

IMMIGRATION ADJUDICATION BANKRUPTCY

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ABSTRACT

The Trump Administration is pushing an adjudicatory system on the brink over the edge. The system designed to decide whether to remove (deport) individuals from the United States has longstanding problems that predate the Trump Administration. Those problems are being exacerbated rather than improved. It is time to consider the notion of immigration adjudication bankruptcy. Immigration adjudication bankruptcy involves a declaration that the removal adjudication system is not satisfying the basic principles of administrative process: accuracy, acceptability, and efficiency. This Article, a part of a symposium on executive power and immigration law, raises questions about when bankruptcy should be declared and examines issues surrounding the restructuring of immigration removal adjudication.

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INTRODUCTION

When President Trump took over as steward for the immigration adjudication system, he inherited a system beset with problems and struggling to fulfil its core mission: to fairly, accurately, and efficiently decide whether a noncitizen will be removed (deported) from the United States. Despite the Trump Administration's expressed skepticism about regulatory power, the administration has let dysfunctional government power fester in immigration adjudication.¹ Even worse than that, the Trump Administration has made the removal hearing process even less fair and President Trump himself has expressed that he does not believe that process is even necessary when it comes to immigrants. The Administration's views on immigration clearly trump any concern it has about government power in other regulatory contexts.

The Trump Administration is pushing an adjudicatory system on the brink over the edge. This requires consideration of immigration adjudication bankruptcy. Immigration adjudication bankruptcy is a scenario where the system fails to serve the basic principles of administrative adjudication: accuracy, efficiency, and acceptability.² Accuracy "serves as a reminder that the ascertainment of truth, or, more realistically, as close an approximation of reality as human frailty permits, is the major goal of most contested proceedings."³ Efficiency is "the time, effort, and expense of elaborate procedures."⁴ Acceptability "emphasizes the indispensable virtues of procedures that are considered fair by those whom they affect, as well as by the general public."⁵

In immigration adjudication bankruptcy, the immigration court system will no longer be acceptable because it will not function as an unbiased check on immigration enforcement officials. The system will abandon efforts to separate functions and will become accountable only to the desired outcome

¹ See Jill E. Family, *Immigration Law Allies and Administrative Law Adversaries*, 32 GEO. IMMIGR. L.J. 99, 123 (2018) (exploring the phenomenon of the role of immigration law regulation during a deregulatory administration). The American Bar Association has described the immigration courts as "facing an existential crisis" and reports that "the current system is irredeemably dysfunctional and on the brink of collapse." 2 AM. BAR ASS'N COMM'N ON IMMIGRATION, 2019 UPDATE REPORT: REFORMING THE IMMIGRATION SYSTEM 2-3 (2019), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf [hereinafter ABA REPORT].

² Roger C. Cramton, *Administrative Procedure Reform: The Effects of S. 1663 on the Conduct of Federal Rate Proceedings*, 16 ADMIN. L. REV. 108, 112 (1964). For further discussion of Cramton's criteria in the immigration law context, see Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 633-47 (2009).

³ Cramton, *supra* note 2, at 112.

⁴ *Id.*

⁵ *Id.*

of policymakers who publicly favor removal and denigrate process. As a result of its descent into unacceptability, the immigration adjudication system will become a façade of justice and will exist to put a stamp of approval on the decisions of immigration prosecutors. It also will become more inaccurate as it does not seek whatever outcome the law requires in an individual case. The system will place such a high value on efficiency⁶ that the values of accuracy and acceptability will be abandoned.

This Article, a part of a symposium on executive power and immigration, will examine the state of the immigration adjudication system before the Trump Administration, as well as the Trump Administration's efforts that have further damaged the system. From there, the Article will explain that the immigration adjudication system is in a precarious state and is being pushed toward bankruptcy. At what point should the system be declared bankrupt? If it is bankrupt, how should it be reorganized? While a clean slate may have some appeal, the Trump Administration is poised to rebuild a system that is fundamentally opposed to the idea of process for noncitizens and one that embraces government prosecution power at the expense of administrative law values.

I. IMMIGRATION ADJUDICATION BEFORE THE TRUMP ADMINISTRATION

The system designed to adjudicate whether an individual will be removed from the United States faces major challenges. Both Democratic and Republican administrations have failed to course correct over time; the system has been inefficient and dissatisfying for decades. Therefore, all of the blame for what ails immigration adjudication should not be laid at the feet of the Trump Administration. This Part will describe the long-term challenges facing immigration adjudication and its state at the time of President Trump's inauguration in January 2017.

The long-term challenges exist against a constitutional backdrop where the application of the Constitution's provisions take place in the specialized context of immigration law. For example, the application of the Due Process Clause may depend on the location of the noncitizen. The Due Process Clause of the Constitution states that "[n]o person shall be . . . deprived of life, liberty, or property without due process of law."⁷ The clause applies to all *persons* and not just citizens. The Supreme Court has held that the Due Process Clause applies to all persons *within* the United States, even if the person is in the United States without permission.⁸ The Supreme Court,

⁶ The type of efficiency implicated in immigration adjudication bankruptcy is one where speed is most valued, but only if the speedy decision results in removal.

⁷ U.S. CONST. amend. V.

⁸ *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("It is true that aliens who

however, has held that the Due Process Clause applies differently in the case of removal upon application for admission (at the border) versus removal after entry (even if unlawful) into the United States.⁹ If the applicant for admission is a returning lawful permanent resident, however, the Supreme Court has held that the individual does not lose his or her protection under the Due Process Clause as long as the person's absence from the United States was innocent, casual, and brief.¹⁰

When the Due Process Clause applies, the exact contours of its protection in immigration adjudication varies, and some questions are unresolved or evolving. For example, there is no statutory right to government-funded counsel in immigration court.¹¹ So far, the Supreme Court has not held that the Constitution requires otherwise.¹²

Congress has created a statutory scheme of immigration adjudication against this at times unresolved constitutional background. Congress designed the adjudication system to determine whether someone applying for admission at the border should be admitted and whether someone who has reached the interior should be removed. The system is structured to diffuse functions among the Department of Justice and the Department of Homeland Security.¹³ Immigration judges, who are attorney employees of the Department of Justice, are the trial-level adjudicators.¹⁴ They preside over immigration court. During a hearing before an immigration judge, a lawyer who works for the Department of Homeland Security represents the government.¹⁵ The foreign national respondent may be represented if the

have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”)

⁹ *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (stating that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned”).

¹⁰ *Landon v. Plasencia*, 459 U.S. 21, 29–32 (1982); *Rosenberg v. Fleuti*, 374 U.S. 449, 460–61 (1963).

¹¹ 8 U.S.C. § 1229a(b)(4)(A) (2012) (authorizing use of counsel “at no expense to the Government”).

¹² However, a lower court held in 2010 that there is an obligation under the Rehabilitation Act to provide representation to foreign nationals with mental disabilities in immigration court. *See Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034, 1051–52 (C.D. Cal. 2010). After that decision, the Department of Justice announced a policy to provide counsel to immigrants with serious mental disabilities. Press Release, U.S. Dep’t of Justice, Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions (Apr. 22, 2013), <https://www.justice.gov/eoir/pr/department-justice-and-department-homeland-security-announce-safeguards-unrepresented> (last updated July 15, 2015). The United States Court of Appeals for the Ninth Circuit in 2018 agreed to hear en banc a case challenging the lack of government-appointed counsel for children in immigration court. *See C.J.L.G. v. Sessions*, 904 F.3d 642 (9th Cir. 2018).

¹³ *See generally* Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135.

¹⁴ 8 U.S.C. § 1101(b)(4) (2012).

¹⁵ *Who We Are: Overview*, U.S. IMMIGRATION & CUSTOMS ENF’T: OFFICE OF THE PRINCIPAL LEGAL ADVISOR (OPLA), <https://www.ice.gov/opla#wcm-survey-target-id> (last updated Mar. 6, 2019) (explaining that over 1,100 attorneys work for the Office of the Principal Legal Advisor (“OPLA”) for Immigration and Customs Enforcement (“ICE”) and that OPLA is the “exclusive representative

individual can arrange for representation on their own.¹⁶ Decisions of immigration judges may be appealed to the Board of Immigration Appeals,¹⁷ which is a part of the Department of Justice. Through a petition for review process, a United States Court of Appeals may have judicial review of the final administrative decision regarding removability, but the availability of judicial review is limited.¹⁸

Immigration judges are administrative judges; they are not administrative law judges.¹⁹ Despite a regulatory command to use their independent judgment in adjudicating cases, they lack the job protections of administrative law judges, who are more protected from agency influence.²⁰ Traditionally, the hiring of administrative law judges occurred through an independent agency called the Office of Personnel Management and their firing through another, the Merit Systems Protection Board.²¹ The pay of administrative law judges is not dependent on a performance review.²² When a neutral entity makes employment decisions and pay does not depend on pleasing the agency boss, that promotes independent decision-making. By contrast, immigration adjudicators are hired and fired by the agency they work for, the Department of Justice. The Department of Justice also sets the conditions of immigration judge employment.

One long-standing objection to the role of immigration adjudicators is that they lack adequate decisional independence.²³ There have been several proposals to make immigration adjudication more independent.²⁴

of [the Department of Homeland Security] in immigration removal proceedings”).

¹⁶ 8 U.S.C. § 1229a(b)(4)(A) (2012).

¹⁷ 8 C.F.R. § 1003.10(c) (2014).

¹⁸ 8 U.S.C. § 1252 (2012).

¹⁹ Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1647 (2016).

²⁰ 8 C.F.R. § 1003.10(b) (2014).

²¹ *But see* Exec. Order No. 13,843, 83 Fed. Reg. 135 (July 10, 2018). On July 10, 2018, President Trump issued Executive Order No. 13,843 which excepted Administrative Law Judges (“ALJs”) from the Competitive Service selection process, through which they were previously appointed to federal agencies, and required all new ALJ appointments be made into the Excepted Service. *Id.* *See also* Barnett, *supra* note 19, at 1653–56.

²² Barnett, *supra* note 19, at 1655 (stating that ALJs pay is set by statute and regulation but not performance reviews).

²³ *See, e.g.*, Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369 (2006). Professor Legomsky focused his analysis of immigration adjudicator independence on “the threat of personal consequences for the adjudicator.” *Id.* at 389. Professor Legomsky explained:

Under this constraint, the case is presumed to be one that the law clearly allows the adjudicator to decide, and there is no attempt by a superior to directly dictate the outcome of that case, but there are general threats, real or perceived, that decisions which displease an executive official could pose professional risks for the adjudicator. Those risks might include dismissal, reassignment to a less desirable position, nonrenewal of the appointment at the expiration of a fixed term, or loss of compensation.

Id.

²⁴ There are proposals, for example, to recreate immigration adjudication as an Article I court with greater autonomy from the Executive Branch. *See, e.g.*, Christine Lockhart Poarch, *The FBA’s*

Immigration adjudicators must decide cases worried about what the Attorney General, the country's top law enforcement official, thinks of their decision-making record.²⁵ Additionally, the Attorney General has the power to certify removal cases to himself if he does not like the work product of the immigration adjudication system.²⁶ Therefore, even if independent decision-making occurs, the Attorney General may fairly easily overrule it.

Concerns about the independence of immigration adjudicators are not solely abstract. In the past, immigration judge positions have been politicized. During the George W. Bush Administration, the Department of Justice Office of Inspector General found that there was unlawful politicized hiring of immigration judges.²⁷ Also, President George W. Bush's Attorney General, John Ashcroft, fired members of the Board of Immigration Appeals in a move that was seen as eliminating board members with lenient reputations.²⁸

Adding to the restrictions on immigration adjudicator independence is substantive immigration law itself. The substantive law that immigration adjudicators are called on to apply leaves them little room to judge—that is, to exercise much independent judgment about the result in any given case.

Proposal for the Creation of a Federal Immigration Court, FED. LAW., Apr. 2014, at 33, <http://www.fedbar.org/Image-Library/Government-Relations/CH16/Proposed-Article-I-Immigration-Court.aspx>; AM. BAR ASS'N COMM'N ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM 9, at 6-16 to 6-17 (2010), https://www.americanbar.org/content/dam/aba/migrated/media/nosearch/immigration_reform_executive_summary_012510.authcheckdam.pdf; AM. IMMIGRATION LAWYERS ASS'N, RESOLUTION ON IMMIGRATION COURT REFORM (2018), <https://www.aila.org/File/DownloadEmbeddedFile/74919>; *see also* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1640 (2010) (recommending that immigration judges become administrative law judges and be relocated from the Department of Justice to an independent tribunal within the Executive Branch). The United States Government Accountability Office ("USGAO") collected suggestions for structural reform in a report addressing the case backlog. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 73–87 (2017), <https://www.gao.gov/assets/690/685022.pdf>.

²⁵ Deputy Attorney General Rod Rosenstein remarked to a class of new immigration judges: "[I]n addition to your adjudicative function—finding facts and applying laws—you are a member of the executive branch. You follow lawful instructions from the Attorney General, and you share a duty to enforce the law." Rod J. Rosenstein, Deputy Att'y Gen., U.S. Dep't of Justice, Opening Remarks at Investiture of 31 Newly Appointed Immigration Judges (Mar. 15, 2019), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rostenstein-delivers-opening-remarks-investiture-31-newly>.

²⁶ 8 C.F.R. § 1003.1(h)(1)(i) (1958).

²⁷ U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 135 (2008), <https://oig.justice.gov/special/s0807/final.pdf>. The investigation found that staff members in the Office of the Attorney General improperly subjected candidates for certain career positions to the same politically based evaluation they used on candidates for political positions, in violation of federal law and Department policy. *Id.*; *see also* Family, *supra* note 2, at 604–08

²⁸ Family, *supra* note 2, at 602–03, 605.

The immigration statutes are so strict and unforgiving that there is little room for immigration judges to consider equities.²⁹ For example, if a foreign national is convicted of what is considered an aggravated felony for immigration law purposes (an “aggravated felony” is a statutory term of art that encompasses crimes that are not aggravated or felonies), that individual is automatically ineligible for almost all kinds of relief from removal.³⁰ Also, there is little proportionality in immigration law when it comes to assigning the consequences of an immigration law violation.³¹ The “punishment” is almost always removal.³² There is no graduated system of consequences. No matter the severity of the immigration violation, the same consequence applies.

Even when an individual is eligible for relief from removal, the statutory prerequisites to relief present steep hurdles. For example, to be eligible for cancellation of removal, some individuals must show that their removal will cause “exceptional and extremely unusual hardship” to a qualifying United States citizen or green card-holding close relative.³³ Exceptional and extremely unusual hardship is hardship that is substantially beyond what is expected when a family is separated because of immigration law.³⁴ In other words, the separation of a parent from a United States citizen child on its own is meaningless. The separation must go beyond even extreme hardship to rise to the level of exceptionally and extremely unusual hardship.

Another longstanding problem in immigration adjudication is a tremendous backlog of cases awaiting adjudication. The backlog of cases in immigration court has climbed steadily since 2009 and rose throughout the Obama Administration.³⁵ Prior to then, the backlog remained under 200,000 cases.³⁶ In 2009, the backlog reached 223,809.³⁷ By 2012, it

²⁹ See Jill E. Family, *Murky Immigration Law and the Challenges Facing Immigration Removal and Benefits Adjudication*, 31 J. NAT'L ASS'N. OF ADMIN. L. JUDICIARY 45, 54–64 (2011).

³⁰ See 8 U.S.C. § 1101(a)(43) (2012) (defining “aggravated felony”); see also AM. IMMIGRATION COUNCIL, AGGRAVATED FELONIES: AN OVERVIEW 1 (Dec. 16, 2016), <https://www.americanimmigrationcouncil.org/research/aggravated-felonies-overview> (“[A]n ‘aggravated felony’ is simply an offense that Congress sees fit to label as such, and today includes many nonviolent and seemingly minor offenses.”).

³¹ See Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1684 (2009) (“Proportionality is conspicuously absent from the legal framework for immigration sanctions. One sanction—deportation—is the ubiquitous penalty for any immigration violation.”).

³² *Id.*

³³ 8 U.S.C. § 1229b(b)(1)(D) (2012).

³⁴ *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 56 (B.I.A. 2001).

³⁵ *Backlog of Pending Cases in Immigration Courts as of January 2019*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php (last visited Apr. 11, 2019).

³⁶ *Id.*

³⁷ *Id.*

reached 325,044.³⁸ Two years later, it reached 408,037.³⁹ By 2016, the backlog crossed over 500,000 to 516,031.⁴⁰ It has continued to grow under the Trump Administration, reaching 629,051 in 2017.⁴¹ The most current estimate tops 800,000.⁴² For cases where the noncitizen respondent is not detained, it is common for that individual to wait years for a hearing.⁴³ The number of immigration judges has increased, but it has not been enough to reduce the backlog.⁴⁴

The lack of lawyers for noncitizens compounds the backlog. One study concluded that only thirty-seven percent of individuals in removal proceedings are represented.⁴⁵ This means that the majority of individuals are representing themselves. This affects not only the fairness of the proceedings, but also affects efficiency.⁴⁶ Represented immigrants spend less time asking for continuances and are more likely to appear at hearings.⁴⁷

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* The number could be over one million, however, if one counts the cases former Attorney General Sessions placed back on the active dockets of the immigration courts through his efforts to curtail the use of docket control measures. *Immigration Court Backlog Surpasses One Million Cases*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Nov. 6, 2018), <http://trac.syr.edu/immigration/reports/536/>; *see also infra*, notes 103–09.

⁴³ *See Average Time Pending Cases Have Been Waiting in Immigration Courts as of January 2019*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog_avgdays.php (last visited Apr. 2, 2019) (showing that, as of January 2019, the average wait is 746 days).

⁴⁴ The Administrative Conference of the United States has recognized the need for additional resources for immigration adjudication. *See* ADMIN. CONFERENCE OF THE U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2012–3: IMMIGRATION REMOVAL ADJUDICATION 3, 5 (2012), <https://www.acus.gov/sites/default/files/documents/2012-3.pdf>. In 2012, there were 264 immigration judges and now there are approximately 400. LENNI B. BENSON & RUSSELL R. WHEELER, ENHANCING QUALITY AND TIMELINESS IN IMMIGRATION REMOVAL ADJUDICATION 6 (2012), <https://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-7-2012.pdf> (reporting 264 immigration judges in 2012); *Office of the Chief Immigration Judge*, U.S. DEP'T OF JUSTICE (Feb. 21, 2019), <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge> (stating that there are approximately 400 immigration judges).

⁴⁵ Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 7, 16 (2015).

⁴⁶ *Id.* at 75.

⁴⁷ *Id.*

The lack of lawyers also affects a noncitizen's ability to succeed in immigration court.⁴⁸ Representation means "dramatically more successful case outcomes" for noncitizens.⁴⁹ The Department of Justice historically has funded a Legal Orientation Program to help address the efficiency problems caused by a lack of representation.⁵⁰ The program does not provide individual representation, but it does provide for group informational sessions for individuals who are detained during their removal proceedings and also helps to match pro bono referrals.⁵¹

Against this background, many have found fault with the quality of adjudication provided in the immigration adjudication system. For example, in 2006, President George W. Bush's Attorney General, Alberto Gonzales conducted a review of immigration judges' behavior that followed a rash of reports of inadequate immigration judge work-product.⁵² United States Courts of Appeals judges have identified incidents of bias and intimidating and demeaning behavior towards respondents.⁵³ Other studies have made recommendations on how to improve immigration adjudication, including examining the use of video hearings and internal court management processes.⁵⁴

Federal courts of appeals judges only see some of the work-product of the immigration adjudication system. This is because, in 1996, Congress reimagined judicial review over immigration administrative adjudication.⁵⁵ For example, Congress eliminated judicial review over questions of fact and discretionary determinations in many removal cases.⁵⁶ Congress also shortened the time to file a petition for review to thirty days.⁵⁷

⁴⁸ *Id.* at 9, 57; *see also* JENNIFER STAVE ET AL., EVALUATION OF THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT: ASSESSING THE IMPACT OF LEGAL REPRESENTATION ON FAMILY AND COMMUNITY UNITY 5–6 (2017), <https://www.vera.org/publications/new-york-immigrant-family-unity-project-evaluation> (finding that a universal representation project in New York City substantially increased the success rate for foreign nationals in that immigration court).

⁴⁹ Eagly & Shafer, *supra* note 45, at 57.

⁵⁰ ABA Report, *supra* note 1, at 5-18 to 5-19.

⁵¹ *Legal Orientation Program*, U.S. DEP'T OF JUSTICE (Apr. 25, 2018), <https://www.justice.gov/eoir/legal-orientation-program>.

⁵² *See* Family, *supra* note 2, at 601–04.

⁵³ *See, e.g.*, *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005) (explaining that immigration adjudication had fallen "below the minimum standards of legal justice").

⁵⁴ *See, e.g.*, AM. BAR ASS'N COMM'N ON IMMIGRATION, *supra* note 24; BENSON & WHEELER, *supra* note 44, at 88–89; Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U.L. REV. 933, 933 (2015).

⁵⁵ 8 U.S.C. § 1252 (2012).

⁵⁶ *Id.*

⁵⁷ *Id.*

The problems described above are only a part of the immigration adjudication story. Focus on the problems within the immigration courts and the Board of Immigration Appeals provides an incomplete picture of the state of immigration adjudication before the Trump Administration. This is because the majority of removal adjudications do not take place in immigration court.⁵⁸ Through various diversions, opportunities for a hearing before an immigration judge are actually limited for those facing removal. Through expedited removal, various waivers, and the criminalization of immigration law, many are locked out of immigration court.

Expedited removal is a statutory process that diverts individuals from immigration court who are inadmissible either because they lack proper documentation, such as a valid passport or visa, or because they have made a misrepresentation in the process of applying for admission.⁵⁹ If an individual is inadmissible under one of those two grounds and is encountered at or within 100 miles of the border within fourteen days of entry, the individual is subject to expedited removal.⁶⁰ The individual will not receive a hearing before an immigration judge.⁶¹ Instead, a front-line officer working for the Department of Homeland Security will decide whether to remove the foreign national.⁶² That decision is subject only to supervisory review within the Department of Homeland Security.⁶³ Expedited removal, as its name suggests, happens quickly with less process. It also lacks separation of functions protections because the same agency employee prosecutes and adjudicates.

If the applicant expresses fear of returning to his or her home country during the expedited removal process, the individual is due a credible fear hearing under the statute.⁶⁴ If the individual shows that he or she has a credible fear of returning to his or her home country, the person is extracted from the expedited removal process and an asylum hearing is scheduled

⁵⁸ ABA REPORT, *supra* note 1, at 1–14 (reporting that the majority of removals are obtained outside of the immigration court process); see Family, *supra* note 2, at 633–44 (analyzing the variety of diversions from immigration court); Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 183 (2017) (stating that many removal orders against noncitizens never reach immigration courts); Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 2 (2014) (explaining that various removal procedures have been implemented to deport an individual without a court hearing).

⁵⁹ See 8 U.S.C. § 1225(b) (2012).

⁶⁰ 8 U.S.C. § 1225(b)(1)(A)(iii) (2012); Press Release, U.S. Dep't. of Homeland Sec., DHS Streamlines Removal Process Along Entire U.S. Border (Jan. 30, 2006), <http://www.fosterquan.com/news/furtherexpeditedremoval.pdf>.

⁶¹ 8 U.S.C. 1225(b)(1)(A)(i) (2012).

⁶² *Id.*

⁶³ 8 C.F.R. § 235.3(b)(7) (2018).

⁶⁴ 8 U.S.C. § 1225(b)(1)(A)(ii).

before an immigration judge.⁶⁵ At that point the diversion ends and the individual enters the immigration court system. This credible fear process is meant to protect those with credible asylum claims from expedited removal and to preserve an opportunity for an asylum hearing.

For those who do not express a fear of returning home, those who do not pass the credible fear interview, or those who are wrongly denied a credible fear interview, expedited removal represents the beginning and the end of immigration adjudication. This minimal adjudication features quick decision-making by low-ranking border officers in an extremely informal setting. Additionally, judicial review of an expedited removal decision is severely limited.⁶⁶

Individuals are also diverted from the immigration court system through various waivers. For example, the government may encourage a noncitizen to enter into a stipulated order of removal.⁶⁷ In this agreement, a noncitizen agrees that he or she should be removed and agrees to waive any rights to a hearing before an immigration judge.⁶⁸

Another example of a waiver of rights to adjudication before an immigration judge is included in the application to travel to the United States under the Visa Waiver Program. Under the Visa Waiver Program, nationals of certain countries may travel to the United States to visit without the hassle of first visiting a United States Consulate abroad to obtain a visa.⁶⁹ Travelers under the Visa Waiver Program may simply board a plane with a passport. To use the Visa Waiver Program, however, an individual must agree to waive rights to contest any determination made by a front-line officer about the individual's admissibility into the United States.⁷⁰ The only exception is that if the person applies for asylum, the adjudication waiver does not apply.⁷¹ This waiver is far reaching because courts have held it not only applies to any challenges to the decision whether to admit a person upon arrival, but it continues in force beyond that initial determination.⁷² If someone is admitted under the Visa Waiver Program and then is later ordered removed on some other ground, that person has no right to

⁶⁵ 8 U.S.C. § 1225(b)(1)(B)(ii).

⁶⁶ See 8 U.S.C. § 1252(e) (2012).

⁶⁷ JENNIFER LEE KOH ET AL., DEPORTATION WITHOUT DUE PROCESS i, iii (2011), <https://law.stanford.edu/wp-content/uploads/sites/default/files/publication/259893/doc/slspublic/Deportation-Without-Due-Process-2011-09.pdf>; Family, *supra* note 2, at 616–17; Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475, 478 (2013).

⁶⁸ Family, *supra* note 2, at 616–17.

⁶⁹ 8 U.S.C. §§ 1187(a), (c) (2012).

⁷⁰ Family, *supra* note 2, at 612–14.

⁷¹ *Id.*

⁷² *Id.*

challenge the removal decision in immigration court.⁷³

The criminalization of immigration law has also led to diversions from the immigration court system. Most of immigration law is civil law, but there are some federal immigration-related crimes, such as unlawful entry.⁷⁴ If an individual crossed the border without permission, the government has the discretion to place that individual into the criminal justice system. In the criminal justice system, the noncitizen will appear in federal court to answer to the charge of committing a federal crime. The adjudication of the criminal charge does not inherently dispose of any civil immigration violation and a separate hearing before an immigration judge is necessary to adjudicate whether an individual will be removed from the United States. However, immigration defendants in federal court may waive rights to an immigration court hearing as a condition of a plea bargain in the criminal justice system.⁷⁵ By stipulating to removal, an individual is diverted from immigration court because a hearing before an immigration judge is no longer necessary.⁷⁶

Another criminalization diversion applies to foreign nationals who do not have lawful permanent resident (green card) status and are convicted of an aggravated felony.⁷⁷ These individuals are subject to administrative removal and under the statute receive no hearing before an immigration judge.⁷⁸ A foreign national without a green card may be someone without permission to be in the United States, but it also could be someone with lawful temporary permission to be in the United States, such as a student or temporary worker. For these individuals, a low-level employee of the Department of Homeland Security decides whether an aggravated felony has been committed based on paper submissions.

⁷³ *Id.*

⁷⁴ *Id.* at 627–32.

⁷⁵ *Id.*; see also Donna Lee Elm et al., *Immigration Defense Waivers in Federal Criminal Plea Agreements*, 69 MERCER L. REV. 839, 841, 844–48 (2018) (reviewing the language of immigration waivers from various jurisdictions in the United States and noting that “federal criminal prosecution is now routinely used as part of border enforcement strategy”); Joanna Jacobbi Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV. 481, 526 (2010) (describing a case with an undocumented defendant who requested a removal hearing before an immigration judge rather than accepting deportation as part of his plea deal).

⁷⁶ Not all of those charged with a federal immigration crime are eligible for a hearing before an immigration judge. Many are subject to expedited removal and reinstatement of removal. But for those who would be eligible, a stipulation of removal eliminates the opportunity.

⁷⁷ The term “aggravated felony” as used in immigration law is overly broad. While it does include serious crimes such as murder and rape, it also sweeps in offenses like shoplifting. 8 U.S.C. § 1101(a)(43) (2012); see *supra* note 30 and accompanying text.

⁷⁸ 8 U.S.C. § 1228(b) (2012).

A holistic view of the state of immigration adjudication must consider these diversions. Adjudication in the form of a hearing before an immigration judge has not been guaranteed or even the norm for many. These diversions predate the Trump Administration and continue to be used.

The immigration adjudication system has been troubled through various presidential administrations. Immigration adjudicators have lacked decisional independence and have been called on to apply substantive law that is harsh, is complex and lacks proportionality. Because there is no right to government-funded counsel in immigration court, there has been a dearth of lawyers representing noncitizens in immigration court. Immigration judges also have faced tremendous caseloads for years, despite that many cases are diverted from the system. A diverted case receives even fewer procedural protections. On top of all of the problems within the administrative adjudication system, Congress has weakened judicial review of removal decisions. The federal courts are handicapped in their ability to supervise the state of administrative immigration adjudication.

President Trump inherited a troubled immigration adjudication system. The next Part describes the Trump Administration's response.

II. IMMIGRATION ADJUDICATION UNDER THE TRUMP ADMINISTRATION

The Trump Administration is increasing the strains on the already troubled immigration adjudication system. President Trump's statements that he does not think that immigration law needs adjudication and the Administration's policies, both discussed below, are evidence that the administration favors a system, if one has to exist, that places the highest emphasis on quick removals. Immigration judges would become the second immigration law "prosecutor" in the hearing room, working in tandem with the lawyer representing the Department of Homeland Security. Immigration judges would cease to provide any check on the work of immigration enforcement officials and would be biased in favor of removal, no matter what result the law demands in a given case.

While agency adjudicators have never enjoyed all of the same protections provided to Article III judges,⁷⁹ the Trump Administration is making the immigration adjudication system less acceptable and accurate by further diminishing the independence of agency adjudicators. While presidents have

⁷⁹ Catherine Y. Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1, 11–12, 14–15 (2018). The exact constitutional parameters of presidential control over agency adjudication are not clear, but courts have emphasized the importance of due process to agency adjudication. *Id.* at 36–37. In agency adjudication, the President's control over an agency may be weaker than in rulemaking. *Id.* at 10–12.

more control over agency adjudicators than Article III judges, President Trump is seeking total control in a way that delegitimizes the system.⁸⁰ The Administration's actions are especially concerning given that it is prioritizing efficiency and accountability in adjudication, where due process concerns weigh heaviest.⁸¹ Additionally, a Department of Justice regulation requires immigration adjudicators to exercise independent judgment.⁸²

President Trump has expressed his antagonism to providing noncitizens with process and his dislike for investment in process for noncitizens. President Trump has said on Twitter:

We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came. Our system is a mockery to good immigration policy and Law and Order. Most children come without parents⁸³

Hiring manythousands [sic] of judges, and going through a long and complicated legal process, is not the way to go – will always be dysfunctional [sic]. People must simply be stopped at the Border and told they cannot come into the U.S. illegally. Children brought back to their country⁸⁴

Democrats in Congress must no longer Obstruct – vote to fix our terrible Immigration Laws now. I am watching what is going on from Europe – it would be soooo [sic] simple to fix. Judges run the system and illegals and traffickers know how it works. They are just using children!⁸⁵

President Trump also has rebuffed calls to hire more immigration judges. In response to a Republican proposal to add 375 immigration judges, he said, “I don’t want judges. I want border security. I don’t want to try people. I don’t want people coming in.”⁸⁶ He also said, “Ultimately, we have to have

⁸⁰ ABA REPORT, *supra* note 1, at 2–7 (describing the Trump Administration as “exerting unprecedented levels of control over immigration judges” and as having “deteriorated public trust in the immigration court system”).

⁸¹ See *Londoner v. City & Cty. of Denver*, 210 U.S. 373, 386 (1908) (holding that the Due Process Clause applies to agency adjudication).

⁸² 8 C.F.R. § 1003.10(b) (2018).

⁸³ Donald Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 AM), <https://twitter.com/realDonaldTrump/status/1010900865602019329>; see also Philip Rucker & David Weigel, *Trump Advocates Depriving Undocumented Immigrants of Due-Process Rights*, WASH. POST (June 25, 2018), https://wapo.st/2luawRI?tid=ss_tw&utm_term=.51bb2c1f6116 (discussing President Trump’s expressed desire to immediately deport undocumented immigrants without providing an immigration hearing).

⁸⁴ Donald Trump (@realDonaldTrump), TWITTER (June 25, 2018, 5:43 AM), <https://twitter.com/realDonaldTrump/status/1011228265003077632>.

⁸⁵ Donald Trump (@realDonaldTrump), TWITTER (July 11, 2018, 9:41 AM), <https://twitter.com/realdonaldtrump/status/1017086416176730112>.

⁸⁶ Rucker & Weigel, *supra* note 83; see also Michael D. Shear et al., *G.O.P. Moves to End Trump’s Family Separation Policy, but Can’t Agree How*, N.Y. TIMES (June 19, 2018), <https://nyti.ms/2MBGA1Y> (“Mr. Trump dismissed as ‘crazy’ a proposal by Senate Republicans to expedite processing of immigrant families by hiring hundreds of new immigration judges.”).

a real border, not judges.”⁸⁷ He characterized the Republican proposal as adding five or six thousand more judges (it was to add 375).⁸⁸ He said that to add that many judges must involve graft.⁸⁹ He also questioned the motives of at least some immigration lawyers.⁹⁰

The Administration’s strategy is comprised of specific actions that together result in more individuals in the immigration court pipeline, despite an increased use of diversions, while refusing to adequately staff the immigration courts, also while forcing existing adjudicators to process cases faster with an eye towards removal as a preferred result. Efficiency and a predetermined outcome become the most important goals at the expense of accuracy and acceptability.

The Executive Branch has long had prosecutorial discretion to determine if an individual will be placed into removal proceedings.⁹¹ A removal proceeding officially begins when the Department of Homeland Security issues a Notice to Appear (“NTA”) directing the individual to appear in immigration court. The Trump Administration has made every removable foreign national a priority for removal and has determined that it will issue a Notice to Appear in whatever context whenever possible.⁹² The

⁸⁷ Brett Samuels, *Trump Rejects Calls for More Immigration Judges: ‘We Have to Have a Real Border, Not Judges,’* HILL (June 19, 2018, 1:25 PM) <https://thehill.com/homenews/administration/393031-trump-rejects-calls-for-additional-immigration-judges-we-have-to-have>.

⁸⁸ See *Trump Assails Critics of Immigration Policy*, N.Y. TIMES (June 19, 2018), <https://nyti.ms/2I3wrHY>.

⁸⁹ *Id.*

⁹⁰ Shear et al., *supra* note 86. Former Attorney General Sessions described immigration lawyers as “using all of their talents and skill . . . to get around the plain words of the [Immigration and Nationality Act] to advance their clients’ interests.” Jeff Sessions, Att’y Gen., U.S. Dep’t of Justice, Attorney General Sessions Delivers Remarks to the Largest Class of Immigration Judges in History for the Executive Office for Immigration Review (EOIR) (Sept. 10, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-largest-class-immigration-judges-history>.

⁹¹ See generally SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (2017) (discussing the role of prosecutorial discretion in immigration law).

⁹² See Memorandum from the U.S. Citizenship & Immigration Servs. (June 28, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf> (expanding the role of United States Citizenship and Immigration Services in issuing Notices to Appear); see also Shoba Sivaprasad Wadhia, *Notices to Appear: More than an Enigma*, MEDIUM (July 6, 2018), <https://link.medium.com/VFmD5fBcOV> (explaining that the Trump Administration expanded the circumstances under which Notices to Appear should be issued); Lazaro Zamora, *Comparing Trump and Obama’s Deportation Policies*, BIPARTISAN POL’Y CTR., (Feb. 27, 2017), <https://bipartisanpolicy.org/blog/comparing-trump-and-obamas-deportation-priorities/> (“[W]hile Trump’s removal policy seems geared to focus on ‘criminal’ aliens, it also vaguely references broad sections of immigration law and categories of non-citizens that essentially make all unauthorized immigrants ‘priorities’ for removal at any time. The Trump policy is governed by the overarching principle that no group of immigrants will be exempted or excluded from enforcement through prosecutorial discretion.”).

prosecutorial discretion to decline to issue an NTA functions as a kind of reprieve from removal and as a way for the government to prioritize adjudication resources.⁹³ The Trump Administration wants more NTAs issued, and therefore more cases in immigration court.

At the same time, however, it is not supporting an adequate increase in resources for the immigration courts. The Department of Justice has been hiring immigration judges, but the numbers are not enough to decrease the case backlog.⁹⁴ Instead, the backlog continues to grow. As described above, President Trump rejected the idea of a substantial increase in the number of immigration judges. Instead of hiring an adequate number of immigration judges, the Department of Justice implemented case completion quotas for immigration judges, forcing faster decision-making.

As explained above, immigration judges are attorney employees of the Department of Justice. The Department of Justice announced case completion quotas for its immigration judge employees as a means of clearing the case backlog.⁹⁵ Case completion metrics are not inherently objectionable. The Administration will use a failure to meet the goals to evaluate job performance, however, as opposed to only using the results to

⁹³ The Obama Administration set prosecutorial priorities that emphasized the prosecution of noncitizens with criminal records. Memorandum from John Morton, Dir., U.S. Customs & Immigration Servs., to ICE Employees (Mar. 2, 2011), <https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>; see also Zamora, *supra* note 92 (emphasizing that unlike the Obama Administration's priorities, the Trump Administration's guidance accords more discretion to ICE to determine who to detain and remove and likely enables the agency to focus on those who can be most easily apprehended).

⁹⁴ In 2012, there were 264 immigration judges and now there are approximately 400. LENNI B. BENSON & RUSSELL R. WHEELER, ENHANCING QUALITY AND TIMELINESS IN IMMIGRATION REMOVAL ADJUDICATION 6 (2012), <https://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf> (reporting that the immigration court website listed 264 immigration judges in 2012); *Office of the Chief Immigration Judge*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge> (last visited Apr. 5, 2019) (stating that there are currently approximately 400 immigration judges).

⁹⁵ Memorandum from James McHenry, Dir., Exec. Office of Immigration Rev., to Immigration Judges (Mar. 30, 2018), <https://aila.org/infonet/eoir-memo-immigration-judge-performance-metrics>; Jeff Sessions, Att'y Gen., U.S. Dep't of Justice, Attorney General Sessions Delivers Remarks to the Executive Office for Immigration Review Legal Training Program (June 11, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-executive-office-immigration-review-legal>. The case completion requirements are one piece of a new evaluation system that also demands that immigration judges meet certain remand rates and other benchmarks. For example, to earn a performance rating of "satisfactory," the immigration judge must complete 700 cases per year and have a remand rate of less than 15%. Additionally, the immigration judge must meet at least three of six benchmarks. The benchmarks require, among other things, that immigration judges must: (1) complete at least 85% of detained removal cases within three days of the hearing; (2) complete at least 85% of non-detained removal cases within ten days of the hearing; and (3) complete 95% of hearings on the initial scheduled date for the hearing. U.S. DEP'T OF JUSTICE, EOIR PERFORMANCE PLAN: ADJUDICATIVE EMPLOYEES (2018), <http://cdn.cnn.com/cnn/2018/images/04/02/immigration-judges-memo.pdf>.

direct court resources or to influence training programs.⁹⁶ Immigration judges and legal scholars are interpreting the case completion quotas as a way to lessen the decisional independence of immigration judges.⁹⁷

The new performance evaluation system lessens decisional independence because immigration judges are pressured to decide cases faster, knowing that their conditions of employment depend on speed. It will be in an immigration judge's self-interest to deny more cases under the case completion quotas because denials are often speedier than grants of relief.⁹⁸ Denials often shorten case completion time, while approvals can take longer to complete due to security checks or other delays. For example, the main type of relief from removal, cancellation of removal, is limited to 4,000 grants per year.⁹⁹ Once the cap is reached, immigration judges may delay a grant to the following fiscal year.¹⁰⁰ If deferring a grant is not considered a completion,¹⁰¹ then the incentive is to deny the application for relief to earn a completion. This incentive exists even if an immigration judge sincerely believes that the individual is eligible for relief from removal.

⁹⁶ *Id.* A judge who receives a negative performance evaluation could face a variety of consequences, including mandated training, a denial of a promotion to the next pay grade, or possibly termination of employment. E-mail from Ashley Tabaddor, President, Nat'l Ass'n of Immigration Judges, to author (Mar. 29, 2019) (on file with author).

⁹⁷ Nick Miroff, *Trump Administration, Seeking to Speed Deportations, to Impose Quotas on Immigration Judges; The Move Risks Undermining Judicial Independence, According to a Union Representing the Judges*, WASH. POST (Apr. 2, 2018), https://wapo.st/2JbHzV3?tid=ss_tw&utm_term=.0dbf4a8b4f8a; *see also* Letter from author et al., to Jeff Sessions, Att'y Gen., U.S. Dep't of Justice (Aug. 14, 2018), <https://commonwealthlaw.widener.edu/files/resources/letter-to-sessions-immigration-adjudication-with-s.pdf>.

⁹⁸ Immigration courts with higher denial rates tend to complete more cases. *See* Beth Fertig, *How Trump's Quota Plan Could Punish New York's Immigration Judges*, WNYC (Aug. 2, 2018), <https://www.wnyc.org/story/how-trump-administrations-new-quotas-could-hurt-new-yorks-immigration-court/> (explaining that, based on historical data, courts with a history of higher denial rates already meet the case completion quotas, while courts with a history of lower denial rates will have to speed up to meet the case completion quotas).

⁹⁹ *See* 8 U.S.C. § 1229b(e) (2012).

¹⁰⁰ Memorandum from MaryBeth Keller, Chief Immigration Judge, U.S. Dep't of Justice, to Immigration Judges, Court Adm'rs, Att'y Advisors & Judicial Law Clerks, & Immigration Court Staff, U.S. Dep't of Justice (Dec. 20, 2017), <https://www.justice.gov/eoir/file/oppm17-04/download>.

¹⁰¹ According to a memorandum of understanding executed between the National Association of Immigration Judges (the immigration judge union) and the Department of Justice, a case is not complete if it is waiting for a cancellation of removal cap slot. Memorandum of Understanding Regarding the Implementation of New Performance Measures for Immigration Judges (Oct. 3, 2018) (on file with author).

Additionally, the case completion quota system places a large amount of discretion in the hands of the Assistant Chief Immigration Judges (“ACIJJs”).¹⁰² ACIJJs are supervisory judges. If an immigration judge will not meet the case completion quota or other benchmarks under the metrics, an immigration judge may ask his or her ACIJ for a waiver. While providing waivers does provide some flexibility, the placement of the power to grant a waiver with the ACIJ is problematic because immigration judges may work towards a decisional record that he or she believes will please the ACIJ.

The quotas arrived shortly after former Attorney General Sessions narrowed an immigration judge’s power to administratively close a case.¹⁰³ A common use of administrative closure was to pause a removal case where the respondent noncitizen had a collateral action pending (such as an application for a green card) that might have affected the outcome of the removal proceeding.¹⁰⁴ In his opinion addressing administrative closure, former Attorney General Sessions explained that the proper way to pause a removal case is to grant a continuance.¹⁰⁵ He curtailed the use of continuances, however, just a few months after his directive on administrative closure.¹⁰⁶ Following that, he limited the ability of immigration judges to terminate cases.¹⁰⁷ To compound the situation, the case completion quotas contain benchmarks that require immigration judges to complete cases on or very close to the hearing date.¹⁰⁸ This further dissuades immigration judges from issuing continuances or otherwise taking

¹⁰² *Id.* at FAQ Question 2.

¹⁰³ *See In re Castro-Tum*, 27 I. & N. Dec. 271, 272 (A.G. 2018) (“[I]mmigration 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.”).

¹⁰⁴ *See* AM. IMMIGRATION COUNCIL & AM. CIVIL LIBERTIES UNION, ADMINISTRATIVE CLOSURE POST-CASTRO-TUM: PRACTICE ADVISORY (June 14, 2018), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/administrative_closure_post-castro-tum.pdf (describing administrative closure as a “docket-management mechanism that immigration judges (IJs) and the Board of Immigration Appeals (BIA) have used for more than three decades to suspend removal proceedings in appropriate cases”).

¹⁰⁵ *See Castro-Tum*, 27 I. & N. Dec. at 282 (arguing that immigration judges “lack a general authority to grant administrative closure,” unlike their expressly conferred power to grant continuances).

¹⁰⁶ *See In re L-A-B-R-*, 27 I. & N. Dec. 405, 406 (A.G. 2018) (stating that “the good-cause requirement is an important check on immigration judges’ authority that reflects the public interest in expeditious enforcement of the immigration laws, as well as the tendency of unjustified continuances to undermine the proper functioning of our immigration system” (citing 8 C.F.R. § 1003.29 (2018))). Former Attorney General Sessions interpreted that authority narrowly to ensure the expeditious adjudication of removal cases.

¹⁰⁷ *See In re S-O-G- & F-D-B-*, 27 I. & N. Dec. 462, 463 (A.G. 2018) (stating that “[c]onsistent with . . . Matter of Castro-Tum, immigration judges have no inherent authority to terminate or dismiss removal proceedings” (internal citation omitted)).

¹⁰⁸ *See* Memorandum of Understanding Regarding the Implementation of New Performance Measures for Immigration Judges, Benchmarks 1, 2, 5, and 6 (Oct. 3, 2018) (on file with author) (explaining the various deadlines and requirements immigration judges must meet and the performance evaluation process).

time to complete the case in a time that the immigration judge thinks is just. Former Attorney General Sessions used his power to certify cases to himself, along with the announcement of the case completion quotas, to express his desire for more cases to be decided faster under procedures calibrated against relief from removal.¹⁰⁹

The Trump Administration is poised to use the power to certify cases to the Attorney General at a record rate. During the first two years of the Trump Administration, former Attorney General Sessions certified seven cases to himself and Acting Attorney General Whitaker certified two cases.¹¹⁰ The power was used only four times in the eight years of the Obama Administration.¹¹¹ It was used sixteen times through both George W. Bush Administrations.¹¹² The Trump Administration has seized on this power to implement changes to long-standing practices that allowed immigration judges to slow down a case where fairness demanded it.

If the message of speed and removal was not clear enough through written policies, the Department of Justice sent additional signals when it removed an immigration judge from a case to guarantee a desired outcome.¹¹³ The National Association of Immigration Judges, the union

¹⁰⁹ Former Attorney General Sessions emphasized the importance of efficiency in remarks delivered to a new class of immigration judges. He implied that objections to faster adjudication are inherently anti-enforcement and symbolize an “open borders philosophy.” Jeff Sessions, Att’y Gen., U.S. Dep’t of Justice, Attorney General Sessions Delivers Remarks to the Largest Class of Immigration Judges in History for the Executive Office for Immigration Review (“EOIR”) (Sept. 10, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-largest-class-immigration-judges-history>.

¹¹⁰ See generally *In re A-B-*, 27 I. & N. Dec. 316 (A.G. 2018); *In re Castillo-Perez*, 27 I. & N. Dec. 495 (A.G. 2018); *Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018); *In re E-F-H-L-*, 27 I. & N. Dec. 226 (A.G. 2018); *L-A-B-R-*, 27 I. & N. Dec. 405 (A.G. 2018); *In re L-E-A-*, 27 I. & N. Dec. 494 (A.G. 2018); *In re M-G-G-*, 27 I. & N. Dec. 469 (A.G. 2018); *In re M-S-*, 27 I. & N. Dec. 476 (A.G. 2018); *S-O-G- & F-D-B-*, 27 I. & N. Dec. 462 (A.G. 2018).

¹¹¹ See generally *In re Chairez-Castrejon*, 26 I. & N. Dec. 819 (B.I.A. 2016); *In re Silva-Trevino*, 26 I. & N. Dec. 550 (A.G. 2015); *In re Dorman*, 25 I. & N. Dec. 485 (A.G. 2011); *In re Compean*, 25 I. & N. Dec. 1 (A.G. 2009).

¹¹² Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General’s Review Authority*, 101 IOWA L. REV. 841, 858 (2016).

¹¹³ For examples of news regarding the removal, see Jeff Gammage, *Immigration Judges File Grievance Over Justice Dept.’s Removal of Philly Jurist Who Delayed Man’s Deportation*, PHILLY.COM (Aug. 8, 2018), <http://www.philly.com/philly/news/immigration-judges-association-grievance-philadelphia-steven-morley-removal-deportation-case-20180808.html>; Tai Kopan, *Immigration Judge Removed from Cases After Perceived Criticism of Sessions*, CNNPOLITICS, <https://www.cnn.com/2018/08/08/politics/immigration-judges-justice-department-grievance/index.html> (last updated Aug. 8, 2018, 5:49 PM); Max Mitchell, *Hear the Audio: ‘Chilling’ Immigration Court Hearings that Led to Grievance Against DOJ*, LEGAL INTELLIGENCER (Sept. 21, 2018, 12:50 PM), <https://www.law.com/thelegalintelligencer/2018/09/21/hear-the-audio-chilling-immigration-court-hearings-that-led-to-grievance-against-doj/>; Max Mitchell, *Immigration Judges’ Union Files Grievance Over Phila. Judge Removal*, LEGAL INTELLIGENCER (Aug. 8, 2018, 2:43 PM), <https://www.law.com/thelegalintelligencer/2018/08/08/immigration-judges-union-files-grievance-over-phila-judge-removal/?sreturn=20180813194659>; Ani Ucar, *Jeff Sessions Wants to Remove Immigration Judges Who*

representing immigration judges, filed a grievance against the Department of Justice for removing the immigration judge.¹¹⁴ The grievance claims that the immigration judge was removed because the immigration judge was exercising decisional independence. In the case removed from the immigration judge, the immigration judge had deferred issuing a removal order until he was confident the noncitizen had received notice of his hearing.¹¹⁵

An additional threat to the acceptability of hearings comes from a desire to end the Legal Orientation Program. Former Attorney General Sessions announced that he would suspend the program while the Department of Justice evaluates it.¹¹⁶ After strong opposition from Congress, former Attorney General Sessions changed his mind about the suspension and agreed not to suspend the program while it is evaluated.¹¹⁷ This evaluation is taking place despite previous government and external studies concluding that the program makes the removal process more efficient and lowers government costs.¹¹⁸

Acceptability also is diminished as the Trump Administration creates a new type of diversion from immigration court adjudication. The Trump Administration has placed roadblocks in the way of individuals fleeing persecution and seeking an asylum hearing in immigration court. The Administration has tightened access to the border with Mexico, artificially lowering the number of individuals who may present themselves at the border to apply for asylum, and then who receive a hearing.¹¹⁹ It also attempted to implement a policy that those who enter the United States

Aren't Deporting People Fast Enough, VICENEWS (Aug. 8, 2018), https://news.vice.com/en_us/article/qvmejd/jeff-sessions-wants-to-remove-immigration-judges-who-arent-deporting-people-fast-enough.

¹¹⁴ See Mitchell, *Immigration Judges' Union Files Grievance Over Phila. Judge Removal*, *supra* note 113 (discussing the details of the grievance).

¹¹⁵ See Ucar, *supra* note 113 (including a copy of the grievance). The grievance also claims that similar cases also were reassigned from the immigration judge. *Id.*

¹¹⁶ See Maria Sacchetti, *Sessions Backtracks on Pausing Legal Aid for Immigrants Facing Deportation*, WASH. POST (Apr. 25, 2018), https://www.washingtonpost.com/local/immigration/sessions-backtracks-on-pausing-legal-aid-program-for-immigrants/2018/04/25/c0d27a12-48cb-11e8-827e-190efaf1flee_story.html (providing background on the decision).

¹¹⁷ *Id.*; see also Tai Kopan, *Sessions Resumes Immigrant Legal Advice Program Under Pressure from Congress*, CNNPOLITICS (Apr. 25, 2018, 4:14 PM), <https://www.cnn.com/2018/04/25/politics/immigration-legal-advice-program-resumed/index.html> (stating that former Attorney General Sessions made the decision at the request of Congress).

¹¹⁸ ABA REPORT, *supra* note 1, at 5–19 to 5–21. The Department of Justice appears to be working toward a new evaluation of the program that is negative. See EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, LEGAL ORIENTATION PROGRAM: COHORT ANALYSIS 4 (2018), <https://www.justice.gov/eoir/file/1091801/download> (finding that the Legal Orientation Program increases government costs and does not improve proceeding outcomes).

¹¹⁹ STEPHANIE LEUTERT ET AL., ASYLUM PROCESSING AND WAITLISTS AT THE U.S.–MEXICO BORDER (2018), https://www.strausscenter.org/images/MSI/AsylumReport_MSI.pdf.

illegally are ineligible to apply for asylum.¹²⁰ Additionally, the Administration intends to force asylum applicants who do reach the border to remain in Mexico while they wait for a hearing before an immigration judge.¹²¹ These actions aim to prevent asylum applicants from ever applying for asylum or from pursuing their claims. A system that artificially blocks hearings required by law certainly is not acceptable as it does not even attempt to accurately adjudicate claims.

Other changes implemented by the Trump Administration also emphasize efficiency at the expense of acceptability and accuracy. For example, former Attorney General Sessions certified an asylum case to himself¹²² and decided that domestic violence victims rarely will be eligible for asylum, reversing existing Board of Immigration Appeals precedent.¹²³ After that decision, former Attorney General Sessions then announced that immigration judges are not needed to hear those types of asylum claims since he already decided that asylum claims based on domestic violence should fail.¹²⁴ Also, the Department of Justice appears to be sanctioning the use of summary denials in asylum cases that do reach immigration court.¹²⁵ If an immigration judge believes that a hearing is not necessary, he or she may deny the claim without hearing testimony.

¹²⁰ E. Bay Sanctuary Covenant v. Trump, 354 F. Supp. 3d 1094, 1101 (N.D. Cal. 2018) (enjoining the policy), *appeal filed*, No. 18-17436 (9th Cir. Dec. 26, 2018).

¹²¹ Memorandum from Kirstjen M. Nielsen, Sec’y, U.S. Dep’t of Homeland Sec., to L. Francis Cissna et al. (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf. Pending litigation challenges the legality of the Remain in Mexico policy. *See generally* Complaint, Innovation Law Lab v. Nielsen (N.D. Cal. 2019) (No. 19-cv-00807), https://www.tahirih.org/wp-content/uploads/2019/02/2019.02.14.0001_compl._for_decl._and_inj._relief.pdf.

¹²² *In re A-B-*, 27 I. & N. Dec. 316, 323 (A.G. 2018).

¹²³ *Id.*; U.S. CITIZENSHIP & IMMIGRATION SERVICES, PM-602-0162, GUIDANCE FOR PROCESSING REASONABLE FEAR, CREDIBLE FEAR, ASYLUM, AND REFUGEE CLAIMS IN ACCORDANCE WITH *MATTER OF A-B-* (2018) (stating the purpose of the asylum statute was not to protect domestic violence victims based solely on the relationship with the abuser).

¹²⁴ *Id.*; Tal Kopan, *Trump Administration to Turn Away Far More Asylum Seekers at the Border Under New Guidance*, CNNPOLITICS (July 12, 2018, 2:45 PM), https://amp.cnn.com/cnn/2018/07/11/politics/border-immigrants-asylum-restrictions/index.html?__twitter_impression=true (“The Trump administration is implementing a new asylum policy at the border that will result in potentially thousands of asylum seekers being turned away before they can plead their case in court.”); *see generally* Grace v. Whitaker, 344 F. Supp. 3d 96 (2018) (enjoining the policy), *appeal filed*, No. 19-5013 (D.C. Cir. Jan. 30, 2019).

¹²⁵ Jeffrey S. Chase, *Are Summary Denials Coming to Immigration Court?*, LEXISNEXIS (June 24, 2018), <https://www.lexisnexis.com/legalnewsroom/immigration/b/immigration-law-blog/archive/2018/06/24/are-summary-denials-coming-to-immigration-court-jeffrey-s-chase.aspx>.

While the Administration does continue to hire new immigration judges (although not enough), some members of Congress have expressed concern that the Administration is “using ideological and political considerations” in the hiring of immigration judges.¹²⁶ These members of Congress cited information from whistleblowers that “indicates that there may be internal communications within [the Department of Justice] discussing the perceived immigration policy views of [applicants] not aligning with those of the Trump Administration.”¹²⁷ Such vetting would violate civil service rules and certainly works against the administrative law value of acceptability.¹²⁸

In short, the Trump Administration is working to put more individuals in removal proceedings while also squelching what independence is left in that system. Immigration judges are expected to move faster and to favor removal. Exercises of independent judgment are not welcome. The Trump Administration is pushing a troubled system in the wrong direction. The Administration is not attempting to fix what ails immigration adjudication. Instead, it is aggravating longstanding problems and expressing disdain for the idea of providing process to noncitizens in removal proceedings. Its vision of immigration adjudication appears to be one where immigration judges exist to rubber stamp the decisions of immigration enforcement officials and to provide nothing more than a façade of justice. Such a system fails to promote the basic ideals of administrative adjudication.

III. IMMIGRATION ADJUDICATION BANKRUPTCY UNDER THE TRUMP ADMINISTRATION

The Trump Administration’s actions point to a dismal future for immigration adjudication. The Administration’s strategy aims to decrease acceptability by undercutting process and devaluing adjudicator independence. The Administration’s actions value efficiency at the expense of accuracy. The state of immigration removal adjudication raises two important questions for scholars and advocates to consider. First, at what point is the system bankrupt? Second, if the system is bankrupt, what happens next?

¹²⁶ Letter from Elijah E. Cummings et al. to Jeff Sessions, Att’y Gen., U.S. Dep’t of Justice 1 (Apr. 17, 2018), <https://cummings.house.gov/sites/cummings.house.gov/files/Dems%20to%20DOJ%20re.%20EOIR%20Politicization.pdf>.

¹²⁷ *Id.* at 1–2.

¹²⁸ *See supra* note 27.

A. *When Should Bankruptcy Be Declared?*

Before the Trump Administration, the immigration adjudication system already was seriously flawed. The major difference is that the Trump Administration favors a policy that openly rejects the need for acceptability and accuracy. President Trump has expressed his distaste for process for noncitizens. The Department of Justice implemented a series of policies designed to make the system less likely to reach results that favor noncitizens. The mission of immigration adjudication now is to remove as many individuals as quickly as possible. There is a strong argument that the Trump Administration already has pushed the immigration adjudication system into bankruptcy because it no longer pays even lip service to the idea that immigration adjudication should be used to promote the rule of law.

That being said, agency policies do not always filter down to every agency employee at full strength. Immigration judges and members of the Board of Immigration Appeals still stand as symbols of the importance of providing process to noncitizens. Removal orders are not the result in every case. Justice is still done in some cases.

The immigration adjudication system purposely was structured to provide more independent judgment than simply allowing a front-line enforcement officer to decide whether an individual will be removed.¹²⁹ Congress placed immigration adjudication outside of the Department of Homeland Security. Despite that the system is indeed severely troubled, for now, the corps of immigration adjudicators are still an obstacle to the outright control the Trump Administration seems to crave.

Another piece of the calculus is to consider whether the Trump Administration *wants* the immigration adjudication system to be bankrupt. It may be easier to argue to replace a completely hobbled system. Therefore, advocates face a difficult choice whether to continue to support a flawed system to keep it afloat in the hope that a later caretaker may act to improve it. On the other hand, what if the existence of the system provides cover to the Trump Administration to enact its program to strip the system of acceptability and accuracy? The existence of the system may provide a façade of justice that distracts from reality. In that case, should advocates pursue dismantling the system to reveal the Trump Administration's true preferences? The adjudication system is difficult to defend, because it does need radical restructuring.

¹²⁹ An exception is expedited removal. *See* 8 U.S.C. § 1225(b) (2012).

B. Immigration Adjudication Reorganization

If the Trump Administration will be in charge of immigration adjudication reorganization, we can guess what the immigration adjudication system would look like. If we take President Trump at his word, he envisions a system that provides no process. Enforcement officials would be given even more power to “bring them back from where they came”¹³⁰ without any check or balance provided even by another agency, let alone judicial review. Removals at entry are different from removals after a legal entry, but it is hard to imagine that President Trump would champion more robust procedural rights for immigrants in the interior who face removal. The Constitution may ultimately prevent the Administration’s actions, but if we take President Trump at his word, acceptability and accuracy would not be major influences for his immigration administrative process design.

Even if the Trump Administration would not implement the President’s vision completely and eliminate all process, it could move the system even further away from acceptability and accuracy. Under the Immigration and Nationality Act, expedited removal could be expanded. The statute provides that expedited removal may be applied to any noncitizen that cannot show two years of presence in the United States.¹³¹ The statutory limit casts a wider net than the current agency rule that applies expedited removal to those encountered within 100 miles of the border within fourteen days of entry. While the constitutionality of the statutory limit has never been tested because it has never been implemented, an expansion of expedited removal seems to fit with the type of non-process the Administration prefers.

Additionally, President Trump’s attorney general could continue to use the power to certify cases to himself at an unprecedented rate to undo interpretations of immigration law that favor noncitizens. By manipulating more long-standing interpretations, the Trump Administration could create more cases with removal as the outcome.

Alternatively, the Administration could further test the limits of its control over immigration adjudicators. What if the Administration fires every immigration judge with a decision-making record favorable to immigrants? What if immigration judges are told to decide removal cases based on paper submissions rather than live hearings? What if the agency rescinds the rule that commands immigration adjudicators to exercise independent judgment? What could be done that has not been imagined yet? Litigation would, of course, follow any of these actions.

¹³⁰ Donald Trump (@realDonaldTrump), TWITTER, *supra* note 83.

¹³¹ 8 U.S.C. § 1225(b)(1)(A)(iii)(II) (2012).

There are alternative visions of reorganization. Prominent organizations have called for the creation of an Article I immigration court.¹³² Such a move would increase acceptability by removing immigration adjudication from the Executive Branch and letting it run itself, with fair, accurate, and efficient adjudication as its goal.¹³³ Reinvigorating judicial review also is important, as it provides a way to promote and ensure accuracy, efficiency and acceptability within the immigration adjudication system.¹³⁴

A blank slate might be desirable, given the current state of immigration adjudication. The problem is that the Trump Administration has indicated that it would implement a system that disfavors accountability and accuracy. Its ideals advance a system that is fundamentally opposed to the idea of process for noncitizens.

CONCLUSION

The immigration removal adjudication system has been troubled through Democratic and Republican administrations. President Trump inherited a severely flawed system. Instead of working to improve the system's faithfulness to the administrative process criteria of accuracy, acceptability, and efficiency, the Trump Administration is taking steps to further undermine the system. Given President Trump's express desire to provide no process for noncitizens, the time sadly has come to envision what immigration adjudication bankruptcy looks like. At what point should

¹³² ABA REPORT, *supra* note 1; AM. BAR ASS'N, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES ES-9 (2010) https://www.americanbar.org/content/dam/aba/migrated/media/nosearch/immigration_reform_executive_summary_012510.pdf ("The Article I court has been selected as the preferred restructuring option . . ."); *AILA Policy Brief: Restoring Integrity and Independence to America's Immigration Courts*, AM. IMMIGRATION LAW. ASS'N, (2018), <https://www.aila.org/infonet/aila-calls-for-independent-immigration-courts#PDF> ("In order protect and advance America's core values of fairness and equality, the immigration court must be restructured outside of the control of DOJ, in the form of an independent Article I court."); *Congress Should Establish an Article I Immigration Court*, FED. BAR ASS'N, <http://www.fedbar.org/Advocacy/Article-1-Immigration-Court.aspx> (last visited Apr. 5, 2019) ("Since 2013 the Federal Bar Association has urged Congress to establish an Article I 'United States Immigration Court . . ."); Email from A. Ashley Tabaddor, President, Nat'l Ass'n of Immigrant Judges, to Elizabeth Stevens, President, Fed. Bar Ass'n (Mar. 15, 2018), https://www.naij-usa.org/images/uploads/publications/NAIJ_endorses_FBA_Article_I_proposal_3-15-18.pdf (endorsing "the Federal Bar Association's proposed legislation in support of an independent Immigration Court").

¹³³ See Jill E. Family, *No Agency Adjudication?*, CTR. FOR MIGRATION STUDIES OF N.Y. (Dec. 18, 2018), <http://cmsny.org/publications/family-agency-adjudication/> (discussing the benefits of creating an Article I immigration court).

¹³⁴ Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 KAN. L. REV. 541, 589 (2011) ("[T]he system still needs judicial review to promote efficiency, to perform its oversight role, to lend legitimacy to the system, and to ease immigration law's esteem problem.").

scholars and advocates denounce the system as a farce? If the system is bankrupt, how might the Trump Administration reorganize it?