NOTES

COURTS IN NAME ONLY: REPAIRING AMERICA'S IMMIGRATION ADJUDICATION SYSTEM

INTRODUCTION

In recent years, immigration has risen to the top of America's collective consciousness. From President Trump's infamous "Muslim ban"[1] to the separation of families at the border[2] and the Biden Administration's response to Haitian refugees (and its subsequent response to Afghan and Ukrainian refugees),[3] the fervor surrounding immigration has transcended administrations. At the crux of all these discussions is the broad and near-unlimited authority the executive branch exercises over immigration policy and enforcement — and the way that authority impacts noncitizens currently navigating the system.

Each year, hundreds of thousands of noncitizens appear in immigration court before Immigration Judges (IJs),[4] almost always for removal proceedings.[5] An estimated sixty-three percent of these noncitizens do not have counsel.[6] This Note argues that executive control over immigration adjudication subjects IJs to a variety of conditions that bias the entire adjudicatory system in favor of removal, resulting in an irreparably dysfunctional system. While Congress ponders the creation of an Article I immigration court in response to these concerns, the executive branch has the power to implement a variety of smaller reforms that have often gotten lost in the shadows of the structural-reform discussion. This Note cuts through that noise to provide a list of reforms that are

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[1] *See Timeline of the Muslim Ban*, ACLU OF WASH., https://www.aclu-wa.org/pages/timeline-muslim-ban [https://perma.cc/E3X8-VGSX].

[2] *See, e.g.*, Miriam Jordan, *"I Have No Idea Where My Daughter Is": Migrant Parents Are Desperate for News*, N.Y. TIMES (Apr. 9, 2021), https://www.nytimes.com/2021/04/09/us/migrant-children-border-parents.html [https://perma.cc/RG8N-N443].

[3] *See, e.g.*, Char Adams, *African Immigrant Advocates Point to "Double Standard" as Ukrainians Receive U.S. Relief*, NBC NEWS (Apr. 5, 2022, 5:44 PM), https://www.nbcnews.com/news/nbcblk/african-immigrant-advocates-point-double-standard-ukrainians-receive-u-rcna23092 [https://perma.cc/N9M4-JJ79]; *see also* Nicole Narea, *The Afghan Refugee Crisis Has Revealed the Artificial Limits of America's Will to Welcome*, VOX (Sept. 23, 2021, 11:10 AM), https://www.vox.com/policy-and-politics/2021/9/23/22673658/afghan-refugee-haitian-migrant-border-biden [https://perma.cc/ZR8X-XXKH].

[4] *See* EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., ADJUDICATION STATISTICS: NEW CASES AND TOTAL COMPLETIONS (2022), https://www.justice.gov/eoir/page/file/1060841/download [https://perma.cc/Q5SD-U2DQ].

[5] *See* EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., STATISTICS YEARBOOK: FISCAL YEAR 2018, at 12 (2019), https://www.justice.gov/eoir/file/1198896/download [https://perma.cc/8XV6-CV7U] (reporting that 1,237,070 of the 1,301,256 cases immigration courts received between 2014 and 2018 were removal cases).

[6] *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 7 (2015).

simpler and less controversial, yet still impactful — reforms that the sitting President could implement immediately.

Part I summarizes the role IJs play within the current immigration court system and explains how this structure has opened the door for executive control and influence over IJs. Part II summarizes existing reforms and concludes that an Article I immigration court is the best way forward. Part III explains various improvements that can and should be implemented in the meantime, and then analyzes their place in the existing statutory and administrative framework.

I. BACKGROUND

A. The Unique Structure of the Immigration Adjudication System

Congress established the current structure of the immigration legal system when it created the Department of Homeland Security (DHS) in 2002 and gave the agency control over most immigration functions.[7] The Department of Justice (DOJ) retained control of the Executive Office for Immigration Review (EOIR),[8] which houses the entire immigration court system.[9]

IJs are attorneys appointed by the Attorney General of the United States (AG).[10] Within the immigration court system, they oversee hearings involving noncitizens DHS alleges to be subject to removal.[11] These judges exercise wide discretion in making relief decisions, which commonly turn on subjective determinations such as witness credibility; as a result, IJs have a tremendous impact on people's likelihood of being able to stay in the United States.[12] Parties may appeal IJ decisions to the Board of Immigration Appeals (BIA), which is also nested within EOIR and consists of attorneys appointed by the AG.[13] The BIA rarely

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[7] DAVID WEISSBRODT, LAURA DANIELSON & HOWARD S. (SAM) MYERS III, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL § 3-3, at 112 (7th ed. 2017).

[8] *Id.*

[9] *See* RICHARD A. BOSWELL, ESSENTIALS OF IMMIGRATION LAW 3 (3d ed. 2012).

[10] 8 C.F.R. § 1003.10(a) (2021). Thus, the term "judge" refers not to true judicial authority but to IJs' authority to adjudicate administrative proceedings.

[11] *See* EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T. OF JUST., FACT SHEET: OBSERVING IMMIGRATION COURT HEARINGS 1 (2018), https://www.justice.gov/eoir/page/file/1079306/download [https://perma.cc/U7D8-4FXF]. As of 2022, there are around six hundred IJs who preside over sixty-eight immigration courts. *Office of the Chief Immigration Judge*, U.S. DEP'T. OF JUST., https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios [https://perma.cc/EHL3-W4WN].

[12] *See* Amit Jain, *Bureaucrats in Robes: Immigration "Judges" and the Trappings of "Courts,"* 33 GEO. IMMIGR. L.J. 261, 270–71 (2019); *Asylum Outcome Increasingly Depends on Judge Assigned*, SYRACUSE UNIV.: TRAC (Dec. 2, 2016), https://trac.syr.edu/immigration/reports/447 [https://perma.cc/JN67-MM83] (finding that the IJ to which someone is assigned can impact their asylum chances by over fifty-six percent).

[13] 8 C.F.R. § 1003.1(a)(1) (2021); *see* Maurice A. Roberts, *The Exercise of Administrative Discretion Under the Immigration Laws*, 13 SAN DIEGO L. REV. 144, 147 (1975).

hears oral arguments,[14] yet its decisions have binding precedential value nationwide.[15] In certain instances, noncitizens may appeal BIA decisions to the federal courts of appeals.[16] A deferential standard of review applies in some form at every level of the appeals process.[17]

B. *Executive Branch Influence over IJ Employment and Decisionmaking*

Because the executive branch is tasked with enforcing immigration law, the President and their administration have considerable latitude in designing their own immigration system — even when the "letter of the law" has not changed.[18]

For one, the AG has near-exclusive authority over the hiring process — a process made more significant by the high turnover rate among IJs.[19] At times, hiring has been overtly political: during the Bush Administration, for example, the DOJ hired IJs based almost entirely on

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[14] *Board of Immigration Appeals*, U.S. DEP'T. OF JUST. (Sept. 14, 2021), https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/MA85-J5EV].

[15] 8 C.F.R. § 1003.1(g)(1) (2021).

[16] These appeals are governed by section 242(a) of the Immigration and Nationality Act, 8 U.S.C. § 1252. Generally, circuit courts will hear: (1) legal claims (that is, that the BIA or immigration enforcement "erroneously applied or interpreted the law"); (2) constitutional claims (for example, that the agency violated the Due Process Clause); (3) factual claims (that is, that the agency made erroneous findings of fact); and (4) discretionary claims (that is, that the agency abused its discretion). AM. IMMIGR. COUNCIL, PRACTICE ADVISORY: HOW TO FILE A PETITION FOR REVIEW 3 (2015), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/how_to_file_a_petition_for_review_2015_update.pdf [https://perma.cc/9ZKX-JT59]. Congress has frequently attempted to insulate executive decisionmaking regarding noncitizens from judicial review. *See, e.g.*, Patel v. Garland, 142 S. Ct. 1614, 1618 (2022).

[17] 8 C.F.R. § 1003.1(d)(3)(i)–(ii) (2021); *see, e.g.*, 3 OFF. OF STAFF ATT'YS, U.S. CT. OF APPEALS FOR THE NINTH CIR., STANDARDS OF REVIEW OUTLINE: CIVIL PROCEEDINGS 145–51 (2022), https://cdn.ca9.uscourts.gov/datastore/uploads/guides/stand_of_review/III.%20Civil%20Proceedings%202022.pdf [https://perma.cc/8M6Q-8BL9] (summarizing the applicable standards of review the Ninth Circuit uses in immigration cases). More broadly, the Supreme Court (and, therefore, lower federal courts) has largely left immigration policy and adjudication up to the political branches, invoking the plenary power doctrine — a doctrine of the Court's own creation — to justify an almost complete refusal to limit or otherwise direct congressional and executive action in the immigration sphere. *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952); Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 603–04 (1889). *See generally* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (summarizing the history of the plenary power doctrine, its historical and contemporary use, and the ramifications of its use). The Court first used the plenary power doctrine in relation to immigration perhaps most infamously in *The Chinese Exclusion Case*, 130 U.S. 581, 603–04. Reluctant to cite that case, contemporary courts have opted to further develop — and therefore entrench — the doctrine independently through a separate line of cases such that, while the origin of the doctrine may have been judicially obfuscated, the substance remains largely intact. *See, e.g.*, *Harisiades*, 342 U.S. at 588–89. *See generally* Motomura, *supra*.

[18] *See* HIROSHI MOTOMURA, AM. IMMIGR. COUNCIL, THE PRESIDENT'S DISCRETION, IMMIGRATION ENFORCEMENT, AND THE RULE OF LAW 4 (2014).

[19] *See More Immigration Judges Leaving the Bench*, SYRACUSE UNIV.: TRAC (July 13, 2020), https://trac.syr.edu/immigration/reports/617 [https://perma.cc/2NQR-8R3S].

political affiliation[20] despite a stated intention to "improve [the immigration courts'] performance and quality of work."[21] More generally, IJs are predominantly previous DHS attorneys, who argue for noncitizens' removal in immigration court, which risks "systematizing pro-enforcement biases."[22]

Even when hiring is not overtly political, the DOJ is constrained by very little when it hires IJs — in fact, individuals may be hired as IJs without any previous immigration experience at all.[23] Naturally, this renders job training — the nature, scope, and depth of which are exclusively determined by the DOJ[24] — incredibly important. In 2018, this training featured then-AG Sessions informing the IJs in attendance that they were part of the law enforcement function of the DOJ,[25] a sentiment that was repeated by then–Deputy AG Rosenstein at the investiture of newly appointed IJs in 2019.[26] Perhaps even more jarringly, AG Sessions also advised IJs that the "vast majority" of asylum claims were unfounded or fabricated.[27]

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[20] *See generally* Gabriel Pacyniak, Development in the Judicial Branch, *Controversy Reemerges over Hiring, Review of Immigration Judges*, 22 GEO. IMMIGR. L.J. 805 (2008); OFF. OF PRO. RESP. & OFF. OF THE INSPECTOR GEN., U.S. DEP'T. OF JUST., AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (2008), https://oig.justice.gov/sites/default/files/legacy/special/s0807/final.pdf [https://perma.cc/SWU5-WC9X]. By the time this hiring was revealed, sixteen of those judges had already decided over a hundred cases each. Those decisions were allowed to stand. Charlie Savage, *Vetted Judges More Likely to Reject Asylum Bids*, N.Y. TIMES (Aug. 23, 2008), https://www.nytimes.com/2008/08/24/washington/24judges.html [https://perma.cc/TKJ6-28F5].

[21] Press Release, U.S. Dep't of Just., Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006), https://www.justice.gov/archive/opa/pr/2006/August/06_ag_520.html [https://perma.cc/WWL8-D9SE].

[22] Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1667 (2010); *see id.* at 1666–67.

[23] *See Immigration Judge*, U.S. DEP'T. OF JUST. (Dec. 10, 2018), https://www.justice.gov/legal-careers/job/immigration-judge-8 [https://perma.cc/5C54-28YF] (job posting for the IJ position requiring only "seven (7) years of . . . litigation and/or administrative law" experience); *see also* Nolan Rappaport, Opinion, *No Experience Required: US Hiring Immigration Judges Who Don't Have Any Immigration Law Experience*, THE HILL (Feb. 3, 2020, 11:30 AM), https://thehill.com/opinion/immigration/481152-us-hiring-immigration-judges-who-dont-have-any-immigration-law-experience [https://perma.cc/34YG-P3K2] (noting that of twenty-eight recently hired IJs, eleven had no prior immigration law experience).

[24] *See* 8 C.F.R. § 1003.0(b)(vii) (2021). In 2018, for example, this training took the form of a three-day "Legal Training Program," during which IJs were trained on everything from substantive asylum law (two one-hour sessions) to the immigration consequences of certain convictions (a fifty-minute session). *See* Exec. Off. for Immigr. Rev., Legal Training Program Agenda 1, 4 (2018), https://www.aila.org/File/Related/18082203.pdf [https://perma.cc/BZ4K-G3JL].

[25] Jeff Sessions, Att'y Gen., Remarks to the Executive Office for Immigration Review Legal Training Program (June 11, 2018) [hereinafter AG Sessions Remarks], https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-executive-office-immigration-review-legal [https://perma.cc/FB84-7GTX].

[26] Rod J. Rosenstein, Deputy Att'y Gen., Opening Remarks at Investiture of 31 Newly Appointed Immigration Judges (Mar. 15, 2019), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-opening-remarks-investiture-31-newly [https://perma.cc/4DU9-ZVX3] ("You follow lawful instructions from the Attorney General, and you share a duty to enforce the law.").

[27] AG Sessions Remarks, *supra* note 25.

After being hired and trained, IJs are still continuously subject to the influence of the sitting administration's policy. For example, IJs serve a two-year probationary period during which they are even more vulnerable to removal;[28] as a result, many newly appointed IJs feel like they must issue decisions in accordance with the administration's policy views in order to keep their jobs.[29] More generally, the sitting presidential administration is a statistically significant predictor of removal rates,[30] suggesting that these sorts of subtle disciplinary signals are incredibly effective in shaping hearing outcomes.

Moreover, by virtue of their location within the DOJ, IJs are necessarily acting on the AG's behalf rather than independently.[31] In fact, IJs statutorily act as the AG's "delegates" — every decision an IJ makes is technically being made in the AG's capacity.[32] That the AG serves as the "agency head" for IJs might be less troubling if the AG did not also supervise the Office of Immigration Litigation, the executive office tasked with defending immigration cases for the government — in other words, advocating for noncitizens' removal — in appellate court.[33]

Through their authority over the immigration court system, then, the AG has tremendous influence over the day-to-day adjudication of immigration cases (which, by some estimates, is over a thousand cases — and people's fates — decided per day[34]).

C. Executive Branch Influence over IJ Work

Unlike Administrative Law Judges (ALJs), whose hiring, firing, and general decisionmaking are governed by the Administrative Procedure Act[35] (APA), IJs are generally overseen by the Office of the Chief

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[28] Jain, *supra* note 12, at 306–07.

[29] *Id.*; *see* Email Interview with Dana Leigh Marks, Former President of the Nat'l Ass'n of Immigr. Judges (Aug. 19, 2022) (on file with the Harvard Law School Library).

[30] Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control over Immigration Adjudication*, 108 GEO. L.J. 579, 625–26 (2020).

[31] *See* BOSWELL, *supra* note 9, at 3.

[32] 8 C.F.R. § 1003.10(a) (2021); *see* Julie Menke, Note, *Abuse of Power: Immigration Courts and the Attorney General's Referral Power*, 52 CASE W. RSRV. J. INT'L L. 599, 607 (2020).

[33] *See Office of Immigration Litigation*, U.S. DEP'T. OF JUST. (Sept. 9, 2020), https://www.justice.gov/civil/office-immigration-litigation [https://perma.cc/YTW9-GR2C].

[34] *See Immigration Court Completions Remain at Historic Lows Through July 2020*, SYRACUSE UNIV.: TRAC (Aug. 20, 2020), https://trac.syr.edu/immigration/reports/620 [https://perma.cc/8PWL-8VJF]. *But see* EXEC. OFF. FOR IMMIGR. REV., *supra* note 4. Because many immigration relief decisions are discretionary, executive control over these decisions has heightened impact — IJs are utilizing executive discretion in their decisionmaking rather than formulaically finding facts and applying law. As a result, the AG has much more room to influence hearing results. *See generally* Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611 (2006) (exploring "some of the consequences of mixing administrative discretion with the authority to deport" noncitizens, *id.* at 611).

[35] 5 U.S.C. §§ 551, 553–559, 701–706; *see id.* §§ 554(d), 557(d)(1)(a) (requiring ALJs to exercise independent decisionmaking); 5 C.F.R. § 930.211(a) (2013) (establishing for-cause removal protections for ALJs); Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 109–12 (1981) ("ALJ[s] may not be . . . subject to supervision by[] anyone performing investigative or prosecutorial functions for an agency." *Id.* at 111.).

Immigration Judge, which "establishes operating policies and oversees policy implementation for the immigration courts [and] provides overall program direction and establishes priorities" for all IJs.[36] Similarly, procedural requirements and safeguards such as the Federal Rules of Evidence and the APA requirements for formal hearings do not apply in immigration court.[37] As a result, IJs are deciding "death penalty cases . . . in a traffic court setting."[38]

The executive branch's influence over IJs is so prominent that IJs bear more resemblance to fungible DOJ employees than to judges. This has various implications that render the court system incompatible with its judicial façade. To begin with, the DOJ has used IJs to implement agency policy, even when the IJ tasked with applying that policy disagreed with it.[39] Moreover, IJs lack the power to hold DHS attorneys in contempt.[40] As a result, IJs are powerless to sanction government attorneys who fail to comply with IJ-issued "orders, deadlines, or rules of decorum" — even when the attorneys' errors compound the delays most cases already suffer.[41]

This employee-supervisor dynamic has tangible effects on the day-to-day lives of IJs as well. First, IJs are prohibited from speaking publicly about immigration law, policy, or immigration courts in their personal capacities and must preclear all immigration-related speeches with the DOJ.[42] In addition, IJs deal with bureaucracy in a way conventional

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[36] *Office of the Chief Immigration Judge*, *supra* note 11.

[37] *See, e.g.*, Barradas v. Holder, 582 F.3d 754, 762 (7th Cir. 2009) (noting that courts defer to the AG for determining the permissibility of evidence); Anim v. Mukasey, 535 F.3d 243, 256 (4th Cir. 2008) (noting that the Federal Rules of Evidence do not apply in immigration proceedings); Alexandrov v. Gonzalez, 442 F.3d 395, 404 (6th Cir. 2006) (citing Kasa v. Gonzales, 128 F. App'x 435, 440 (6th Cir. 2005)) (same). The Federal Rules of Evidence do serve as a guide in immigration court proceedings, though evidence is generally admissible as long as it is relevant and fundamentally fair. *See* EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., IJ BENCHBOOK 2, https://www.justice.gov/eoir/page/file/988046/download [https://perma.cc/V3K2-LCUF].

[38] Jennifer Ludden, *Immigration Crackdown Overwhelms Judges*, NPR (Feb. 9, 2009, 12:09 AM) (quoting Dana Leigh Marks, Former President of the Nat'l Ass'n of Immigr. Judges), https://www.npr.org/templates/story/story.php?storyId=100420476 [https://perma.cc/LQ29-KQTD].

[39] Jain, *supra* note 12, at 293.

[40] *See* CHARLES STIMSON & GIANCARLO CANAPARO, HERITAGE FOUND., AUTHORITY DELAYED IS AUTHORITY DENIED: GIVING IMMIGRATION JUDGES CONTEMPT AUTHORITY 1 (2019), https://www.heritage.org/sites/default/files/2019-08/LM249.pdf [https://perma.cc/54DC-FEBD].

[41] *Id.* at 5–6.

[42] *See* Samuel B. Cole, *The First Amendment and the Immigration Court*, A.B.A. (Mar. 11, 2022), https://www.americanbar.org/groups/judicial/publications/judges_journal/2022/winter/the-first-amendment-and-immigration-court [https://perma.cc/8UDM-M3WB]. As a result of this strict speaking ban, the IJ union has become the prominent voice of IJs; the DOJ has responded with efforts to decertify the union. Mimi Tsankov, *The Immigration Court: Zigzagging on the Road to Judicial Independence*, 93 U. COLO. L. REV. 303, 316 (2022); Richard Gonzales, *Trump Administration Seeks Decertification of Immigration Judges' Union*, NPR (Aug. 12, 2019, 9:17 PM), https://www.npr.org/2019/08/12/750656176/trump-administration-seeks-decertification-of-immigration-judges-union [https://perma.cc/6CQK-TY7B].

judges do not, giving rise to a "chain of command" mindset that feels reminiscent of the ones frequently present in federal employee structures rather than those in typical judicial chambers.[43] This manifests itself through supervision, among other things: for example, IJs have been required to clock in and out for parts of their terms, indicating a lack of trust in IJs' ability or willingness to complete their assignments without such supervision.[44] The agency is easily able to utilize this supervision to undermine impartiality: supervisors have monitored IJs the agency felt were granting relief in too many cases to try and catch them in the act of minor infractions such as arriving late or leaving early,[45] called IJs insubordinate for interpreting directives in certain ways, and even threatened to fire IJs for issuing certain decisions.[46]

D. Executive Branch Influence over IJ Procedures and Process

The executive branch also has tremendous influence over the pressures IJs face to adjudicate cases quickly. First, the prioritization and implementation of heightened enforcement has contributed to the immense backlog of cases facing immigration judges[47] and brought even more noncitizens into a resource-strained immigration court system already struggling under pressures to adjudicate more cases faster.[48] But

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[43] *See* Jain, *supra* note 12, at 296.

[44] *Id.*

[45] *See* Email Interview with Jeffrey Chase, Former Immigr. Judge (Apr. 26, 2022) (on file with the Harvard Law School Library).

[46] *See* Jain, *supra* note 12, at 296.

[47] *Immigration Court Backlog Now Growing Faster than Ever, Burying Judges in an Avalanche of Cases*, SYRACUSE UNIV.: TRAC (Jan. 18, 2022), https://trac.syr.edu/immigration/reports/675 [https://perma.cc/NWM6-ZSW5] ("The main contributor to the backlog's increase . . . is not the pace of case completions, it is the recent deluge of new cases filed by the Department of Homeland Security . . . ."). The backlog has been criticized and analyzed by journalists, scholars, practitioners, and political actors alike. *See generally, e.g.*, Alexandra Villarreal, *US Immigration Courts Struggle amid Understaffing and Backlog of Cases*, THE GUARDIAN (Feb. 21, 2022, 1:00 AM), https://www.theguardian.com/us-news/2022/feb/21/us-immigration-courts-cases-backlog-understaffing [https://perma.cc/63KM-837D]; Kara A. Naseef, *How to Decrease the Immigration Backlog: Expand Representation and End Unnecessary Detention*, 52 U. MICH. J.L. REFORM 771 (2019); Elizabeth J. Stevens, *Making Our "Immigration Courts" Courts*, FED. LAW., Mar. 2018, at 17; Press Release, Rep. Raja Krishnamoorthi, Congressman Krishnamoorthi Urges Senate to Find Way Forward for Immigration in Build Back Better Act, Including Provisions to Raise Significant Revenue by Clearing the Employment-Based Green Card Backlog (Sept. 22, 2021), https://krishnamoorthi.house.gov/media/press-releases/congressman-krishnamoorthi-urges-senate-find-way-forward-immigration-build-back [https://perma.cc/E7VY-GQMH].

[48] Exercises of prosecutorial discretion (especially through sweeping programs or categorical priorities like DACA) take large swaths of people out of removal proceedings, thereby making dockets more manageable, and vice versa. *See* Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475, 492–94 (2013). For example, President Obama's DHS explicitly maintained quotas for deportation numbers — effectively instituting a minimum case-number addition to the courts every year. *Id.* at 493.

while bringing all these cases *in*, the executive branch has simultaneously pushed IJs to get more cases *out*. The existing case backlog has been used as a justification, an excuse, and most often as pretext for subjecting IJs to various policies ostensibly designed to increase efficiency.[49] In the immigration-adjudication context, however, a bias toward speed is necessarily a bias toward removal.[50] As a result, these policies have functionally resulted in increased removal rates.

In 2021, for example, DHS and the DOJ jointly announced the "Dedicated Docket," a process that expedites immigration proceedings for "recently arrived families."[51] The Dedicated Docket requires IJs to "work generally to issue a decision within 300 days" of the noncitizens' initial appearance in immigration court and is ostensibly designed to help newly arrived families avoid "languish[ing] in a multi-year backlog."[52] The average asylum case takes nearly four and a half years to adjudicate — as a result, a three-hundred-day goal provides for a highly compressed timeline.[53] After implementing this timeline without simultaneously implementing other reforms, such as increasing access to counsel, the Biden Administration has seen ninety-four percent of completed Dedicated Docket cases end in orders of removal.[54]

In another such policy, AG Sessions required, inter alia, that eighty-five percent of cases involving detained noncitizens be resolved within

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[49] *Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts: Hearing Before the Subcomm. on Immigr. & Citizenship of the H. Comm. on the Judiciary*, 116th Cong. 13–15 (2020) [hereinafter *Courts in Crisis*] (statement of A. Ashley Tabaddor, President, Nat'l Ass'n of Immigr. Judges).

[50] A commonly floated justification for promoting speed at the expense of process for noncitizens is that noncitizens like to seek review and extend litigation to stay in this country for longer. Scholars have criticized this justification as flawed on the merits, *see, e.g.*, Jill E. Family, *Removing the Distraction of Delay*, 64 CATH. U. L. REV. 99, 110–12 (2015), and possibly pretextual for deeper concerns about "the role of national sovereignty," *id.* at 100, and, indeed, judicial review in the immigration legal system, *id.* at 100 n.6.

[51] Press Release, Off. of Pub. Affs., U.S. Dep't. of Just., DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings (May 28, 2021) [hereinafter Dedicated Docket Process], https://www.justice.gov/opa/pr/dhs-and-doj-announce-dedicated-docket-process-more-efficient-immigration-hearings [https://perma.cc/NZ77-NTXA]. The practice of requiring IJs to hold expedited hearings for certain noncitizens transcends administrations. *See, e.g.*, *Human Rights First Concerned Biden Plan Risks New "Rocket Dockets" When It Should End Trump Asylum Policies*, HUM. RTS. FIRST (May 28, 2021), https://www.humanrightsfirst.org/press-release/human-rights-first-concerned-biden-plan-risks-new-rocket-dockets-when-it-should-end [https://perma.cc/C76Z-KF6V] (describing controversy around Obama and Trump Administrations' "rocket dockets").

[52] Dedicated Docket Process, *supra* note 51.

[53] *Unrepresented Families Seeking Asylum on "Dedicated Docket" Ordered Deported by Immigration Courts*, SYRACUSE UNIV.: TRAC. (Jan. 13, 2022), https://trac.syr.edu/immigration/reports/674 [https://perma.cc/AK28-9ZF2].

[54] *Id.*

sixty days, that the same percentage of cases involving nondetained immigrants be resolved within a year, and that ninety-five percent of *all individual hearings* on the merits should be completed on the initially scheduled date.[55]

These metrics were criticized as baseless,[56] evidence of "micromanagement,"[57] and "unprecedented."[58] They were also impossible to meet.[59] As a result, they operated as ample pretext for EOIR to fire any judges they wanted to (namely, judges who did not issue decisions in accordance with the Executive's policy preferences).[60]

Even before AG Sessions's quotas, the DOJ regularly sent department-wide emails listing IJs' case-completion and workload rates, comparing these metrics across judges; these emails did not contain metrics that could conceivably measure accuracy, such as affirmance rates.[61] In the same vein, EOIR superiors frequently praised IJs for efficiency but not other important successes, such as adjudicating particularly difficult cases.[62] This prioritization of efficiency at the expense of quality

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[55] Laura Meckler, *New Quotas for Immigration Judges as Trump Administration Seeks Faster Deportations*, WALL ST. J. (Apr. 2, 2018, 4:50 PM), https://www.wsj.com/articles/immigration-judges-face-new-quotas-in-bid-to-speed-deportations-1522696158 [https://perma.cc/E8XR-RKDJ]; *see* Memorandum from James R. McHenry III, Dir., Exec. Off. of Immigr. Rev., U.S. Dep't of Just., to the Off. of the Chief Immigr. Judge, All Immigr. Judges, All Ct. Adm'rs & All Immigr. Ct. Staff app. A at 3 (Jan. 17, 2018); Jain, *supra* note 12, at 301. Later that year, the DOJ issued a second memorandum with additional mandates, including 700 case completions per year (in the five years previously, IJs had had an average case-completion rate of 678, according to EOIR). *See* Meckler, *supra*. The case-completion metrics provided no exception for justified extensions or delays. EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., EOIR PERFORMANCE PLAN: ADJUDICATIVE EMPLOYEES (2018), https://www.justice.gov/eoir/page/file/1358951/download [https://perma.cc/QT5U-AURB].

[56] *Courts in Crisis*, *supra* note 49, at 11 (statement of A. Ashley Tabaddor).

[57] Aaron Reichlin-Melnick, *As Immigration Court Quotas Go Into Effect, Many Call for Reform*, IMMIGR. IMPACT (Oct. 1, 2018), https://immigrationimpact.com/2018/10/01/immigration-court-quotas-call-reform [https://perma.cc/X5TX-NPED].

[58] Joel Rose, *Justice Department Rolls Out Quotas for Immigration Judges*, NPR (Apr. 3, 2018, 1:09 PM) (quoting Jeremy McKinney, Sec'y, Am. Immigr. Laws. Ass'n), https://www.npr.org/2018/04/03/599158232/justice-department-rolls-out-quotas-for-immigration-judges [https://perma.cc/9D3F-MG87].

[59] *Courts in Crisis*, *supra* note 49, at 14 (statement of A. Ashley Tabaddor).

[60] *See id.* As of 2022, these quotas have been suspended. Erich Wagner, *Biden Admin. Suspends Immigration Judge Quotas, Prompting Similar Requests Elsewhere*, GOV'T EXEC. (Oct. 26, 2021), https://www.govexec.com/workforce/2021/10/biden-admin-suspends-immigration-judge-quotas-prompting-similar-requests-elsewhere/186396 [https://perma.cc/MJ33-E2MK]. But the fact that they could be implemented and suspended within three years is evidence enough of the volatility IJs face regarding job security and the general landscape in which they make and issue decisions.

[61] Jain, *supra* note 12, at 299–300. Federal judges are subject to a similar shaming mechanism called the "Six-Month List," which theoretically has a smaller impact because of federal judges' insulation from the political process and removal; nonetheless, the List has also attracted significant criticism and — more significantly — empirically affects judicial outcomes. *See generally* Miguel F.P. de Figueiredo, Alexandra D. Lahaw & Peter Siegelman, *The Six-Month List and the Unintended Consequences of Judicial Accountability*, 105 CORNELL L. REV. 363 (2020). IJs received them far more frequently and — again — are more easily terminated or otherwise sanctioned. Jain, *supra* note 12, at 300.

[62] Jain, *supra* note 12, at 300.

is a tale nearly as old as EOIR itself — in 2005, an IJ denied a continuance on the grounds that the case had been pending for more than eight months, the period established by the DOJ as a universal case-completion goal.[63] Later, AG Sessions explicitly directed IJs to consider "DHS's views on [the] motion" and "administrative efficiency" before granting a continuance.[64]

The concept of "efficiency" has also been inappropriately conflated with that of "speed." Rigid docketing mandates, for example, interfere with an IJ's ability to schedule cases efficiently and manage their dockets, which might have as many as 9000 matters.[65] In addition, cases are remanded to IJs at incredibly high rates (up to forty percent, depending on the circuit), thus forcing IJs to decide cases multiple times over.[66] If well-reasoned decisions and a more careful case-by-case approach are desirable and drive quality decisionmaking, these policies designed for "efficiency" actually make the system more *inefficient*.[67] Taken together, then, these pressures "incentivize judges to issue more orders of deportation, faster, at the risk of losing their jobs."[68]

II. EXISTING PROPOSALS FOR STRUCTURAL REFORM

This Part surveys the primary proposals for immigration court reform and concludes that, while an Article I immigration court may be the best solution, achieving this goal will likely prove difficult in the short term.[69] Therefore, the executive branch should use its authority

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[63] Hashmi v. Att'y Gen. of the U.S., 531 F.3d 256, 257–59 (3d Cir. 2008).

[64] *In re* L-A-B-R-, 27 I. & N. Dec. 405, 416 (A.G. 2018).

[65] *Burgeoning Immigration Judge Workloads*, SYRACUSE UNIV.: TRAC (May 23, 2019), https://trac.syr.edu/immigration/reports/558 [https://perma.cc/V2A5-A93R].

[66] *See* Benslimane v. Gonzales, 430 F.3d 828, 829 (7th Cir. 2005); Legomsky, *supra* note 22, at 1647. Immigration appeals comprise a significant percentage of appellate court dockets and "have created a now well-documented crisis for the federal courts." *Id.* at 1646. This crisis has become so pervasive that federal circuits have explicitly written multiple opinions criticizing immigration decisions from IJs and the BIA. *E.g.*, *Benslimane*, 430 F.3d at 829–30 ("[T]he adjudication of [immigration] cases has fallen below the minimum standards of legal justice."); Niam v. Ashcroft, 354 F.3d 652, 654 (7th Cir. 2004) (identifying "a pattern of serious misapplications by [immigration adjudicators] of elementary principles of adjudication").

[67] *See* Legomsky, *supra* note 22, at 1646. For example, Judge Marks reported that a pervasive attitude EOIR supervisors have is that IJs are working only while they are "in court" — that is, the work IJs put in outside their courtrooms to review facts, depositions, and so on to make the actual hearings more efficient is not considered when EOIR assigns additional cases. Because the hearings themselves seem like they are moving faster (because the transcripts are shorter, thanks to the IJs' out-of-court preparation), EOIR feels comfortable adding additional cases — and hours — to these judges' schedules. This decrease in "administrative time" — that is, the time judges spend outside of court to review and prepare for cases — logically leads to longer hearings and more mistakes, which then increase the number of cases that are appealed. *See* Email Interview with Dana Leigh Marks, *supra* note 29.

[68] *Courts in Crisis*, *supra* note 49, at 13 (statement of A. Ashley Tabaddor).

[69] It is important to note that the reforms discussed in this section do not significantly alter or focus on the substantive rights noncitizens enjoy (or the lack thereof) under U.S. law — that

to implement incremental reforms in the meantime to alleviate both the unsustainable working conditions IJs face and the immense backlog facing our immigration courts.

A. Embracing the Bureaucracy

Some scholars argue that immigration courts have fallen so far from the ideal of true court-like proceedings that the proper reform may be to simply embrace the bureaucracy of it all and forego the veneer of judicial similarity.[70] Professor Amit Jain, for example, argues that immigration courts operate much more like "street-level bureaucracies" than courts and should be analyzed — and perhaps formalized — as such.[71]

A less overtly adversarial, independent bureaucratic system could be better suited to the drastic power disparities between noncitizens and the government.[72] Federal judges may give routine bureaucratic decisions less deference than those issued by an immigration "judge" operating with apparent, if not actual, independence.[73] Further, embracing the bureaucracy would do away with the misleading symbolism of having immigration cases decided by a seemingly independent court, which helps the average person "stomach the harsh consequences of immigration law" because removal decisions seem grounded in legal and moral reason and therefore appear "legitimate."[74]

As long as the government is intent on removing noncitizens from this country and employs a federal agency to pursue that goal, however, removal adjudications will be inherently adversarial. Moreover, while any wrongful deprivation by an executive agency may be harmful, there is perhaps an instinctive recognition that deportation is uniquely violent and a "punishment" that bears greater similarity to criminal penalties than typical agency action.[75] A bureaucratic system that overlooks that fact would thus be ill-suited for proceedings that fundamentally require the government to act as an adversary against those attempting to

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discussion is beyond the scope of this Note. Instead, this Part discusses reforms with the narrower goal of improving the fairness and efficiency of the adjudicatory process, given the substance of immigration law as it currently exists.

[70] *See, e.g.*, Jain, *supra* note 12, at 312–16.

[71] *Id.* at 315–16.

[72] *Id.* at 317.

[73] Indeed, federal courts remand cases decided by the Social Security Administration at a much higher rate than they do EOIR cases, even though Social Security applicants are afforded more protective process than noncitizens slated for removal and the ALJs who decide those cases enjoy greater independence than IJs. *Id.* at 321–22, 322 n.423.

[74] *See id.* at 323. By Jain's argument, to do the opposite — that is, to choose the symbol rather than the reality — is to fall into the trappings by which the immigration court system has already become bound. *Id.* at 323–24.

[75] Harisiades v. Shaughnessy, 342 U.S. 580, 600 (1952) (Douglas, J., dissenting) (writing that deportation is the equivalent of the common law punishment of "banishment," which "may deprive a man and his family of all that makes life worth while," including "[t]heir plans for themselves and their hopes for their children").

navigate that system. Perhaps more importantly, a bureaucratic removal process may not remedy the ills the current system suffers at all; the "vast majority" of removal orders today are already entered using administrative processes that involve no in-person hearing at all, and those processes receive even less attention than those in the immigration courts.[76]

Further, the undesirable outcomes Jain ascribes to the façade of independence of immigration courts are largely attributable to the ills described above, not the courts' lack of independence per se — that is, many of the current problems result from the fact that the symbol of independence is deceptive, not necessarily that the symbol exists. Furthermore, it is unclear how abandoning the pretense of a "court" would disempower DHS attorneys or further empower noncitizens — many of the same obstacles noncitizens currently face (such as language barriers, limited access to counsel, and lack of familiarity with the legal system[77]) would exist just the same in a more "straightforward" bureaucratic process.

B. The Middle Ground: An Independent Agency

Establishing EOIR as an independent agency — and making IJs ALJs in so doing — presents a middle ground that may be appealing to those who favor a less extreme, but still effective, overhaul of the system.[78] This could afford IJs many of the benefits of a nonagency court system without the structural lifting required to establish an external court system: immigration adjudications would be newly independent and thus more insulated from the AG's prerogatives, IJs would enjoy more substantial removal protections, and the AG would no longer have logistical or budgetary power over the immigration court system.[79]

But given that "a bureaucracy masquerading as a court exacerbates the flaws of both,"[80] this would only partially mitigate the issues facing IJs and would not overcome the structural obstacles to fair adjudications in the current system. Though extracting IJs from the DOJ would free them from the AG's supervision, independent agencies are not fully

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[76] Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 183–84 (2017). As a result, the immigration court system — including IJ adjudication and BIA review — represents the "*best*" process that noncitizens can currently receive, augmenting the need for fairness and due process. *See* Jennifer Lee Koh, *Executive Defiance and the Deportation State*, 130 YALE L.J. 948, 967 (2021).

[77] *See* Eagly & Shafer, *supra* note 6, at 7; Jennifer Medina, *Anyone Speak K'iche' or Mam? Immigration Courts Overwhelmed by Indigenous Languages*, N.Y. TIMES (Mar. 19, 2019), https://www.nytimes.com/2019/03/19/us/translators-border-wall-immigration.html [https://perma.cc/67QQ-7W66].

[78] This would place EOIR in a similar structural position to the Occupational Safety and Health Review Commission (OSHRC), for example. *See* James Vike, *The Bureaucracy as a Battleground: Contentious Politics Surrounding OSHA 1980–2004*, 35 POL. & POL'Y 570, 580 (2007).

[79] Legomsky, *supra* note 22, at 1683.

[80] Jain, *supra* note 12, at 267.

insulated from executive influence. On the contrary, a President retains significant soft authority and control over independent agencies' adjudicatory and other functions.[81] Thus, even the most carefully constructed independent agency runs the risk of falling under presidential influence, and it is likely that even an independent agency tasked with adjudicating removal cases would maintain the same "taint[]" of judicial veneer as the current system.[82] Moreover, given that restructuring the nation's immigration court system would require significant legwork regardless of the ultimate structure, this risk likely renders negligible the benefit of advocating for an agency structure that would afford only a minor overhaul.[83]

C. An Article I Immigration Court

Transforming the immigration court system into an independent adjudicatory system consistent with Article I of the U.S. Constitution has attracted a growing consensus as the most desirable method of establishing and preserving IJ independence.[84] There is less consensus, however, over exactly what that would look like.

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[81] *See, e.g.*, Keith Bradley, *The Design of Agency Interactions*, 111 COLUM. L. REV. 745, 791–94 (2011) (explaining one method of "amplify[ing] presidential influence" over agencies through methods other than formal control, *id.* at 794). *Compare, e.g.*, Vike, *supra* note 78, at 580 (describing presidential influence over OSHRC), *with, e.g.*, William B. Gould IV, *Politics and the Effect on the National Labor Relations Board's Adjudicative and Rulemaking Processes*, 64 EMORY L.J. 1501 (2015) (describing the influence various recent presidential administrations have had on the National Labor Relations Board).

[82] *Strengthening and Reforming America's Immigration Court System: Hearing Before the Subcomm. on Border Sec. & Immigr. of the S. Comm. on the Judiciary*, 115th Cong. 8 (2018) [hereinafter *Strengthening and Reforming America's Immigration Court System*], https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf [https://perma.cc/2TFB-LEAJ] (statement of A. Ashley Tabaddor, President, Nat'l Ass'n of Immigr. Judges).

[83] Professor Stephen Legomsky has proposed a slight variation on this approach: he would adopt it in full, with the caveat that appellate jurisdiction would be vested exclusively in a new Article III Court of Appeals that would hear only immigration cases. Legomsky, *supra* note 22, at 1686–87. Logistically, however, this seems difficult to implement, not least because it would be a difficult swing for Congress and the federal judiciary. Such a drastic change in not only the administrative state but also the federal court system would be even less feasible than establishing an Article I immigration court, and the marginal benefits a specialized Article III court would achieve over an Article I court seem far outweighed by the opportunity costs of advocating for such an effort.

[84] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 73–80 (2017), https://www.gao.gov/assets/gao-17-438.pdf [https://perma.cc/9RB5-F6RE]; Press Release, Fed. Bar Ass'n, FBA Statement on Rep. Zoe Lofgren's (D-CA) Independent Immigration Courts Legislation (Feb. 2, 2022), https://www.fedbar.org/government-relations/policy-priorities/article-i-immigration-court [https://perma.cc/8DDY-G4MU]. The three most recent presidents of the National Association of Immigration Judges (NAIJ) have all advocated for an Article I immigration court. *See* Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGR. BULL. 3, 15–20 (2008); *Courts in Crisis*, *supra* note 49, at 21–22 (statement of A. Ashley Tabaddor); Tsankov, *supra* note 42, at 322. As demands for an Article I immigration court have

Congresswoman Zoe Lofgren has brought this proposal as close to success as it has ever been. On February 3, 2022, Representative Lofgren introduced a landmark bill, the Real Courts, Rule of Law Act,[85] to "[e]stablish an independent immigration court" under Article I of the Constitution.[86] Under the proposed act, immigration courts would become part of an Article I court system split into trial, appellate, and administrative divisions.[87] Trial-level judges would be appointed by the appellate judges and removable only for cause; appellate judges would need to be appointed through presidential nomination and the advice and consent of the Senate.[88] Endorsements of the bill from the American Bar Association, the American Immigration Lawyers Association, the Federal Bar Association, and the National Association of Immigration Judges (NAIJ) demonstrate general support among parties with vested interests in IJ independence and immigration court reform, bringing the vision of an Article I immigration court closer to reality.[89]

Structurally, an Article I court may seem functionally similar to an independent agency, as both would be independent adjudicatory bodies within the executive branch. So one might argue that an Article I court would be subject to the same dangers as the independent agency and, indeed, the current system are: that is, an Article I court might appear to be independent while it is still being manipulated by the executive branch. There are, however, significant distinctions between the institutional designs of existing Article I courts and independent adjudicatory agencies (compare, for example, bankruptcy courts with the National Labor Relations Board (NLRB) or the Occupational Safety and Health Review Commission (OSHRC) — the last two are significantly more subject to presidential influence).[90] Moreover, there is power in the symbolic differences between the two structures: because an Article I court is likely to be perceived by the public as more independent than an independent agency is, the Executive may be more

gained momentum, even the American Bar Association has rejected anything short of an Article I court, including structures similar to those listed earlier in this Part — a departure from the ABA's previous recommendations in light of the continued and sustained deterioration of IJs' independence in the last decade. 1 COMM'N ON IMMIGR., AM. BAR ASS'N, 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM, PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 25–27 (2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf [https://perma.cc/K7W3-F8SC]; *see also* Tsankov, *supra* note 42, at 314.

[85] H.R. 6577, 117th Cong. (2022).

[86] Press Release, Rep. Zoe Lofgren, Lofgren Introduces Landmark Legislation to Reform the U.S. Immigration Court System (Feb. 3, 2022), https://lofgren.house.gov/media/press-releases/lofgren-introduces-landmark-legislation-reform-us-immigration-court-system [https://perma.cc/RP25-RD9S].

[87] H.R. 6577, 117th Cong. § 2, sec. 601(a) (2022).

[88] *Id.* § 2, secs. 601(b)(2)(A), 601(e)(2)(A), 602(f).

[89] Press Release, Rep. Zoe Lofgren, *supra* note 86.

[90] *Compare* Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 754–55 (2010), *with* sources cited *supra* note 81.

constrained, for example, in how it can attempt to influence the courts without attracting public pushback.

The mere introduction of a bill does not mean it will become law, of course, and this is perhaps the biggest drawback of the Article I approach: such sweeping reform is likely to be highly controversial in Congress, a body that has historically limited immigrant procedural rights far more frequently than it has expanded them,[91] and may take a significant amount of time to pass and implement, if it passes at all.[92] In the realm of immigration, this is costly — every day the courts continue to function as is, hundreds of people are denied fair and independently reasoned decisions regarding their immigration statuses. But this does not mean that an Article I court is not worth pursuing; rather, it simply means that reformers should also advocate for reforms that could be implemented more quickly in the meantime. More specifically, the executive branch's considerable power over IJs and the immigration court system means that the current administration has the power to implement meaningful and necessary reforms in the short term.

III. INTERMEDIATE REFORM

The smaller disparities between immigration courts and typical courts can be "easily" remedied, in that they would require simple directives rather than systemic overhaul. By using its power over the immigration court system to increase, rather than decrease, the system's independence, the executive branch could significantly mitigate many of the problems the system faces. For example, requiring judges to issue all decisions as written decisions — and providing them with the resources required to do so — would encourage better-reasoned decisions.[93] More resources would also alleviate the issues caused by the overwhelming backlog of cases and chronic underresourcing of the courts, so long as the funding is attached to carefully articulated specifications.[94] Ongoing, more comprehensive, and independent training

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[91] *See* BOSWELL, *supra* note 9, at 4–20 (surveying history of immigration legislation). *See generally* WALTER A. EWING, IMMIGR. POL'Y CTR., OPPORTUNITY AND EXCLUSION: A BRIEF HISTORY OF U.S. IMMIGRATION POLICY (2012).

[92] In perhaps an indication of the nature of future debates, Representative Tom Tiffany, a Republican from Wisconsin, argued during a House Judiciary Committee hearing in January 2022 that an Article I immigration court is not a sufficiently pressing issue and that Congress should instead be focused on "enforcing our immigration laws." Caroline Coudriet, *Lofgren Bill Would Move Immigration Courts Outside DOJ*, ROLL CALL (Feb. 3, 2022, 10:38 AM), https://rollcall.com/2022/02/03/lofgren-bill-would-move-immigration-courts-outside-doj [https://perma.cc/2MZZ-WUPY].

[93] Email Interview with Dana Leigh Marks, *supra* note 29.

[94] For example, if funding is provided to hire additional employees, it should be circumscribed only for IJs and support staff so that EOIR higher-ups may not use it to hire supervisory employees who do not hear cases. *See* Tsankov, *supra* note 42, at 312. In addition, hiring influxes should be thoughtfully and deliberately managed. In the past, the combination of mass hiring and existing IJs' busy schedules has prevented new hires from interacting with, observing, and learning from experienced IJs. Email Interview with Dana Leigh Marks, *supra* note 29.

would both better prepare IJs for their jobs and lessen the influence the AG and other DOJ supervisors have over IJs immediately upon hiring.[95]

Three reforms, in particular, stand out as the most impactful in terms of effectiveness and ease of implementation: for-cause removal, functional contempt power, and more seamless interaction with United States Citizen and Immigration Services (USCIS). Together, these reforms could be implemented by the executive branch quickly, with little issue, and would insulate IJs from executive branch influence while also contributing to greater efficiency in the immigration court system.

A. Removal Protections

Perhaps most clearly, requiring that IJs may be removed only for cause would ameliorate numerous pressures IJs currently experience, given that "[t]he threat of at-will removal . . . is a potent stick for ensuring that [an adjudicator] does the bidding of the removing official."[96] Requiring a good-cause finding by an AG-designee before removal would allow IJs to adjudicate cases without the currently ever-present fear and pressure of losing their jobs; as a result, IJs would feel freer to issue decisions based on the merits of each case, not the sitting administration's policy preferences. Moreover, any DOJ "soft quotas" and soft pressure would have considerably weaker influence.

What "good cause" means would require careful line drawing, as courts have never defined the term; however, there is general consensus that the term places at least some restrictions on the Executive's power to remove.[97] Still, the Executive generally has discretion over what constitutes "good cause" (and there is some argument that, beyond some abstract limit, the term can mean "whatever the President wants it to mean");[98] therefore, an administration implementing this reform would be wise to define clear parameters for IJ removal. These parameters could take various forms — for example, required investigations if an IJ receives a certain number of credible complaints from the public or

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[95] Professor Michele Pistone has developed one such training program for students that could be easily adapted for judges. *See VIISTA — Villanova Interdisciplinary Immigration Studies Training for Advocates*, VILL. UNIV., https://www1.villanova.edu/university/professional-studies/academics/professional-education/viista.html [https://perma.cc/D6KE-MKW7].

[96] Kent Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 53 GA. L. REV. 1, 96 (2018).

[97] Cary Coglianese, Opinion, *"Good Cause" Does Not Mean Anything Goes*, REGUL. REV. (Apr. 18, 2018), https://www.theregreview.org/2018/04/18/coglianese-good-cause-not-anything-goes [https://perma.cc/A5PM-8YCK]; *see, e.g.*, Bowsher v. Synar, 478 U.S. 714, 729 (1986) (interpreting statute's good-cause removal standards of "inefficiency," "neglect of duty," or "malfeasance" as "very broad" and allowing for removal "for any number of actual or perceived transgressions"); Ramspeck v. Fed. Trial Exam'rs Conf., 345 U.S. 128, 142 (1953) (interpreting the "good cause" standard as barring "promot[ion] or discharge[] at the whim or caprice of the agency or for political reasons"); *see also* Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 27–52 (2021) (describing the way for-cause protections have been understood over time).

[98] Coglianese, *supra* note 97.

the immigration bar, or a certain number of federal court decisions in which federal judges sharply criticize IJ decisionmaking. While a certain amount of line drawing would be required to distinguish, for instance, an IJ who nakedly refuses to follow precedent from an IJ who is simply making decisions independent of the AG, such strictures could be identified and refined through the rulemaking process as practitioners, judges, and other interested parties provide their input. The DOJ may promulgate removal protections either through typical notice-and-comment regulations[99] or under the APA exemptions that allow "rules of agency organization, procedure, or practice" and rules that govern matters "relating to agency management or personnel" to forego notice and comment.[100]

The biggest and most obvious challenge to this approach is that ALJ for-cause removal protections themselves are legally questionable after *Lucia v. SEC*,[101] in which the Court found that the Securities and Exchange Commission's ALJs are "inferior officers" under the Appointments Clause and must be hired accordingly.[102] It follows, then, that the President must have the same discretion to remove ALJs as they do other inferior officers — a discretion that the Court has found unconstitutionally limited by multilayer removal schemes such as the one that governs ALJs.[103] In fact, the ALJ removal scheme may become increasingly similar to the IJ removal scheme rather than the other way around.[104] But this does not mean that IJ for-cause removal protections are necessarily ill fated — circuits have ruled both ways, and while the Supreme Court may eventually have to decide the fate of for-cause

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[99] Such rules, once promulgated, must be followed by the agency even after new presidential administrations come into power and can be undone only by further notice-and-comment rulemaking. *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41–42 (1983) (holding agency rescission of a rule to "arbitrary and capricious" standard); Am. Lung Ass'n v. EPA, 985 F.3d 914, 938 (D.C. Cir. 2021) (mentioning that the EPA rescinded a former rule through notice and comment), *rev'd and remanded sub nom.* West Virginia v. EPA, 142 S. Ct. 2587 (2022).

[100] 5 U.S.C. § 553(a)(2), (b)(3)(A). For the sake of transparency and informed decisionmaking, the Administrative Conference of the United States has recommended that agencies utilize this exception only when the proposed rule is "truly procedural, rather than substantive in a procedural mask." ADMIN. CONF. OF THE U.S., RECOMMENDATION 92-1: THE PROCEDURAL AND PRACTICE RULE EXEMPTION FROM THE APA NOTICE-AND-COMMENT RULEMAKING REQUIREMENTS 2 (June 18, 1992), https://www.acus.gov/sites/default/files/documents/92-1.pdf [https://perma.cc/5LU8-PN3B]. On its face, implementing a more protective removal scheme seems clearly procedural — such a rule would not directly impact anyone other than IJs themselves, nor would it change any substantive or procedural requirement for those appearing in immigration court. Moreover, there is precedent for establishing removal requirements this way; for example, the DOJ itself has previously issued a rule under these exemptions that DOJ-appointed special counsel may be removed by the AG for cause only. *Id.*

[101] 138 S. Ct. 2044 (2018).

[102] *See id.* at 2055.

[103] *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 514 (2010).

[104] *See, e.g.*, Spencer Davenport, Note, *Resolving ALJ Removal Protections Problem Following* Lucia, 53 U. MICH. J.L. REFORM 693, 701–04 (2020) (explaining post-*Lucia* executive action regarding ALJ removal protections and their ramifications).

removal protections, it has not yet done so.[105] Perhaps mirroring ALJ protections while this question remains open is unwise, but there have been proposals for removal requirements that may allow EOIR to work around the *Lucia* holding.[106] In addition, removal protections are not unprecedented in the non-ALJ world; for example, Equal Employment Opportunity Commission Administrative Judges and NLRB Hearing Officers enjoy removal protections based on their collective-bargaining agreements, as well as "regulations, guidance, and custom."[107]

Removal protections are also not all created equal. If removal is a spectrum with at-will removal on one end and ALJ for-cause protections on the other, IJ job protections could exist somewhere in the middle. To prevent any future use of Sessions-esque metrics as pretext for at-will removal, these protections should be carefully designed to hold IJs to a quality standard while closing the door on undue executive influence. The DOJ could do this by, for example, meeting with interested parties and experts — including IJs, the NAIJ, scholars, and DOJ officials — to develop a set of fair performance standards IJs are expected to meet and a removal process that is more involved than simply "at-will" but not so strict as to invite legal trouble. Moreover, the clarity and transparency of the removal scheme is just as important as the substance of the removal protections themselves — fear of sanction, regardless of whether it has ultimately been realized, has proven a strong motivator for IJs to cater to the Executive's policy preferences. As such, these standards should be promulgated as part of the rule. This would ensure that they are clear, transparent, communicated to all involved, and relatively fixed; that is, their existence and administration should remain consistent across regime changes.

B. Contempt Power

Establishing functional contempt power for IJs would give them greater control over their dockets, leading to both better-adjudicated cases and more efficient case management. IJs have reported that their lack of contempt power often contributes to the infamous sluggishness of immigration hearings; for example, "it is not uncommon for cases to be continued due to private counsel's failure to appear or be prepared

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[105] *See* Paul R. Verkuil, *Presidential Administration, The Appointment of ALJs, and the Future of For Cause Protection*, 72 ADMIN. L. REV. 461, 469 (2020) ("Presumably, the Supreme Court will step in to explain the limits of *Lucia* before things go that far."); *see also, e.g.*, Jarkesy v. SEC, 34 F.4th 446, 463 (5th Cir. 2022) (finding the for-cause removal protections enjoyed by SEC ALJs unconstitutional); Decker Coal Co. v. Pehringer, 8 F.4th 1123, 1130 (9th Cir. 2021) (finding the for-cause removal protections enjoyed by Department of Labor ALJs constitutional).

[106] *See, e.g.*, Davenport, *supra* note 104, at 708–13 (surveying possible proposals and arguing for peremptory challenges to remove ALJs from specific cases); *see also* Barnett & Wheeler, *supra* note 96, at 97–99 (explaining common themes in non-ALJ removal schemes and the ways agencies can ensure those schemes are transparent and effective).

[107] Barnett & Wheeler, *supra* note 96, at 84 & n.245.

for a hearing, or [DHS attorneys'] failure to follow the Court's orders."[108] Historically, the contempt power has been viewed as "necessary to the exercise" of the adjudicatory power.[109] If a party disobeys a subpoena or other court order, an IJ's only method of formal recourse is to request the same subpoena from a U.S. district court — a method that IJs seem understandably reluctant to use and that has resulted in a subpoena exactly one time.[110] Because attorneys endure no repercussions for their misconduct, they feel no need to curtail it; in fact, some attorneys purposefully prioritize nonimmigration cases over immigration cases because IJs lack contempt power.[111] This phenomenon has resulted in immigration courts having higher failure-to-appear rates than does any state or federal court in the country.[112]

If efficiency and reducing the current case backlog are truly priorities for the executive branch, then contempt power is an obvious mitigation technique, as it would allow IJs to ensure that their cases are being heard and resolved in a timely manner. Though there is some risk IJs unsympathetic to noncitizens would weaponize this power as another mode of hostility towards noncitizens and their attorneys, this risk would be present for any facially neutral mode of giving IJs' orders more teeth. Rather than foregoing an otherwise useful reform, this concern could be mitigated by ensuring IJ neutrality and quality in other ways —through the other reforms listed in this Part, for example.

Granting IJs this power would be relatively simple and uncontroversial; in fact, the AG has the explicit authority to do it. In 1996, Congress amended the Immigration and Nationality Act to give IJs "authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority."[113] Though they have occasionally indicated

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[108] *Strengthening and Reforming America's Immigration Court System*, *supra* note 82, at 4 (statement of A. Ashley Tabaddor).

[109] United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812).

[110] *See* Andrea Saenz, *Subpoenas in Immigration Court*, IMMIGR. L. ADVISOR, Aug. 2011, at 1, 16; *cf.* MARK H. METCALF, CTR. FOR IMMIGR. STUD., BUILT TO FAIL: DECEPTION AND DISORDER IN AMERICA'S IMMIGRATION COURTS 49 (2011), https://cis.org/sites/cis.org/files/articles/2011/built-to-fail-full.pdf [https://perma.cc/9WUM-JGZ5] (arguing that IJ reliance on external processes to enforce court orders "separates the judge from his case" and means that "judges are disqualified to discipline the same people they may order returned to their homelands or grant the path to citizenship . . . [and] are made bystanders").

[111] *Strengthening and Reforming America's Immigration Court System*, *supra* note 82 (statement of A. Ashley Tabaddor) ("[W]hen I confronted an attorney for his failure to appear . . . he candidly stated that he had a conflict with a state court hearing, and fearing the state court judge's sanction authority, chose to appear at that hearing over the immigration hearing in my court. Similarly, when I asked a DHS attorney why she had failed to engage in the Court mandated pre-trial conference or file the government's position brief in advance of the hearing, she defiantly responded that she felt that she had too many other work obligations to prioritize the Court's order.").

[112] MARK H. METCALF, CTR. FOR IMMIGR. STUD., SKIPPING COURT: U.S. IMMIGRATION COURTS & ALIENS WHO DISAPPEAR BEFORE TRIAL 1–5 (2019), https://cis.org/sites/default/files/2019-01/metcalf-skipping-court.pdf [https://perma.cc/9TR7-34MH].

[113] 8 U.S.C. § 1229a(b)(1); *see* STIMSON & CANAPARO, *supra* note 40, at 4–5.

an intention to, no AG in the over twenty-five years since has promulgated any such regulations.[114]

Some have speculated that this is yet another result of the problematic location of EOIR within the DOJ, in that the refusal to follow through reflects the AG's reluctance to subject DOJ trial lawyers to discipline by IJs in the same agency.[115] Whatever the reason, delay can be justified no longer; the AG has had the authority to put IJs in better control of their dockets for decades. Issuing a straightforward notice-and-comment regulation to do so would be one incremental — but overdue and sorely necessary — step to improving the speed, quality, and legitimacy of our immigration courts.[116]

C. *Integrating USCIS Systems*

IJs lack jurisdiction over initial adjudications that go through USCIS, such as visa applications and other USCIS petitions. This problem is exacerbated by the lack of streamlined communication — and, in some cases, any communication whatsoever — between USCIS and EOIR. *Benslimane v. Gonzales*[117] provides a good illustration of the consequences of such a system. In that case, Benslimane submitted an adjustment-of-status request after marrying an American citizen.[118] At the same time, his new wife separately submitted a visa petition for him.[119] While this was taking place, the government put him in removal proceedings.[120] After being told about the visa petition, the IJ gave the government lawyer ninety days to report to the judge the petition's status.[121] Because the petition was being adjudicated by USCIS, the government lawyer did not have any information about the petition.[122] The judge then asked Benslimane to file his adjustment-of-status petition — a petition that he had already filed with USCIS over ninety days prior — with the court within sixty days.[123] Due to a procedural misunderstanding, Benslimane's lawyer failed to submit a copy of the petition he had already filed months earlier.[124] The IJ ordered Benslimane removed.[125]

At best, then, these separate adjudicative tracks create a potential for mismatch in scheduling and delay due to avoidable dysfunction. At

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[114] STIMSON & CANAPARO, *supra* note 40, at 5.

[115] *Id.*

[116] That the contempt power would be relatively safe from sudden revocation by subsequent administrations would allow IJs to exercise it with relative confidence and stability. *See supra* note 99 and accompanying text.

[117] 430 F.3d 828 (7th Cir. 2005).

[118] *Id.* at 830.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.* at 831.

[123] *Id.* The government lawyer also could not obtain a copy of the petition. *Id.*

[124] *Id.*

[125] *Id.*

worst, noncitizens are subject to the emotional turmoil of removal proceedings that may very well turn out to be completely inappropriate, and the immigration court system spends valuable time adjudicating cases it may have no need to hear. When IJs are forced to grant continuances to wait for pending USCIS adjudications, they further exacerbate the delays that many cases already face.[126] Moreover, immigration court hearings are sometimes used to adjudicate facts or discretionary factors that overlap with the facts and factors USCIS adjudicates when deciding, for example, whether a marriage is bona fide.[127]

Improving the interplay between EOIR and USCIS is thus a critical step on the way to greater efficiency and fairer adjudications. One key component of this is opening, improving, and streamlining the channels of communication between the two agencies. On one level, this would prevent the sort of fiasco that occurred in *Benslimane*; on another, the agencies may be able to consolidate their factfinding processes to adjudicate cases more quickly, especially those that are more straightforward. USCIS is no stranger to collaborating with other agencies; for example, it has continuously worked with law enforcement agencies to enforce immigration law.[128] Another component involves granting IJs increased authority. The DOJ could do this unilaterally by, for instance, implementing procedures that require IJs to grant continuances or to administratively close cases that involve pending USCIS adjudications.[129] DHS could utilize its prosecutorial discretion to issue guidance (or, in a stronger move, promulgate a notice-and-comment regulation) directing its employees to refrain from bringing people with pending USCIS petitions into removal proceedings. While preventing future administrations from removing certain classes of people may seem to impermissibly restrict presidential prerogative, using notice and comment to codify such action may actually put the administration on stronger

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[126] *See, e.g.*, Hashmi v. Att'y Gen. of the U.S., 531 F.3d 256, 258–59 (3d Cir. 2008).

[127] *See* Email Interview with Dana Leigh Marks, *supra* note 29.

[128] *See, e.g.*, Katarina Ramos, *Criminalizing Race in the Context of Secure Communities*, 48 CAL. W. L. REV. 317, 322–24, 331 (2012) (describing interplay between USCIS, Immigration and Customs Enforcement, the Federal Bureau of Investigation, and local law enforcement in the context of the Secure Communities program).

[129] This would also solidify administrative closure as a tool available to IJs, a tool that is critical for efficient docket management and that has been given to and taken away from IJs throughout the years. *See, e.g.*, *In re* Castro-Tum, 27 I. & N. Dec. 271, 273 (A.G. 2018), *overruled by In re* Cruz-Valdez, 28 I. & N. Dec. 326, 326–28 (A.G. 2021); AARON REICHLIN-MELNICK, AM. IMMIGR. COUNCIL, PRACTICE ADVISORY: ADMINISTRATIVE CLOSURE AND MOTIONS TO RECALENDAR 3–4 (2017), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/practice_advisory_administrative_closure_and_motions_to_recalendar.pdf [https://perma.cc/MF3U-4DLA]. Currently, a common method for putting removal proceedings on hold for a noncitizen to seek adjustment of status before USCIS is for the parties to file a joint motion to dismiss. *See* Elizabeth Carlson, *Adjustment of Status: Immigration Judges as well as USCIS Can Rule on Marriage Bona Fides*, CATH. LEGAL IMMIGR. NETWORK, INC. (CLINIC) (Oct. 28, 2021), https://cliniclegal.org/resources/family-based-immigration-law/adjustment-status-immigration-judges-well-uscis-can-rule [https://perma.cc/VP8G-XAWZ].

legal footing, especially given that the agency would simply be opting not to remove certain people rather than providing them with affirmative benefits.[130] Further, framing the regulation in terms of prioritizing efficiency and avoiding duplicative adjudications may lend validity to a regulation that would bind future administrations. The DOJ and DHS could also issue joint regulations geared towards minimizing double adjudications and time wasting, for example by creating an expedited USCIS process for people also in removal proceedings.

D. Soft Reform

Finally, though they may be more vulnerable to changing political whims, soft reforms are critical to establishing and maintaining structural respect for IJs' independence. This could include EOIR establishing a general culture of respect for IJs as adjudicators, not just employees supervised like any other. The DOJ should work to promote and develop a culture of professionalism, which "springs from a number of sources . . . [including] the training, expertise, and sense of mission shared by the adjudicators."[131] More specifically, this could look like less stringent supervision of IJs' workdays and caseload management, the termination of "soft quotas" and the interpersonal pressures the agency has put on IJs to decide cases quickly and in certain ways, and the intentional characterization of IJs as impartial adjudicators, not law enforcement employees, at trainings, conferences, and in day-to-day interactions.

CONCLUSION

The immigration crisis in this country has reached new heights. At the root of this crisis is the placement of our immigration courts inside the DOJ, which subjects IJs to control by the AG and an untenable set of working conditions that render the U.S. immigration court system not an independent adjudicatory system but a prosecutorial one. Because these conditions stem from the very structure of the current administrative state and EOIR's place within it rather than political pressures alone, any reform short of complete extraction and transformation of EOIR into an Article I immigration court is likely to fall short. While waiting for Congress to act, however, the executive branch has the authority to implement several crucial reforms that would allow for noncitizens to have their cases heard in fairer proceedings overseen by IJs with true, independent adjudicatory power.

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[130] *Cf.* Texas v. United States, 549 F. Supp. 3d 572, 603–14 (S.D. Tex. 2021) (finding that DHS was required to use notice and comment to implement DACA, and that DACA was substantively unlawful because it conferred affirmative benefits — such as lawful presence and work authorization — to noncitizens rather than simply directing officials to refrain from removing certain groups of immigrants), *aff'd in part and remanded*, 50 F.4th 498 (5th Cir. 2022).

[131] Margaret H. Taylor, Response, Refugee Roulette *in an Administrative Law Context: The* Déjà Vu *of Decisional Disparities in Agency Adjudication*, 60 STAN. L. REV. 475, 500 (2007).