[105] These criticisms invoke unfairness to the parties involved, which seems from the outset to be a power that should be outside the authority of the Attorney General. The administration's effort to expedite immigration cases is a step in the right direction; however, it is going about it in an unjust way.

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[102] Shaw, *supra* note 90.

[103] The statute reads, in part:

> (1) The Board shall refer to the Attorney General for review of its decision all cases that:
> (i) The Attorney General directs the Board to refer to him.
> (ii) The Chairman or a majority of the Board believes should be referred to the Attorney General for review.
> (iii) The Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the concurrence of the Attorney General, refers to the Attorney General for review.
> (2) In any case the Attorney General decides, the Attorney General's decision shall be stated in writing and shall be transmitted to the Board or Secretary, as appropriate, for transmittal and service as provided in paragraph (f) of this section.

8 C.F.R. § 1003.1(h) (2019).

[104] Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 741 (2019).

[105] *Id.* at 742.

The most relevant criticism for purposes of this note is the Attorney General's decisions based on a political basis rather than on the actual merits of the case.[106] Indeed, former Attorney General Sessions took full advantage of this review process. In his law review article, former Attorney General Alberto Gonzales writes that "Attorney General referral and review is a potent tool through which the executive branch can lawfully advance its immigration policy agenda."[107] Former Attorney General Gonzales knows first-hand that the power to review immigration cases can be an avenue to advance particular political agendas. The attorneys general under both Clinton and Obama used this review process a total of seven times over eight years; comparatively, Sessions used it four times during his short, twenty-one month tenure.[108] Former attorneys general most often used the review mechanism in situations when cases were referred to by the Board.[109] Sessions, instead, used his own certification process by choosing cases he wanted to review and instructing the Board to refer specific cases to him.[110]

Specifically, Sessions' use of the review process stripped the procedural rights of parties in immigration proceedings, which some have viewed as an attempt to advance policies aligned with President Trump.[111] The four instances when Sessions used his review power (discussed below) illustrate this issue.

1. Matter of E-F-H-L-[112]

In *Matter of E-F-H-L-*, the respondent applied for asylum and withholding of removal.[113] The immigration judge denied the application because it did not demonstrate prima facie eligibility for relief and, therefore, determined respondent was not entitled to an evidentiary hearing.[114] The respondent appealed on the merits to the Board of Immigration Appeals.[115] The Board remanded and held that a respondent applying for asylum and withholding of removal was "ordinarily entitled to

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[106] *Id.*
[107] *See* Hon. Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841, 920 (2016).
[108] Marouf, *supra* note 104, at 744.
[109] Marouf, *supra* note 104, at 744.
[110] Marouf, *supra* note 104, at 742, 744.
[111] Marouf, *supra* note 104, at 744.
[112] Matter of E-F-H-L-, 27 I. & N. Dec. 226 (A.G. 2018).
[113] *Id.*
[114] Matter of E-F-H-L-, 26 I. & N. Dec. 319 (B.I.A. 2014).
[115] *E-F-H-L-*, 27 I. & N. Dec. at 226.

a full evidentiary hearing."[116] At this point, respondent withdrew his application for asylum because he became eligible to legalize his status through family-based application, "which provides a much more straightforward path to permanent residence."[117] In her law review article on the executive branch's role in immigration adjudication, Professor Fatma E. Marouf explains the reasoning for this decision:

Since the USCIS [U.S. Citizenship and Immigration Services], not the immigration court, has jurisdiction over family-based petitions, the parties filed a joint motion to administratively close the removal proceedings, which would allow the judge to take the case temporarily off the court's docket to give USCIS time to make a decision. The IJ naturally granted that joint motion.[118]

The Immigration Review Board of Immigration Appeals held that respondent is entitled to a full evidentiary hearing based on precedent[119] and federal regulations.[120] The regulation states that "[a]pplications for asylum and withholding of removal so filed will be decided by the immigration judge . . . after an evidentiary hearing to resolve factual issues in dispute."[121]

Sessions then stepped in and used his review process powers to strip procedural rights of parties in removal proceedings. He vacated the Board's decision and directed the matter to be calendared and restored to the active docket of the Immigration Court.[122] In his one-page opinion, Sessions reasoned that:

> [b]ecause the application for relief which served as the predicate for the evidentiary hearing required by the Board has been withdrawn with prejudice, the Board's decision is effectively mooted. I accordingly vacate the decision of the Board in this

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[116] *Id.*

[117] Marouf, *supra* note 104, at 745.

[118] Marouf, *supra* note 104, at 745.

[119] *See* Matter of Fefe, 20 I. & N. Dec. 116, 117–18 (A.G. 1989).

[120] Federal regulations state:

> Applications for asylum and withholding of removal so filed will be decided by the immigration judge pursuant to the requirements and standards established in 8 CFR part 1208 of this chapter after an evidentiary hearing to resolve factual issues in dispute. An evidentiary hearing extending beyond issues related to the basis for a mandatory denial of the application pursuant to § 1208.14 or § 1208.16 of this chapter is not necessary once the immigration judge has determined that such a denial is required.

8 C.F.R. § 1240.11(c)(3) (2019).

[121] *Id.*

[122] Matter of E-F-H-L-, 27 I. & N. Dec. 226 (A.G. 2018).

> matter, and I also direct that this matter be recalendared and restored to the active docket of the Immigration Court.[123]

Sessions mooted the Board's decision, going against years of precedent and regulated procedural rights for parties in immigration cases.[124] Moreover, Sessions' remand came with no citing of the federal regulations allowing an evidentiary hearing.[125] Marouf contends that this decision was the first step to narrow the procedural rights of noncitizens and to speed up the removal proceedings.[126] Why else would Sessions direct the Board to refer this particular case to himself, and then rule in a way that goes against established law? Sessions was, however, well within his authority as Attorney General to intervene and remand any case he wished—and therein lies the issue. It is obvious that *Matter of E-F-H-L-* was not ruled on the merits of the case; rather, the decision was made by Sessions with political implications in mind. In an effort to expedite removal proceedings, Sessions stepped in and ensured that this particular noncitizen would not be granted asylum nor withholding of removal. Due to the insurmountable number of immigration cases in the docket, Sessions used his review power to decrease that number.

2. Matter of Castro-Tum[127]

Sessions used his review process for the second time in his decision of *Matter of Castro-Tum* holding that immigration judges and the Board are not authorized to administratively close cases.[128] Administrative closure is when a case is put on hold and removal proceedings are delayed to allow the United States Citizenship and Immigration Services (USCIS) to work on visa and green card applications of respondents.[129] This gives respondents (and the USCIS) adequate time to complete the complicated administrative requirements necessary to obtain a visa or green card.[130] Additionally, administrative closure gives respondents a fair opportunity to stay in the

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[123] *Id.*
[124] Marouf, *supra* note 104, at 745.
[125] *See E-F-H-L-*, 27 I. & N. Dec. at 226.
[126] Marouf, *supra* note 104, at 746.
[127] Matter of Castro-Tum, 27 I. & N. Dec. 271 (A.G. 2018).
[128] *Id.* at 271.
[129] Louisa Edzie, *Matter of Castro-Tum: The Future of Administrative Closures and Due Process*, IMMIGR. & HUM. RTS. L. REV. (Feb. 25, 2019), https://lawblogs.uc.edu/ihrlr/2019/02/25/matter-of-castro-tum-the-future-of-administrative-closures-and-due-process/ [https://perma.cc/36VC-ULVD].
[130] *Id.*

United States without being removed on a technicality regarding their paperwork.[131]

The court in *Matter of Bavakan Avetisyan* provides a succinct explanation:

> Administrative closure, which is available to an Immigration Judge and the Board, is used to temporarily remove a case from an Immigration Judge's active calendar or from the Board's docket. In general, administrative closure may be appropriate to await an action or event that is relevant to immigration proceedings but is outside the control of the parties or the court and may not occur for a significant or undetermined period of time.[132]

Administrative closure is a fair way of letting things play out that are out of the hands of the parties involved. Not only does administrative closure help the respondents, but it also helps the immigration judges because, for the time being, that particular case is removed from their docket and they can tackle the next on the list.

Sessions, however, appointed himself to the case of *Matter of Castro-Tum*[133] and reversed years of precedent allowing immigration judges to administratively close cases.[134] He ruled that "immigration judges and the Board may only administratively close a case where a previous regulation or a previous judicially approved settlement expressly authorizes such an action."[135] In his opinion, Sessions argues that administrative closure undermines the ability to "swiftly adjudicate immigration cases" and that respondents who fail to appear should be issued deportation orders.[136]

Once again, Sessions used his review powers to strip the rights of aliens in immigration cases and, in this particular case, the due process rights for respondents. In this case specifically, due process rights for respondents.[137] Sessions argues:

> Immigration judges exercise only the authority provided by statute or delegated by the Attorney General. Congress has never

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[131] *Id.*

[132] Matter of Bavakan Avetisyan, 25 I. & N. Dec. 688, 692 (B.I.A. 2012) (internal citations omitted).

[133] *Castro-Tum*, 27 I. & N. Dec. at 281.

[134] Marouf, *supra* note 104, at 746.

[135] *Castro-Tum*, 27 I. & N. Dec. at 271.

[136] *Id.* at 290.

[137] *See The Attorney General's Judges*, *supra* note 50, at 17. The report discusses how the Attorney General's office "has abused its controversial certification power in ways that further jeopardize asylum seekers' access to a fair hearing." *The Attorney General's Judges*, *supra* note 50, at 24.

> authorized administrative closures in a statute, and Department of Justice regulations only permit administrative closure in specific categories of cases. The Attorney General has never delegated the general authority, and I decline to do so now. Cases that have been administratively closed absent a specific authorizing regulatory provision or judicially approved settlement shall be recalendared upon motion of either party. I overrule all Board precedents inconsistent with this opinion and remand for further proceedings.[138]

Despite these comments, immigration judges do hold certain independent responsibilities when it comes to determining cases. Federal regulations state "immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities . . . that is appropriate and necessary for the disposition of such cases."[139] Immigration judges were using their "independent judgement" when administratively closing cases in order appropriately adjudicate immigration proceedings. Sessions did not like these cases being put on hold to be determined later—his goal was to adjudicate and deport as fast as possible to clear the decks for quicker decisions.[140] Unfortunately, this way of stripping due process rights from noncitizens is well within the Attorney General's power.

3. Matter of L-A-B-R-[141]

Matter of L-A-B-R- is the third case when Sessions used the review process to overturn a case in which he was unhappy with how the Board ruled. This case involved evaluating when a continuance is appropriately granted. Continuances involve due process and give noncitizens the ability to find a representative, obtain evidence, present testimony, and receive a decision from the USCIS for a pending visa application that would create a path to legal status.[142] Federal regulations permit an immigration judge to

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[138] *Castro-Tum*, 27 I. & N. Dec. at 274.

[139] 8 C.F.R. § 1003.10(b) (2019).

[140] In his opinion, Sessions argued that there was:

> . . . no basis for inferring that immigration judges or the Board possess a general power to order administrative closure based on some inherent adjudicatory authority. The fact that federal district courts employ administrative closure as a docket-management tool to temporarily defer adjudication on the merits during the pendency of other proceedings does not justify the practice here.

Castro-Tum, 27 I. & N. Dec. at 291.

[141] Matter of L-A-B-R-, 27 I. & N. Dec. 405 (A.G. 2018).

[142] Marouf, *supra* note 104, at 747.

"grant a motion for continuance for good cause shown."[143] Sessions intervened and eventually ordered all future cases involving continuances be referred to him for review.[144] Sessions questioned the standard for "good cause" in continuance cases and eventually narrowed the definition to reduce the possibility for continuance motions to be granted.[145]

Sessions agrees that immigration judges "should continue to apply a multifactor test to assess whether good cause exists for a continuance for a collateral proceeding, but that the decision should turn primarily on the likelihood that the collateral relief will be granted and will materially affect the outcome of the removal proceedings."[146] This multifactor test had been the standard for deciding good cause, but Sessions makes an important distinction in *Matter of L-A-B-R-*.

Sessions explicitly provides when a continuance may not be granted: "Good cause also may not exist when the alien has not demonstrated reasonable diligence in pursuing the collateral adjudication, DHS justifiably opposes the motion, or the requested continuance is unreasonably long, among other possibilities."[147] Sessions further constricts granting continuance by holding that "good cause does not exist if the alien's visa priority date is too remote to raise the prospect of adjustment of status above the speculative level."[148] In her article, Marouf points out that this restriction vastly affects the number of noncitizens that would be granted a continuance.[149] She specifically mentions those waiting for family-based visas to become available, including spouses of permanent residents and unaccompanied minors waiting for the USCIS to make particular decisions.[150] In some of these situations, all a noncitizen would need is time in order to be legally authorized to stay in the country. This is the main point of a continuance—to provide noncitizens due process and a ruling on the merits of the case.

Sessions, however, was more interested in administrative efficiency. He instructed immigration judges to consider administrative efficiency when deciding whether to grant a continuance because "at bottom, continuances

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[143] 8 C.F.R. § 1003.29 (2019).

[144] "I direct the Board of Immigration Appeals to refer these cases to me for review of its decisions. The Board's decisions in these matters are automatically stayed pending my review." Matter of L-A-B-R-, 27 I. & N. Dec. 245, 245 (A.G. 2018).

[145] *L-A-B-R-*, 27 I. & N. Dec. at 419.

[146] *Id.* at 412.

[147] *Id.*

[148] *Id.* at 418.

[149] Marouf, *supra* note 104, at 749.

[150] Marouf, *supra* note 104, at 749.

are themselves intended to promote efficient case management."[151] However, promoting efficiency over due process puts noncitizens in a much more difficult position to receive a fair trial. By not providing parties with the time that they need to find a representative, obtain evidence, or present testimony, they are not being afforded their due process rights for a fair trial. Once again, Sessions used his review process to expedite immigration cases in order to decrease the amount of immigration adjudication and increase the number of deportations.[152]

4. Matter of A-B-[153]

Matter of A-B- is the final case in which Sessions instructed the Board to refer a case to himself. The case discusses when the dismissal of asylum claims are appropriate and has increased the amount of asylum claims dismissed without an evidentiary hearing.[154] Statutory provisions list five protected groups for asylum: race, religion, nationality, membership of a particular social group, or political opinion.[155] The category in question in *Matter of A-B-* is membership of a particular group which, according to Marouf, is the most difficult to define.[156]

In this case, the respondent claimed she was eligible for asylum because she was persecuted for being a member of a particular social group of "'El Salvadoran women who are unable to leave their domestic relationships where they have children in common' with their partners."[157] Respondent shares three children with her ex-husband, and she claims that he repeatedly abused her during and after their marriage.[158] Upon appeal,

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[151] *L-A-B-R-*, 27 I. & N. Dec. at 416.

[152] Marouf, *supra* note 104, at 752.

[153] Matter of A-B-, 27 I. & N. Dec. 316 (A.G. 2018).

[154] Marouf, *supra* note 104, at 752.

[155] The statute reads, in part:

> (A) Safe third country. Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

8 U.S.C.S. § 1158(a)(2)(A) (2019).

[156] Marouf, *supra* note 104, at 752.

[157] *A-B-*, 27 I. & N. Dec. at 321.

[158] *Id.*

the Board found that respondent's particular social group was sufficient to grant asylum,[159] and this is when Sessions assigned the case to himself.

In his opinion, Sessions stated that "claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum."[160] He goes on to say that "[t]he mere fact that a country may have problems effectively policing certain crimes—such as domestic violence or gang violence—or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim."[161]

After Sessions's decision in *A-B-*, the USCIS sent out new instructions for asylum officers advising them on the impact of the *A-B-* decision on asylum interviews.[162] This was an effort to dismiss asylum cases even earlier before trial and, therefore, further expedite removal proceedings.[163] However, these instructions and the determination that victims of domestic violence or gang violence will not necessarily qualify for asylum were found to be unlawful by the United States District Court for the District of Columbia in *Grace v. Whitaker*.[164] A group of plaintiffs brought action against the Attorney General after their interview for asylum was denied. The opinion states that "[a]lthough the asylum officers found that plaintiffs' accounts were sincere, the officers denied their claims after applying the standards set forth in a recent precedential immigration decision issued by then-Attorney General, Jefferson B. Sessions."[165] The court ruled for the plaintiffs, determining that the general rule constructed by *A-B-* is "arbitrary and capricious because there is no legal basis for an effective categorical ban on domestic violence and gang-related claims."[166]

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[159] *Id.*

[160] *Id.* at 320.

[161] *Id.*

[162] Marouf, *supra* note 104, at 754.

[163] Marouf, *supra* note 104, at 755.

[164] 344 F. Supp. 3d 96, 127 (2018). In addition to overturning well-settled case law, *A-B-* disrupted a long-term consensus between the government and immigration advocates that domestic violence, in certain circumstances, is an appropriate basis for granting asylum. The SPLC Southern Poverty Law Center report also discusses this qualification for asylum:

There has never been a categorical bar against such claims, nor a blanket rule that all claims involving domestic violence are valid. Rather, each case has traditionally been assessed on its merits, measured against the same general standards applicable to all claims. Reaching beyond the facts of the case before him, Sessions held that few claims pertaining to domestic or gang violence perpetrated by nongovernmental actors would qualify for asylum—an attempt to set forth a new policy that would make the vast majority of claims related to domestic violence or gang violence fail "in practice."

The Attorney General's Judges, *supra* note 50, at 18.

[165] *Whitaker*, 344 F. Supp. 3d at 105.

[166] *Id.* at 126.

The court references the amendment to immigration laws giving aliens with a credible fear of persecution by his or her country of origin the opportunity for asylum.[167] The entire point was to provide aliens asylum, so they would not be subjected to further persecution.[168] The court further explains Sessions' errors:

> The general rule is also arbitrary and capricious because it impermissibly heightens the standard at the credible fear stage. The Attorney General's direction to deny most domestic violence or gang violence claims at the credible fear determination stage is fundamentally inconsistent with the threshold screening standard that Congress established: an alien's removal may not be expedited if there is a "significant possibility" that the alien could establish eligibility for asylum.[169]

In *A-B-*, Sessions went against the intent of Congress in determining asylum eligibility for aliens in fear of prosecution. The United States District Court for the District of Columbia ruled against Sessions in an effort to combat the executive branch's goal of decreasing the number of aliens it lets into the United States.

In all four cases Sessions instructed the Board to refer to himself.[170] Sessions used his power as the Attorney General to review immigration cases that did not need reviewing. This type of interference with previously adjudicated cases would be less likely to happen if immigration courts were Article I courts because biases of the President could no longer be a factor. In *Matter of A-B-*, the plaintiffs were forced to bring legal action to manifest their rights as aliens deserving asylum (or at least a fair trial to determine whether they were).

V. SEPARATION OF POWERS—IS THE ATTORNEY GENERAL OVERSTEPPING BOUNDARIES?

A. Separation of Powers Background

Since the enactment of the constitution, the United States government has been based on the separation of powers doctrine. In the Federalist Papers 51, James Madison explains why the constitution was written in a way that disperses power among three government branches: executive,

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[167] *Id.* at 104.

[168] *Id.*

[169] *Id.* at 126–27.

[170] *See The Attorney General's Judges*, *supra* note 50, at 4, 25–26; Marouf, *supra* note 103, at 746–47, 751, 755.

legislative, and judicial.[171] Due to the overbearing tyranny of the Crown, the new United States drafted its constitution to avoid one particular authority reigning tyranny on its citizens. Madison explains that a "partition of power" is necessary to avoid "oppression of its rulers."[172] This has been one of the cornerstones of democracy since the birth of the country; however, the current constitution is not a first draft. Before the constitution as it is written today, the Articles of Confederation existed.[173]

The Articles of Confederation was a first effort in outlining the fundamental principles for the United States, and there was room for improvement. For example, the Articles gave the states collective power over the federal government, and Congress was the only existing branch of government at that time.[174] Given there was only one branch of government, there certainly was not separation of powers. Congress's powers were limited; it had the ability to go to war, but there was no money to do so because it was unable to tax the states.[175] The states' "league of friendship" in accordance with the limited powers of Congress proved to be fundamental principles that a country could not be built upon.[176]

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[171] James Madison describes how the separated powers government can thrive:

> In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another.

THE FEDERALIST NO. 51 (James Madison).

[172] *Id.*

[173] ARTICLES OF CONFEDERATION of 1781.

[174] The relevant articles are quoted below:

> Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.

Id. at art. II.

> The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

Id. at art. III.

[175] *Id.* art. VIII, para. 2.

[176] *See* Gregory E. Maggs, *A Concise Guide to the Articles of Confederation as a Source for Determining the Original Meaning of the Constitution*, 85 GEO. WASH. L. REV. 397, 401–

As a result, the United States Constitution was written and divided the country's power between the legislative, executive, and judicial branches. Article I details the powers of the legislative branch, Article II the executive branch, and Article III the judicial branch. The branches are framed in a way so they are accountable to each other, and each branch depends on the people—the true source of authority.[177] Madison argues that the challenge in running a government is enabling the government to control the governed and then enabling it to control itself.[178] The government is able to control itself through the separation of powers because not one government entity will wield enough power to overstep its bounds. Madison writes that in the federal republic of the United States ". . . all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority."[179] This type of government functions when the separation of powers aims to protect the justice of its citizens, because "[i]n a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger."[180]

The constitution was written to give power to the people by limiting the power of the government. To keep a particular branch of the government going beyond its power enumerated by the constitution, the other branches may provide accountability or a system of checks and

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03 (2017) ("Although the Articles of Confederation did not remain in effect for a long period, experience under the Articles paved the way for creating the far more enduring Constitution . . . . [T]he influence of the Articles of Confederation remains discernable to this day.").

[177] Madison writes:

> The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.
>
> A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

THE FEDERALIST NO. 51 (James Madison).

[178] *Id.*

[179] *Id.*

[180] *Id.*

balances.[181] For example, the president has the ability to veto laws made by Congress in order to keep the legislative branch in check.[182] However, Congress can override the president's veto with a two-thirds vote from the House of Representatives, which balances out the president's power.[183] This type of accountability is particularly difficult, however, when the branch is statutorily authorized to act in a way that should be addressed by a different branch.

As discussed above, under the Code of Federal Regulation, the Attorney General of the United States appoints immigration judges "to conduct specified classes of proceedings . . . [and] act as the Attorney General's delegates in the cases that come before them."[184] "[I]mmigration judges shall exercise the powers and duties delegated to them by the Act and by the Attorney General through regulation."[185] As the regulations state, immigration judges are subject to the authority of the Attorney General when deciding cases. These regulations give the executive branch an advantage regarding power and, as a result, strip necessary powers from what should be the judicial or legislative branch. The cases cited in Section IV provide instances when the executive branch overstepped its bounds and, ultimately, stripped justice from the parties involved.[186] This section analyzes how and why this power wielded by the executive branch is unconstitutional.

B. Powers of the Executive Branch

The executive branch holds both enumerated and implied constitutional powers. Article II of the Constitution explicitly lists the powers of the President including appointing him or her "Commander in Chief of the Army and Navy of the United States,"[187] and "Power, by and with the Advice and Consent of the Senate, to make Treaties . . . and . . . shall appoint Ambassadors."[188] In *United States v. Curtiss-Wright Export*

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[181] *See* Marbury v. Madison, 5 U.S. 137 (1803) (holding an act of congress unconstitutional); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (limiting the power of the President to seize private property).
[182] U.S. CONST. art. I, § 7, cl. 2.
[183] *Id.*
[184] 8 C.F.R. § 1003.10(a) (2009).
[185] *Id.* at (b).
[186] *See* Matter of E-F-H-L-, 27 I. & N. Dec. 226 (B.I.A. 2014); Matter of Castro-Tum, 27 I. & N. Dec. 271 (A.G. 2018); Matter of L-A-B-R-, 27 I. & N. Dec. 405 (A.G. 2018); Matter of A-B-, 27 I. & N. Dec. 316 (A.G. 2018).
[187] U.S. CONST. art. II, § 2, cl. 1.
[188] *Id.*

Corp., the Supreme Court interprets the constitutional language to determine that the President has broad authority to control foreign affairs.[189]

It seems immigration issues fall directly under the category of foreign affairs and, therefore, the executive branch seemingly has direct power over immigration. However, the legislative branch has a similar argument. Article I of the Constitution authorizes congress "[t]o establish a uniform rule of naturalization,"[190] "[t]o regulate commerce with foreign nations,"[191] "[t]o declare war,"[192] and prohibit "[t]he migration or importation of such persons as any of the States now existing shall think proper to admit."[193] The Constitution, therefore, establishes immigration power in both political branches of the United States government.

Despite the executive branch's constitutional powers over immigration, the President has historically exercised restraint when dealing with adjudication.[194] In her law review article, Professor Marouf argues that presidential interference in proceedings leads to problems in administrative adjudication.[195] Before she assumed her duties as an Associate Justice of the Supreme Court of the United States, Elena Kagan emphasized this point by distinguishing that procedural requirements are stricter when an agency acts through adjudication rather than the rulemaking process.[196] She argues that participation in adjudicative proceedings belongs to the affected parties to "ensure[] fundamental fairness and protection against abuse," and "[i]n this context, presidential participation in administration, of whatever form, would contravene procedural norms and inject an inappropriate influence into the resolution of controversies."[197]

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[189] Quoting Justice Sutherland:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.
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> United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–20 (1936).

[190] U.S. CONST. art. I, § 8, cl. 4.

[191] U.S. CONST. art. I, § 8, cl. 3.

[192] U.S. CONST. art. I, § 8, cl. 11.

[193] U.S. CONST. art. I, § 9, cl. 1.

[194] Marouf, *supra* note 104, at 723.

[195] *Id.*

[196] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2362 (2001).

[197] *Id.* at 2362–63.

This argument should also be applied to immigration cases. Indeed, as seen in the cases discussed in Section IV,[198] President Trump's involvement and policy goals served (and continue to serve) as an "inappropriate influence" in resolving immigration proceedings.[199] This influence in no way promotes the goals of adjudication, and the judiciary is beginning to fight back against these injustices.

C. Relevant Case Law

1. Romero v. Barr[200]

Prior to the ruling in *Romero v. Barr* in August 2019, an immigration judge denied the administrative closure[201] of Jesus Zuniga Romero's original case.[202] Romero, a Honduran citizen, petitioned the Board of Immigration Appeals (BIA) for review, but eventually the appeal was dismissed due to the precedential decision of *Matter of Castro-Tum*.[203] In *Castro-Tum*,

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[198] *See* Matter of E-F-H-L-, 27 I. & N. Dec. 226 (B.I.A. 2014); Matter of Castro-Tum, 27 I. & N. Dec. 271 (A.G. 2018); Matter of L-A-B-R-, 27 I. & N. Dec. 405 (A.G. 2018); Matter of A-B-, 27 I. & N. Dec. 316 (A.G. 2018).

[199] Kagan, *supra* note 195, at 2362.

[200] Romero v. Barr, 937 F.3d 282 (4th Cir. 2019).

[201] If not for the denial, Romero's case would have been removed from the immigration judge's docket, which seemingly, was the intent of the attorney general. *Id.* at 286.

[202] In 2013, "the Department of Homeland Security commenced removal proceedings against Romero" for being in the United States illegally. *Id.* at 286. Romero accepted a grant of voluntary departure but eventually reopened the case because the immigration judge determined he "was a beneficiary of a pending Form I-130 filed by his wife, who was then a lawful permanent resident ("LPR")." *Id.* Judge G. Steven Agee describes the ensuing events in the proceeding:

> After the I-130 had been approved, Romero filed a motion for administrative closure, advising that his wife had since become a naturalized U.S. citizen and that he wished to file a Form I-601A for a provisional unlawful presence waiver. In order to file the Form, the removal proceedings had to be administratively closed . . . . [A]dministrative closure is a procedural mechanism primarily employed for the convenience of the adjudicator (namely, IJs and the BIA) in order to allow cases to be removed from the active dockets of immigration courts, often so that individuals can pursue alternate immigration remedies—such as, in Romero's case, pursuing a provisional unlawful presence waiver. Romero advised that if his case were administratively closed, then once the waiver had been approved, he intended to move to re-calendar and terminate removal proceedings so that he could then go through the consular process in Honduras.

Id. at 286–87 (quoting Judge G. Steven Agee).

[203] Initially, the BIA granted Romero's appeal and administratively closed the case; however, this decision was dismissed later due to the decision in *Matter of Castro-Tum*. *Id.* (citing Matter of Castro-Tum, 27 I. & N. Dec. 271 (A.G. 2018)).

discussed in detail in Section IV, the Attorney General ruled that immigration judges and the BIA do not have authority to administratively close cases.[204]

Romero's wife became a naturalized United States citizen, and in order for Romero to gain legal access into the country, he needed the removal proceedings to be administratively closed.[205] But for the Attorney General's interference in *Matter of Castro-Tum*, Romero would have successfully administratively closed his removal proceedings case and would, therefore, have received legal access in the United States. Once again, immigration judges are being stripped of their powers as adjudicators to try cases on the merits rather than by influence (or interference) of the executive branch.

Romero petitioned the BIA decision for review with the United States Court of Appeals for the Fourth Circuit.[206] Ultimately, the court rejected the Attorney General's ruling that immigration judges do not have authority to administratively close cases.[207] This argument derives from his interpretation of specific federal regulations outlining the powers and duties of the BIA and immigration judges.[208] According to Attorney General

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[204] Quoting the Attorney General's ruling:

> Immigration judges and the Board have come to rely upon administrative closure without thoroughly explaining their authority to do so. Unlike the power to grant continuances, which the regulations expressly confer, immigration judges and the Board lack a general authority to grant administrative closure. No Attorney General has delegated such broad authority, and legal or policy arguments do not justify it. I therefore hold that immigration judges and the Board lack this authority except where a previous regulation or settlement agreement has expressly conferred it.

Matter of Castro-Tum, 27 I. & N. Dec. at 281.

[205] *Romero*, 937 F.3d at 286.

[206] *Id.* at 287. The court has jurisdiction pursuant to 8 U.S.C. § 1252(a)(5) (2019):

> A petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this Act. . .

[207] *Romero*, 937 F.3d at 292.

[208] The relevant regulations specifying the powers and duties of the BIA and immigration judges are quoted below:

> (b) Powers and duties. In conducting hearings under section 240 of the Act and such other proceedings the Attorney General may assign to them, immigration judges shall exercise the powers and duties delegated to them by the Act and by the Attorney General through regulation. In deciding the individual cases before them, and subject to the applicable governing standards, immigration judges shall exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases. Immigration judges shall administer oaths, receive evidence, and interrogate, examine, and cross-

Sessions, ". . . neither section . . . confers the authority to grant administrative closure. Grants of general authority to take measures 'appropriate and necessary for the disposition of such cases' would not ordinarily include the authority to suspend such cases indefinitely."[209]

The Fourth Circuit disagrees with this contention.[210] The court comes to the conclusion that the plain language of the federal regulations ". . . unambiguously confers upon [immigration judges] and the BIA the general authority to administratively close cases. . ."—the exact opposite interpretation of the Attorney General.[211] The court uses the standard tools of interpretation to discern the text of the regulations—specifically focusing on how both regulations grant immigration judges and the BIA the power to "take any action . . . appropriate and necessary for the disposition of the case."[212] The court criticizes the Attorney General's decision to disallow immigration judges and the BIA to employ administrative closures—a mechanism that has been used and consistently reaffirmed since the late 1980s.[213] Judge Agee argues that ". . . numerous petitioners have relied on this long-established procedural mechanism to proceed through the

> examine aliens and any witnesses. Subject to §§ 1003.35 and 1287.4 of this chapter, they may issue administrative subpoenas for the attendance of witnesses and the presentation of evidence. In all cases, immigration judges shall seek to resolve the questions before them in a timely and impartial manner consistent with the Act and regulations.

8 C.F.R. § 1003.10(b) (2019).

> (d) Powers of the Board—(1) Generally. The Board shall function as an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it. The Board shall resolve the questions before it in a manner that is timely, impartial, and consistent with the Act and regulations. In addition, the Board, through precedent decisions, shall provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations.
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> (ii) Subject to these governing standards, Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board, and a panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case.

8 C.F.R. § 1003.10(d)(1)(ii).

[209] *Matter of Castro-Tum*, 27 I. & N. Dec. at 284. Attorney General Sessions further contends that the provisions set out in the federal regulations "direct immigration judges or the Board to resolve matters 'in a timely fashion'—another requirement that conflicts with a general suspension of authority." *Id.*

[210] *Romero*, 937 F.3d at 292.

[211] *Id.*

[212] *Id.* (quoting 8 C.F.R. §§ 1003.10(b), 1003.1(d)(1)(ii)).

[213] *Id.* at 296.

immigration process. To suddenly change this interpretation of the regulation undermines the significant reliance interests such petitioners have developed."[214]

The *Castro-Tum* decision being vacated by *Romero v. Barr* brings three major points to light.[215] First, the decision manifests the already obvious efforts of the executive branch to fulfill its immigration policy goals by stripping power from immigration judges. It has been apparent that President Donald Trump wants to use the immigration courts as a means of enforcing and increasing deportation.[216] The unprecedented interference of the Attorney General in a case stripping the power of immigration judges to administratively close cases is a clear abuse of power and an obvious attempt to halt the just proceedings of Romero.

Second, the fact that the United States Court of Appeals for the Fourth Circuit vacated the decision by the Attorney General provides support that the Attorney General was overstepping his bounds. The court calls the decision in *Castro-Tum* "internally inconsistent" and holds that federal regulations "unambiguously confer upon [immigration judges] and the BIA the general authority to administratively close cases . . . ."[217] It is a relief that the federal courts stepped in to vacate a decision that was clearly not ruled on the merits of the case in an attempt to provide due process. In this instance, the federal courts also kept the Attorney General in check in order to avoid injustice.

Third, *Romeo v. Barr* emphasizes the need for immigration judges to become their own independent court. If this were already the case—with no pressure from the executive branch—the immigration courts would have ruled in the same way as the federal courts. In *Castro-Tum*, the immigration judge administratively closed the case in order to ensure the address for the respondent was correct so that the Notice to Appear was being sent to the right place.[218] However, as discussed above, Sessions appointed himself to

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[214] *Id.*

[215] *Id.* at 286.

[216] The Southern Poverty Law Center describes this type of power as a weapon that:

> . . . has taken many forms, including the recasting of judges as enforcement officers; the encouragement of bias against asylum seekers and their counsel; the imposition of case quotas, which destroy impartiality by threatening judges' job security; the politicization of immigration judge hiring and firing; and the aggressive use of the certification power to eliminate important docket management tools and encourage the prejudgment of cases.

The Attorney General's Judges, *supra* note 50, at 18.

[217] *Romero*, 937 F.3d at 294–97.

[218] After the respondent failed to appear to five hearings, the immigration judge stated that he did not view the "addresses as reliable and would not proceed . . ." and administratively closed the case. Matter of Castro-Tum, 27 I. & N. Dec. 271, 279 (A.G. 2018).

the case and reversed years of precedent allowing immigration judges to administratively close cases.[219] But for the Attorney General's interference, the case would have proceeded with the administrative closure. Given the ruling in *Romeo v. Barr*, *Castro-Tum* should have proceeded with the administrative closure because the decision gives this general authority back to immigration judges.[220] If immigration judges were in their own independent court, it would have saved the court's time and resources in ruling on a decision that was already made. In this case, the Attorney General complicated the matter. No longer should the Attorney General use immigration judges as tools for enforcing deportation—they should simply be independent adjudicators.

VI. THE NEED FOR THE IMMIGRATION JUDICIARY'S INDEPENDENCE

A. Why the Need for Separation?

It has come to the breaking point. The immigration court system is no longer a place where cases can be adjudicated in a way that is consistent with the Constitution.[221] Immigrants are no longer receiving their procedural due process rights as laid out in the Constitution and as a result, immigrants seeking asylum are suffering at the hands of the President. The Fifth Amendment of the United States Constitution extends due process rights to all people within the United States jurisdiction by stating that "[n]o *person* shall be . . . without due process of law . . . ."[222] It may be obvious, but in order for asylum to be granted, one must first appear in court. But without their constitutional due process rights, asylum seekers will be turned away

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[219] *Id.* at 271.

[220] *Id.* at 292.

[221] *See* Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); *see also* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("[T]he Due Process Clause applies to all 'persons' within the United States, including [noncitizens], whether their presence here is lawful, unlawful, temporary, or permanent."). It is also relevant to quote, in full, the Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

[222] U.S. CONST. amend. V (emphasis added).

only to return to the suffering that forced them to leave their country of origin in the first place.

In an article written by Julia Preston, Jeremey McKinney, vice-president of the American Immigration Lawyers Association, is quoted saying "[i]t's time for the Department of Justice and the immigration courts to get a divorce."[223] In July, the immigration lawyers joined with the American Bar Association, the Federal Bar Association, and the National Association of Immigration Judges in writing a letter to Congress asking to be "establish[ed] as an independent court system that can guarantee a fair day in court."[224] The article notes that this idea was percolating in the Democratic presidential contests, with three former candidates—Julián Castro, Beto O'Rourke, and Senator Elizabeth Warren—presenting specific plans. Another former candidate, Senator Kirsten Gillibrand, drafted a bill last year to make the change."[225]

This notion has support and is within reach as long as Congress still considers it. Resolving the immigration courts crisis would bring the balance of power back to the branches of the government. Immigration judges would no longer adhere to the desires of the President; no longer would they have to meet a specific quota of finishing cases in order to keep their jobs.[226] They would simply rule on the merits of the case.

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[223] Julia Preston, *Is It Time to Remove Immigration Courts From Presidential Control?*, THE MARSHALL PROJECT (Aug. 9, 2019, 6:00 AM), https://www.themarshallproject.org/2019/08/28/is-it-time-to-remove-immigration-courts-from-presidential-control [https://perma.cc/L9UM-QTVJ].

[224] *Id.* The proposal would allow "the immigration courts [to] become a stand-alone agency that would not be run or controlled by outside officials, with the goal of insulating judges from political pressure by any administration." *Id.*

[225] *Id.* Preston's article also notes that chairman of the House Judiciary Committee, Rep. Jerrold Nadler, a Democrat from New York, indicated that he will eventually be holding hearings on the proposals. *Id.*

[226] *Id.* One major cause of disruption among immigration judges was the need to fulfill a quota of cases in order to expedite removal proceedings. Since October 2018, judges were required to complete 700 cases a year with no more than fifteen percent of decisions being remanded by appeals courts. In addition, time restrictions were set in place for some decisions. "To remind judges of their standing, Justice officials designed a speedometer that sits on judges' computer screens, with green marking numbers of decisions that meet the metrics and stoplight red indicating where they are lagging." *Id.*

Denise Noonan Slavin, a retired immigration judge, recalled seeing the dashboard: "So you sit down and you see that dashboard staring at you, updated every day, and you have 50 motions on your desk to decide whether to continue a case. If judges get into that red, they can lose their job." *Id.*

B. How Separation Would Work

This note mostly explores the reasons why the immigration courts need independence from the executive branch and the Attorney General, but it is important to outline *how* (if it all) this would be possible. Preston's article indicates that "[m]ost proposals to reconfigure the courts would have Congress act under Article I of the Constitution."[227] The United States federal courts include the courts under Article III of the Constitution, and the adjudicative entities established by Congress under its Article I legislative powers.[228] Congress has created several of these Article I courts using its Constitutional power, like tax and bankruptcy courts.[229] The Federal Bar Association has drafted proposed legislation to create such a court, because there is a consensus that the immigration court system is broken.[230] It is up to Congress whether it wants to reconfigure the immigration courts to become an Article I court, and all anyone else can do is continue to make

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[227] Proposals to reconfigure the immigration courts as a separate agency still within the executive branch have been compared to the tax court that was set up in 1969 "to have independent judges deciding federal tax disputes, taking them out of the grip of the Internal Revenue Service." *Id.*

The type of bill would be "drafted 'with the idea of simply lifting the courts,' and their budget, out of the Justice Department, said Elizabeth Stevens, chair of the organization's immigration law section. Under this plan, the courts would remain in existing facilities and current judges would continue to serve for four years before being re-appointed by Senate-confirmed appeals judges to serve in the new system." *Id.*

[228] *Congress Should Establish an Article I Immigration Court*, *supra* note 2.

The adjudicative entities established by Congress are authorized under Article I of the Constitution: "To constitute tribunals inferior to the supreme Court." U.S. CONST. art. I, § 8, cl. 9.

[229] The Federal Judicial Center distinguishes between Article I and Article III judges:

> Operating under its Article I, section 8 power to "constitute" federal tribunals, Congress has created several courts staffed by judges holding these protections who exercise the "judicial power" contemplated in Article III. These courts are commonly known as "Article III" or "constitutional" courts. The latter moniker can be confusing, as the Constitution does not oblige Congress to create any particular court and such courts routinely hear non-constitutional disputes.
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> . . . .
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> Since the earliest days of the republic, Congress has also created separate "Article I" or "legislative" courts. Again, the nomenclature can be confusing as Article I does not specifically authorize these courts and they do not "legislate" in any traditional sense of the word. These courts range from independent federal tribunals staffed with judges who are not subject to the tenure and salary protection of Article III . . . . Unlike other Article I judges (including bankruptcy, territorial and magistrate judges), for example, they are not administered by the Administrative Office of the United States Courts or governed by the Judicial Conference of the United States.

Courts: A Brief Overview, *supra* note 1.

[230] *Congress Should Establish an Article I Immigration Court*, *supra* note 2.

Congress aware of the injustices that immigration parties endure under the authority of the executive branch.

VII. CONCLUSION

Injustice resides in the immigration courts. The executive branch continues to turn their backs on asylum seekers and their families, causing them to return to unsafe country conditions. Aliens seek asylum because they are in danger. For some, entering the country illegally may be their only option, but that does not mean a country should turn them away. The United States was founded on inclusion and diversity and a way to flee a tyrannical environment that had become oppressing and, in some cases, dangerous. The framers of the Constitution created due process for a reason, and it belongs to everyone.

The executive branch should no longer be in control of the immigration courts because it has abused its power for too long. This was painfully apparent during former Attorney General Jeff Sessions' attempt at reviewing cases he simply assigned to himself. This type of power does not promote justice, due process, or democracy. President Trump is able to force his political agenda on immigration judges in order to receive decisions that are satisfactory to him. A court that has become politicized is no court at all.

Congress needs to create legislation to make the immigration courts an Article I court. The court would be overseen by judges themselves and would eliminate the interference of the Attorney General and the President. Due process would be restored and, so too, would the immigration judiciary system.