

BUREAUCRATS IN ROBES: IMMIGRATION “JUDGES” AND THE TRAPPINGS OF “COURTS”

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ABSTRACT

As U.S. immigration policy and its human impact gain popular salience, some have questioned whether immigration courts—often the first-line adjudicators of deportation—are “courts” at all in the American adversarial legal tradition. This Article aims to answer this question through a focus on the role of the immigration judge (IJ). Informed by in-depth interviews with twelve former IJs and three former supervisory officials, I argue that immigration courts present with superficial hallmarks of adversarial courts, but increasingly exhibit core features of a tightly hierarchical bureaucracy. Although not all features of an immigration bureaucracy are inherently undesirable, masking a bureaucracy with judicial trappings results in a deceptive façade of process that likely limits scrutiny from federal courts and calms public discontent with harsh immigration laws. In light of this phenomenon, enhancing IJ independence through the creation of an Article I immigration court would solve some problems with immigration adjudication but risk papering over others. Instead, achieving a fair system will require both procedural and substantive reforms.

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INTRODUCTION

As debates over U.S. immigration policy and its human impact intensify, immigration judges (IJs), the first-line decision-makers in many deportation proceedings, have not been spared from the spotlight. Journalists have increasingly highlighted IJs' perceived heartlessness¹ or generosity.² Article III federal judges have derided immigration courts, with the Hon. Richard Posner recently assailing them as "the least competent federal agency."³ And comedians have mocked the immigration court as less fair than "tot court."⁴ Starting in 2017, even the overseers of the IJ corps joined the chorus of critics. Then-Attorney General Jeff Sessions criticized the perceived inefficiencies of IJs, all of whom worked under him,⁵ while President Donald J. Trump lambasted the immigration court system as "dysfunctional" and advocated against hiring more IJs to address case backlogs.⁶ Retired IJs responded with blistering attacks on the Attorney General's "malicious incompetence"⁷ and even accused him of "brib[ing] judges to do his bidding."⁸

1. See, e.g., Jerry Markon, *Can a 3-Year Old Represent Herself in Immigration Court? This Judge Thinks So*, WASH. POST (Mar. 5, 2016), https://www.washingtonpost.com/world/national-security/can-a-3-year-old-represent-herself-in-immigration-court-this-judge-thinks-so/2016/03/03/5be59a32-db25-11e5-925f-1d10062cc82d_story.html.

2. See, e.g., Elvia Malagon, *Immigration Judge Grants Asylum to Honduran Teen-Activist Who Fled Gang Violence at 13*, CHI. TRIB. (Mar. 1, 2018), <http://www.chicagotribune.com/news/immigration/ct-met-conteras-immigration-hearing-20180227-story.html>.

3. Chavarria-Reyes v. Lynch, 845 F.3d 275, 280 (7th Cir. 2016) (Posner, J., dissenting).

4. John Oliver, *Last Week Tonight with John Oliver*, YOUTUBE (Apr. 1, 2018), <https://www.youtube.com/watch?v=9fB0GBwJ2QA>. The informed viewer might note that Oliver's "tot court," unlike immigration court, features a court reporter and a stenographer. See Dana Leigh Marks, *Immigration Judge: Death Penalty Cases in a Traffic Court Setting*, CNN (June 26, 2014), <http://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/index.html> (lamenting that IJs "work in conditions that fans of television law dramas wouldn't recognize—no bailiffs, no court reporters, no law clerks, and often no lawyer for the respondent"); see also Shannon Dooling, *With Case Backlogs Rising, Immigration Courts Struggle to Protect the 'Vulnerable'*, WBUR (Mar. 22, 2016), <http://www.wbur.org/morningedition/2016/03/22/mentally-illness-immigration-courts-boston> (quoting Marks: "The immigration court is an extremely challenged tribunal. I often say that we conduct death penalty cases in a traffic court setting.").

5. U.S. DEP'T OF JUSTICE, *RENEWING OUR COMMITMENT TO THE TIMELY AND EFFICIENT ADJUDICATION OF IMMIGRATION CASES TO SERVE THE NATIONAL INTEREST* 2 (Dec. 5, 2017), <https://www.justice.gov/opa/press-release/file/1015996/download> (criticizing "[u]nwarranted delays and delayed decision making" by IJs).

6. Salvador Rizzo, *President Trump's Misconceptions About Immigration Courts and Law*, WASH. POST (June 26, 2018), https://www.washingtonpost.com/news/fact-checker/wp/2018/06/26/president-trumps-misconceptions-about-immigration-courts-and-law/?noredirect=on&utm_term=.6df9abaf1530. More recently, President Trump has argued that the United States should "get rid of [immigration] judges" entirely. Colby Itkowitz, *Trump: Congress Needs to 'Get Rid of the Whole Asylum System'*, WASH. POST (Apr. 5, 2019), https://www.washingtonpost.com/politics/trump-congress-needs-to-get-rid-of-the-whole-asylum-system/2019/04/05/700eac1a-57a5-11e9-8ef3-fbd41a2ce4d5_story.html.

7. Paul W. Schmidt, *NAIJ President, Judge A. Ashley Tabaddor Responds to DOJ's Unilateral Action on Production Quotas for U.S. Immigration Judges*, IMMIGR. COURTSIDE (Apr. 4, 2018), <http://immigrationcourtside.com/2018/04/04/naij-president-judge-a-ashley-tabaddor-responds-to-doj-s-unilateral-action-on-production-quotas-for-u-s-immigration-judges-doj-spokesperson-bald-faced-lied-to-media-quota-memo-is/>.

8. Bruce J. Einhorn, *Jeff Sessions Wants to Bribe Judges to Do His Bidding*, WASH. POST (Apr. 5, 2018), https://www.washingtonpost.com/opinions/jeff-sessions-wants-to-bribe-judges-to-do-his-bidding/2018/04/05/fd4bdc48-390a-11e8-acd5-35eac230e514_story.html?utm_term=.55eb4f51826f.

However divergent these perspectives may be, all agree that the IJs' task—adjudicating which noncitizens are allowed to stay in the United States—is critical.⁹ The stakes are enormously high: each decision by an IJ transforms the lives of a noncitizen and their loved ones, while IJs' collective work reshapes the composition of U.S. society. Yet the system does not seem designed to match these stakes. IJs wear judicial robes and preside from behind judges' benches, but they do not enjoy the decisional protections of Administrative Law Judges, who are statutorily shielded from sanction for their rulings. The applicant-protective procedures of the Administrative Procedure Act for formal hearings are inapplicable, as are the Federal Rules of Evidence.¹⁰ The IJs themselves report sky-high levels of stress and burn-out,¹¹ and the IJ union has complained for years that immigration courts are grossly underfunded.¹² According to the union, recent changes are making these problems worse: the organization has accused the Department of Justice of “trying to turn immigration judges into assembly-line workers.”¹³

Numerous commentators¹⁴ and advocates¹⁵ have proposed reforms to cure these ills and other problems. Recently, for example, a growing range of stakeholders has endorsed the creation of an independent “Article I” immigration court, akin to the U.S. Tax Court or the U.S. Court of Federal Claims, to limit top-down influences on IJ decision-making.¹⁶ But to fashion effective

9. E.g., U.S. DEP'T OF JUSTICE, *supra* note 5, at 2 (“Indeed, the manner in which cases are adjudicated has a direct impact on the sovereign interests of our nation.”); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018) (plurality opinion) (“[T]his Court has reiterated that deportation is a particularly severe penalty, which may be of greater concern to a convicted alien than any potential jail sentence.”) (internal quotation marks omitted).

10. See *infra* Part I.B.

11. Stuart L. Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57, 60 (2008).

12. E.g., Marks, *supra* note 4.

13. John Bowden, *Justice Criticized for Turning Immigration Judges into 'Assembly-Line Workers,'* THE HILL (Oct. 13, 2017), <http://thehill.com/homenews/administration/355348-group-justice-dept-is-turning-immigration-judges-into-assembly-line>.

14. E.g., David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177, 1207-16 (2016); Kevin R. Johnson, *Possible Reforms of the U.S. Immigration Laws*, 18 CHAP. L. REV. 315, 333-36 (2015); Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 76-77 (2015); Won Kidane, *The Inquisitorial Advantage in Removal Proceedings*, 45 AKRON L. REV. 647, 706-16 (2012); Scott Rempell, *The Board of Immigration Appeals' Standard of Review: An Argument for Regulatory Reform*, 63 ADMIN. L. REV. 283, 317-20 (2011); Christen Chapman, *Relief from Deportation: An Unnecessary Battle*, 44 LOY. L.A. L. REV. 1529, 1569-78 (2011); Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 546-89 (2011); David L. Koelsch, *Follow the North Star: Canada as a Model to Increase the Independence, Integrity and Efficiency of the U.S. Immigration Adjudication System*, 25 GEO. IMMIGR. L.J. 763, 794-805 (2011); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1685-1720 (2010); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 403-08 (2006).

15. E.g., Elizabeth J. Stevens, *Making Our 'Immigration Courts' Courts*, in FED. LAWYER 17, 18 (Mar. 2018); Am. Immigration Lawyers Ass'n (AILA) Board of Governors, *Resolution on Immigration Court Reform* 1-2 (Jan. 29, 2018), https://www.naij-usa.org/images/uploads/publications/AILA_Resolution_Passed_2.3.2018_.pdf.

16. Nat'l Ass'n of Immigration Judges, *NAIJ Blueprint for Immigration Court Reform 2013 2*, https://www.naij-usa.org/images/uploads/publications/NAIJ-BLUEPRINT-FOR-REFORM-Revised_4-13-13-1_2.pdf; AILA, *supra* note 15, at 1-2; ABA Comm'n on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of*

reforms, we must understand the nature of the system we already have. Critiques of immigration court generally assume that the system is best analyzed through the lens of an Anglo-American “court,” which theoretically entails an independent and impartial adjudicator who resolves a dispute between equally situated parties, as opposed to a “bureaucracy,” meaning a hierarchical structure through which the executive branch advances policy goals.¹⁷ But it has been a full thirteen years since a leading immigration law scholar famously wrote that the executive branch had “eviscerat[ed]” IJs’ decisional independence.¹⁸ Since then, only a few scholars have examined the design of the system through the “linchpin” of the IJ,¹⁹ and almost none have spoken with retired IJs directly.²⁰ Meanwhile, IJs have continued to decry the Justice Department’s increasing influence over them, calling into question whether and to what extent the framework of “courts” remains relevant.²¹

Removal Cases – Executive Summary 9 (Feb. 2010), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_executive_summary.authcheckdam.pdf; see also Stevens, *supra* note 15, at 17–18 (endorsing Article I proposal on behalf of Federal Bar Association).

17. This is not the only definition of a court: many non-U.S. courts utilize non-adversarial models, and even purportedly adversarial U.S. courts have incorporated bureaucratic-managerial trends. Nevertheless, I adopt this shorthand in this Article to capture what U.S. residents conceptualize as courts in the country’s adversarial legal tradition, particularly from a non-lawyer perspective. For more on adversarial legalism, see *infra* Part III.A. Similarly, although some would define U.S. courts as “bureaucracies,” I use this term to capture hierarchical policy-implementing organizations, as distinguished from impartial dispute-resolution mechanisms.

18. Legomsky, *Deportation and the War on Independence*, *supra* note 14, at 370–71.

19. BANKS MILLER, LINDA CAMP KEITH, & JENNIFER S. HOLMES, IMMIGRATION JUDGES AND U.S. ASYLUM POLICY 1 (2015). In an exception to this trend, Miller, Keith, and Holmes focus on case-level decision-making. *Id.* at 3. Analyzing a robust database of all asylum cases decided between 1990 and 2010, the authors find that the policy preferences of IJs dramatically influence their disposition of asylum cases, as do local demographic, economic, and political factors. *Id.* at 48–49, 100–04. The authors further uncover that seemingly arbitrary factors, like the gender of the IJ or the language spoken by the applicant, have statistically significant effects on case outcomes. *Id.* at 71.

20. Most relevant studies have utilized surveys, e.g., Lustig, *supra* note 11, at 57, 60, or quantitative analysis of outcomes, e.g., MILLER ET AL., *supra* note 19, at 3–4; JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ, & PHILIP G. SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 34–44 (2009) (identifying wide disparities in outcomes for asylum-seekers across different immigration courts and IJs). Although a 2017 Government Accountability Office report did involve interviews with some key stakeholders in the immigration court system, including IJs, the report was focused on case backlogs rather than administrative design and bureaucratic influences. See generally 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 (June 2017) [hereinafter “GAO 2017”]. Journalists have spoken with current IJs on the record about some, but not all, issues discussed here. E.g., Julia Preston, *Lost in Court*, MARSHALL PROJECT (Jan. 19, 2018), <https://www.themarshallproject.org/2018/01/19/lost-in-court>.

21. See, e.g., Dana Leigh Marks, *Now Is the Time to Reform the Immigration Courts*, in INT’L AFFAIRS FORUM 47, 50 (Winter 2016) (lamenting that IJs “are asked to serve two masters, each with different priorities”); Dana Leigh Marks, *Still a Legal “Cinderella”? Why the Immigration Courts Remain an Ill-Treated Stepchild Today*, in FED. LAWYER 25, 29 (Mar. 2012) (“[I]mmigration judges are viewed by the DOJ as ‘attorneys’ who are employed by the U.S. government, rather than true judges—a status that is in constant tension with the role immigration judges actually fulfill.”); Denise Noonan Slavin & Dana Leigh Marks, *Conflicting Roles of Immigration Judges: Do You Want Your Case Heard by a “Government Attorney” or by a “Judge”?*, 16 BENDER’S IMMIGR. BULL. 1785, 1786 (2011) (“[O]n one hand there are circumstances where immigration judges are treated as ‘attorneys working for or representing the U.S. Government,’ while on the other hand, their daily role and the duties they discharge mandate the traditional responsibilities that the title of ‘judge’ implies.”).

This Article aims to determine whether the immigration courts are properly deemed “courts,” with a special focus on the perspectives of former IJs.²² Between January and March of 2018, I conducted semi-structured interviews with twelve former IJs appointed under a variety of presidential administrations and parties.²³ I asked these former IJs for their views on the purpose of the IJ, their authority and constraints, and their relationships with administrators and other decision-makers. I followed up by interviewing three former administrators, including two IJ supervisors, about similar topics.

The study results support the growing sentiments that reform is needed. On the one hand, retired IJs report that restrictionist reforms to downsize the Board of Immigration Appeals and limit its scope of review in 2002 backfired by increasing federal-court scrutiny of IJs’ reason-giving and tone. These IJs also express self-awareness about the choice to adopt the trappings of courts, and some seem to wish for more such hallmarks and the esteem that they may bring. But at the same time, appellate court scrutiny and court symbols have not achieved the independence that reformers crave. Rather, the IJs describe growing frustrations with (and pressures from) agency supervisors and the Justice Department, even before the imposition of case quotas;²⁴ decreasing authority to manage dockets; disagreements over the proper role of an IJ; and tightening constraints on IJ discretion to grant relief.

Based on these findings, I argue that although immigration courts feature some hallmarks of Anglo-American courts, these conceal the fact that they internally operate largely as bureaucracies. While the trappings of courts may enhance the perceived legitimacy of the system, they also obscure the harshness of immigration law and the imbalance of power between noncitizens and the government, without accounting for substantive justice. In other

22. I do not intend to elide the fact that many immigration decisions occur outside of immigration court entirely. For example, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress enacted a system of “expedited removal” for individuals apprehended near the border shortly after entry. Div. C of Pub. L. No. 104-208, 110 Stat. 3009-546 [hereinafter “IIRIRA”]. A noncitizen in expedited removal is never entitled to any review unless they claim a fear of return to their home country, in which case an IJ may review an asylum officer’s finding that the noncitizen lacks a credible fear of return, but the noncitizen may not appeal past the IJ. 8 U.S.C. §§ 1225(b)(1)(A)(ii), 1252(a)(2), 1252(e). Scholars have criticized expedited removal and other diversions from immigration court. See generally, e.g., Amit Jain & Joanne Lee, Note, *Interviewing Refugee Children: Theory, Policy, and Practice with Traumatized Asylum Seekers*, 29 YALE J.L. & FEMINISM 421 (2018) (highlighting deficiencies in credible fear screenings of children in expedited removal); Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181 (2017) (positing that deficiencies of immigration courts are amplified in “shadow proceedings” outside of that system); Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1 (2015) (urging executive to provide “a day in court” for individuals in “speed deportation”); Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475 (2013) (criticizing use of stipulated removal orders as violative of due process); Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595 (2009) (outlining how diversions from immigration hearings fall short of administrative design process criteria).

23. See *infra* Part II (methodology).

24. JAMES R. MCHENRY, III, EOIR PERFORMANCE PLAN FOR ADJUDICATIVE EMPLOYEES 2-3 (Mar. 30, 2018), <http://www.aila.org/File/Related/13040204b.pdf> [hereinafter “McHenry Quota Plan”]; JAMES R. MCHENRY, III, CASE PRIORITIES AND IMMIGRATION COURT PERFORMANCE MEASURES 7 (Jan. 17, 2018), <http://www.aila.org/infonet/eoir-updates-its-case-priorities-and-immigration> [hereinafter “McHenry Memo”].

words, a bureaucracy masquerading as a court exacerbates the flaws of both. Although transposing the system onto an “independent” immigration court outside of the Justice Department would certainly solve some of these problems, it would risk perpetuating others while diverting attention from the inequities and substantive injustices underlying immigration adjudication. Given the stakes of deportation, a wholesale reexamination of the system is warranted.

This Article proceeds in four parts. Part I outlines the history and procedures of removal hearings and the Executive Office for Immigration Review (EOIR) for readers who are unacquainted with the immigration courts. In Part II, I explain the methodology behind the fifteen semi-structured interviews I conducted with former IJs and EOIR officials. Part III, the core of the Article, outlines interview results and follow-up research. In Part IV, I analyze these results to argue that immigration courts are mixed institutions, more bureaucracies than courts. Although an immigration bureaucracy is not anathema in the abstract, I posit that the toxic mixture of bureaucratic hierarchy and judicial hallmarks magnifies some of the least desirable features of both paradigms. I conclude with a call for both procedural and substantive reforms.

I. BACKGROUND

A. *Historical Development*

Understanding the immigration court system requires an appreciation of its historical evolution, which has been driven by both racism and egalitarianism.²⁵ These conflicting interests have generated tension between government officials’ roles as enforcement officers and impartial adjudicators, tension that continues to play out today in the position of the IJ. History further highlights the novelty of the very idea of “immigration courts,” as statutes did not refer to “immigration judges” until 1996.²⁶

From the founding through the late 1800s, the federal government had limited involvement with immigration regulation as it is understood today.²⁷

25. See, e.g., HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 96-102 (2014) (describing history of racialized immigration laws and their effect on immigrant populations); IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 27-28 (2d ed. 2006) (outlining why “[t]he racial composition of the U.S. citizenry . . . reflects the conscious design of U.S. immigration and naturalization laws”); Arthur L. Rizer, III, *The Ever-Changing Bogeyman: How Fear Has Driven Immigration Law and Policy*, 77 LA. L. REV. 243, 246 (2016) (exploring “how immigration as the proverbial ‘bogeyman’ has steered immigration law”).

26. T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 239, 250 (5th ed. 2003) [hereinafter “ALEINIKOFF 5TH ED.”].

27. *Id.* at 240. This is not to say that the federal government was uninvolved with migration or citizenship. Rather, direct federal regulation of migration was focused on native-born communities whose entitlement to citizenship was contested—namely, Native Americans and free African-Americans. See, e.g., MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA 27-28 (2018) (discussing 1821 congressional debate over allowing Missouri to ban free African-Americans from entering the state); KUNAL M. PARKER, MAKING FOREIGNERS: IMMIGRATION AND CITIZENSHIP LAW IN AMERICA, 1600-2000 92 (2015) (describing “Trail of Tears” as “the first large-

This changed dramatically in 1882, when Congress began formal restrictionism with the Chinese Exclusion Act.²⁸ In the ensuing decades, as restrictions against disfavored Asian groups expanded,²⁹ the Immigration and Nationality Service (INS) was created to enforce these restrictions, finding a home in the Justice Department by 1940.³⁰

The IJ's role began in the early twentieth century with the INS "hearing officer" or "examining officer."³¹ In addition to overseeing hearings, these officers undertook enforcement tasks.³² An officer who investigated a case could preside over the hearing in that case with the noncitizen's consent.³³ This provoked concern from the Supreme Court, which held in 1950 that the Administrative Procedure Act (APA) required separation between enforcement and adjudication.³⁴ The Court emphasized:

[T]his commingling, if objectionable anywhere, would seem to be particularly so in the deportation proceedings, where we frequently meet with a voteless class of litigants who not only lack the influence of citizens, but who are strangers to the laws and customs in which they find themselves involved and who often do not even understand the tongue in which they are accused.³⁵

The Court also cited constitutional concerns:

When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. . . . It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation

scale deportation of 'foreigners' from out of [the United States's] midst"); Martha S. Jones, *Leave of Court: African American Claims-Making in the Era of Dred Scott v. Sandford*, in *CONTESTED DEMOCRACY: FREEDOM, RACE, AND POWER IN AMERICAN HISTORY* 54, 62-64 (Manisha Sinha & Penny Von Eschen eds., 2007) (outlining development of Supreme Court jurisprudence on free black immigration).

28. Harvard University Library Open Collections Program, *Immigration to the United States, 1789-1930: Timeline* (last visited Apr. 6, 2018), <http://ocp.hul.harvard.edu/immigration/timeline.html>; BETH LEW-WILLIAMS, *THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA* 5-10 (2018) (connecting anti-Chinese violence to Chinese exclusion and the development of the modern American "alien").

29. In 1892, Congress extended the Chinese Exclusion Act for ten years and further restricted the rights of Chinese U.S. residents. Harvard University Library Open Collections Program, *supra* note 28; Geary Act, Pub. L. No. 52-60, 27 Stat. 25 (1892) (requiring Chinese nationals to carry permits, barring them from serving as trial witnesses, and excluding them from bail in habeas proceedings) (repealed 1943). In 1902, Congress indefinitely renewed Chinese Exclusion. Harvard University Library Open Collections Program, *supra* note 28. In 1917, Congress enacted a literacy requirement and banned all immigrants from Asia except those from Japan and the Philippines. Immigration Act of 1917, Pub. L. No. 64-301, ch. 29, 39 Stat. 874, 874-98 (repealed 1924).

30. ALEINIKOFF 5TH ED., *supra* note 26, at 240.

31. Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 65 INTERP. RELEASES 453, 453-54 (1988).

32. ALEINIKOFF 5TH ED., *supra* note 26, at 249.

33. Rawitz, *supra* note 31, at 454.

34. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 45-46 (1950).

35. *Id.* at 46.

proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake.³⁶

Notwithstanding these qualms, Congress overrode the Court's ruling within months by amending the APA.³⁷ Two years after that, Congress enacted the Immigration and Nationality Act (INA), again superseding APA protections and largely preserving as before the mixed role of the hearing officer in immigration proceedings, now called a "special inquiry officer" (SIO).³⁸

However, as immigration law took a more egalitarian turn in the 1960s,³⁹ procedures in removal hearings also began to shift. The Department of Justice began assigning non-SIO officers to present evidence and cross-examine witnesses. In turn, SIOs specialized in adjudication. By 1973, INS referred to SIOs as "immigration judges" and permitted them to wear robes.⁴⁰ According to one textbook narrative, this demonstrated that "bureaucratic imperatives . . . largely succeeded in securing [the] types of changes the due process advocates had urged."⁴¹

Finally, from the 1980s through the early 2000s, process reforms continued even as substantive immigration policy grew increasingly punitive. In 1983, the Department of Justice created the Executive Office for Immigration Review (EOIR),⁴² separate from INS and accountable to the Attorney General. In 1996, Congress reinforced this role separation by revising the INA to use the term "immigration judge."⁴³ At the same time, it ushered in a new phase of restrictionism, colored by notions of migrant criminality, with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which expanded the categories of convictions that triggered deportation, constricted relief, and limited judicial review.⁴⁴ After the attacks

36. *Id.* at 50-51.

37. *See* *Ardestani v. INS*, 502 U.S. 129, 133 (1991).

38. *See* *Marcello v. Bonds*, 349 U.S. 302, 310 (1955); Rawitz, *supra* note 31, at 457.

39. In 1965, Congress overhauled immigration policy through the repeal of country-based quotas and the Asiatic Barred Zone. LOPEZ, *supra* note 25, at 28; Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911. This led to changes in U.S. ethnic composition, but also precipitated a transition towards treating more immigrants as a temporary labor force rather than a future citizenry. *E.g.*, MOTOMURA, *supra* note 25, at 89, 102-05. A rise in unauthorized immigration also followed. *Id.* at 102-03. By the 1980s, the notion of the "illegal" immigrant had taken root in the national dialogue. *E.g.*, AMADA ARMENTA, PROTECT, SERVE, AND DEPORT: THE RISE OF POLICING AS IMMIGRATION ENFORCEMENT 4 (2017). During this time period, the Supreme Court "repeatedly affirmed the federal government's plenary power over the exclusion, deportation, and naturalization of aliens," thus facilitating the creation of a federal deportation apparatus "that acted with relative impunity." PARKER, *supra* note 27, at 186.

40. Immigration Judge, 38 Fed. Reg. 8,590 (Apr. 4, 1973) (codified at 8 C.F.R. § 1); ALENIKOFF 5TH ED., *supra* note 26, at 249-50; Rawitz, *supra* note 31, at 458.

41. ALENIKOFF 5TH ED., *supra* note 26, at 249.

42. Board of Immigration Appeals, 48 Fed. Reg. 8,038 (Feb. 25, 1983) (codified at 8 C.F.R. §§ 1, 3, 100); Rawitz, *supra* note 31, at 459.

43. ALENIKOFF 5TH ED., *supra* note 26, at 250.

44. IIRIRA, *supra* note 22; *see also* Cecilia Menjívar & Leisy Abrego, *Legal Violence: Immigration Law and the Lives of Central American Immigrants*, 117 AM. J. SOC. 1380, 1390-91 (2012) (describing IIRIRA and role of local law enforcement); Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1843-48 (2007) (outlining

of September 11, 2001, Congress moved enforcement functions into the new Department of Homeland Security (DHS), leaving EOIR in the Department of Justice.⁴⁵ But again, this increase in distance between enforcement and adjudication coincided with an acceleration of the criminalization of immigration law,⁴⁶ with national security increasingly invoked to justify restrictionist policies.⁴⁷

Today, approximately 400 IJs serve in about 60 different jurisdictions, the largest of which employs 85 IJs and staff.⁴⁸ The National Association of Immigration Judges (NAIJ) has served as IJs' collective bargaining representative since 1979.⁴⁹

B. *Procedures and Powers*

As a result of the immigration courts' haphazard evolution, removal proceedings have incorporated certain procedures that echo state and federal court proceedings, but they lack many others. A modern removal proceeding begins with a "master calendar hearing," in which a noncitizen respondent admits or denies charges of removability.⁵⁰ If removability is unresolved, or if the respondent applies for relief, the case proceeds to an "individual hearing" for adjudication.⁵¹ DHS must prove removability,⁵² and if it does, the respondent must prove eligibility for relief.⁵³ IJs decide both issues in the first instance.⁵⁴ IJs have discretion to deny many forms of relief based on equitable considerations⁵⁵ or credibility determinations.⁵⁶ In some cases, an IJ can

effects of IIRIRA); cf. Emily Ryo, *Less Enforcement, More Compliance: Rethinking Unauthorized Migration*, 62 UCLA L. REV. 622, 624-29 (2015) (problematizing narrative of undocumented migrants as law-breakers); Cecilia Menjívar, *Liminal Legality: Salvadoran and Guatemalan Immigrants' Lives in the United States*, 111 AM. J. SOC. 999, 1002-09 (2006) (introducing concept of "liminal legality").

45. ALENIKOFF 5TH ED., *supra* note 26, at 251.

46. *E.g.*, Menjívar & Abrego, *supra* note 44, at 1394-95 (describing increased post-9/11 use of agreements between ICE and local law enforcement).

47. *E.g.*, Shoba Sivaprasad Wadhia, *Is Immigration Law National Security Law?*, 66 EMORY L.J. 669, 672 (2017) (noting "prominence of immigration in the national security debate," which has "legitimized a selective enforcement policy drawn along lines of race, religion, nationality, and citizenship"); Rizer, *supra* note 25, at 258-86 (describing effects of national security framing).

48. Exec. Office for Immigration Review, *Office of the Chief Immigration Judge* (Apr. 4, 2019), <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios>; Exec. Office for Immigration Review, *Office of the Chief Immigration Judge* (Aug. 24, 2017), <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge>; GAO 2017, *supra* note 20, at 10 (numbers from FY 2015).

49. Nat'l Ass'n of Immigration Judges, *About the NAIJ* (last visited Apr. 6, 2018), <https://www.naij-usa.org/about>.

50. GAO 2017, *supra* note 20, at 13; *see also* 8 C.F.R. § 1240.26 (distinguishing between master calendar hearing and merits hearing for purposes of voluntary departure).

51. 8 C.F.R. § 1240.26.

52. 8 U.S.C. § 1229a(c)(3)(A).

53. 8 U.S.C. § 1229a(c)(4)(A).

54. 8 C.F.R. § 1240.1(a).

55. *E.g.*, 8 U.S.C. § 1158(b)(1)(A) (stating that Attorney General "may" grant asylum to qualifying noncitizen); 8 U.S.C. §§ 1229b(a), (b) (same for cancellation of removal).

56. 8 U.S.C. § 1229a(c)(4)(C). Congress raised the standard of credibility in the REAL ID Act of 2005. Div. B of Pub. L. No. 109-13, § 101, 119 Stat. 231, 302-06. Under REAL ID, an IJ may deem a

order a detained noncitizen's release on bond.⁵⁷

Today, the INA states that IJs "shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses."⁵⁸ This is largely unchanged from the INA's original grant of authority to presiding SIOs, with two exceptions. First, SIOs could present evidence,⁵⁹ which IJs cannot do, though they retain power to question respondents and witnesses. Second, since 1996, the INA has authorized IJs to exercise limited civil contempt powers, but only "under regulations" that the Justice Department never promulgated.⁶⁰ Aside from this, regulations expand on IJs' ability to regulate hearings⁶¹ and require them to exercise "independent judgment and discretion."⁶² Ultimately, an IJ decides whether a noncitizen will be removed.⁶³ This decision may be oral or written, and "formal enumeration of findings is not required."⁶⁴

Noncitizens in removal proceedings, like litigants in many court systems, are entitled to a reasonable opportunity to examine evidence against them, present evidence, and cross-examine government witnesses.⁶⁵ But beyond this, protections are slim. There is no right to appointed counsel under current law.⁶⁶ An IJ may compel non-incriminating testimony.⁶⁷ Application of the exclusionary rule is limited.⁶⁸ Noncitizens lack access to discovery procedures that could uncover favorable evidence⁶⁹: although IJs technically can order depositions and subpoenas,⁷⁰ the only reliable way for a noncitizen to view their own case file is to file a Freedom of Information Act (FOIA)

respondent not credible for virtually any inconsistency, "without regard to whether [it] goes to the heart of the applicant's claim." 8 U.S.C. § 1229a(c)(4)(C).

57. 8 C.F.R. § 1003.19. Under the INA, some categories of noncitizens in removal proceedings are statutorily ineligible for bond. *Jennings v. Rodriguez*, 138 S. Ct. 830, 845-47 (2018).

58. 8 U.S.C. § 1229a(b)(1).

59. Immigration and Nationality Act, Pub. L. No. 414, § 236, 66 Stat. 163, 200 (1952).

60. 8 U.S.C. § 1229a(b)(1). For more on contempt, see *infra* Part III.C.i.a.

61. 8 C.F.R. §§ 1240.1, 1240.6.

62. 8 C.F.R. § 1003.10(b).

63. 8 U.S.C. § 1229a(c)(1)(A).

64. 8 C.F.R. § 1240.12(a).

65. 8 U.S.C. § 1229a(b)(4)(B).

66. 8 U.S.C. § 1229a(b)(4)(A); 8 C.F.R. § 1240.3. Although the American Civil Liberties Union recently argued that the fair hearing provision of the INA, 8 U.S.C. § 1229a(b)(4)(B), mandates appointment of counsel for minors who cannot have a fair hearing without it, a Ninth Circuit panel rejected the argument. *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1150-51 (9th Cir.), *reh'g en banc granted*, 904 F.3d 642 (9th Cir. 2018).

67. *E.g.*, Santos, 19 I. & N. Dec. 105, 109 n.2 (BIA 1984).

68. *See, e.g.*, *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (declining to impose exclusionary remedy for Fourth Amendment violations in immigration context); *id.* at 1050-51 (plurality opinion) (leaving open possibility of exclusion for "egregious violations . . . that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained"). *See generally* Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563 (2010) (critiquing lack of procedural mechanisms to address rights violations in immigration enforcement and advocating reconsideration of *Lopez-Mendoza*).

69. *See generally* Geoffrey Heeren, *Shattering the One-Way Mirror: Discovery in Immigration Court*, 79 BROOK. L. REV. 1569 (2014) (arguing for discovery in removal hearings to balance government's advantage).

70. 8 U.S.C. § 1229a(b)(1); 8 C.F.R. §§ 1003.35, 1287.4(a)(2)(ii); U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL, ch. 4, r. 4.20.

request outside of the removal proceeding, with no guarantee that the results will arrive before the case concludes.⁷¹ No formal rules of evidence apply,⁷² and the APA's trial-like formal hearing provisions remain inapplicable,⁷³ removing many of the procedural protections used to ensure fair adjudications in federal and administrative courts. Although removal hearings are presumptively open to the public, there are exceptions for space limitations, the parties' wishes, and other reasons.⁷⁴

A noncitizen who seeks review of an IJ's order must appeal within 30 days to the Board of Immigration Appeals (BIA or "Board").⁷⁵ The Board has evolved dramatically over the past two decades to streamline case processing and reduce scrutiny of IJ decisions. In the 1990s, the Board heard cases in three-member panels.⁷⁶ In 1999, the Justice Department began allowing single members to issue affirmances without opinion (AWOs).⁷⁷ In 2002, Attorney General John Ashcroft made single-member decisions the norm and increased use of AWOs.⁷⁸ Ashcroft also limited the Board's previously broad ability to review findings of fact and cut its membership by more than half, removing four of the five members who ruled in favor of noncitizens at the highest rates.⁷⁹ Thus, one empirical study found that the data "strongly support[ed] the assertion that the Ashcroft administration was attempting to alter the Board's ideological composition."⁸⁰ The eleven remaining members denied relief more frequently thereafter.⁸¹ As discussed below, these reforms decreased the quality of Board decision-making, causing an explosion of

71. Heeren, *supra* note 69, at 1571-72 (on FOIA requests and their limitations); *id.* at 1582-84 (on limited use of subpoenas, depositions, and witness lists).

72. *E.g.*, Bustos-Torres v. INS, 898 F.2d 1053, 1055 (5th Cir. 1990); *see also* Won Kidane, *Revisiting the Rules of Procedure and Evidence Applicable in Adversarial Administrative Deportation Proceedings: Lessons from the Department of Labor Rules of Evidence*, 57 CATH. U. L. REV. 93, 155-64 (2007) (arguing for adoption of Department of Labor evidentiary rules before IJs and the Board of Immigration Appeals).

73. See 8 U.S.C. § 1229a(a)(3) ("[A] proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be . . . removed from the United States."); *Marcello v. Bonds*, 349 U.S. 302, 307-10 (1955) (holding that INA expressly superseded formal hearing provisions of APA § 554); *Ardestani v. INS*, 502 U.S. 129, 134 (1991) (reaffirming *Marcello* as unaffected by Attorney General's creation of EOIR in 1983).

74. 8 C.F.R. § 1003.27 (directing that all immigration hearings except exclusion hearings are presumptively open, but allowing IJs to close hearings under certain circumstances); Exec. Office for Immigration Review, *Fact Sheet: Observing Immigration Court Hearings* 1-2 (Jan. 2018), <https://www.justice.gov/eoir/page/file/941991/download> (listing exceptions). Hearings in detention facilities are only accessible through compliance with facility requirements. *Id.* at 2.

75. 8 C.F.R. § 1003.1(b).

76. T. ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 256 (8th ed. 2016) [hereinafter "ALEINIKOFF 8TH ED."].

77. ALEINIKOFF 5TH ED., *supra* note 26, at 252 (citing 64 Fed. Reg. 56,135 (Oct. 18, 1999)). For more on the arc of streamlining reforms, see MILLER ET AL., *supra* note 19, at 109-14.

78. ALEINIKOFF 5TH ED., *supra* note 26, at 252 (citing 67 Fed. Reg. 54,878-905 (Aug. 26, 2002)).

79. Peter J. Levinson, *The Facade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9 BENDER'S IMMIGR. BULL. 1154 (2004).

80. MILLER ET AL., *supra* note 19, at 114; *see also id.* at 124 (plotting sharp change in mean BIA ideology score after Ashcroft downsizing).

81. Levinson, *supra* note 79; RAMJI-NOGALES ET AL., *supra* note 20, at 65-72; MILLER ET AL., *supra* note 19, at 116 (collecting studies).

litigation in circuit courts.⁸² The volume of remands eventually leveled off,⁸³ and the Board gradually re-grew from 11 to 21 members between 2002 and 2018.⁸⁴ However, single-member Board opinions remain the norm: a noncitizen today may receive review by a three-member panel only if their case falls into one of six unusual categories.⁸⁵ The modern Board generally decides cases on the briefs, if any, and virtually never hears oral argument.⁸⁶

The Board's decision is usually the end of the administrative process. However, Attorneys General may refer Board cases to themselves for re-determination.⁸⁷ Although this power is common among administrative agencies, it is unusual for non-administrative U.S. courts. Invocation of this authority has been inconsistent, with recent Republican administrations using it more frequently than their Democratic counterparts. Under the Clinton Administration, the Attorney General referred three cases; under Bush, sixteen; and under Obama, four.⁸⁸ The Trump Administration matched its predecessor's numbers in less than two years: then-Attorney General Jeff Sessions referred four cases in the first three months of 2018 and decided each against the noncitizen.⁸⁹ The Department of Justice intends to expand the Attorney General's referral authority to encompass IJ decisions, even when they are

82. See *infra* Part III.B.i.

83. Stacy Caplow, *After the Flood: The Legacy of the "Surge" of Federal Immigration Appeals*, 7 NW. J.L. & SOC. POL'Y 1, 9-11 (2012). By 2011, AWOs composed only two percent of BIA decisions. ALEINIKOFF 8TH ED., *supra* note 76, at 257. Federal court reversals of BIA decisions fell from 17.5 percent in 2006, *id.*, to 12 percent in the first 11 months of 2017, JOHN GUENDELSBERGER, FEDERAL COURT ACTIVITY: CIRCUIT COURT DECISIONS FOR SEPTEMBER-NOVEMBER 2017, 11-7 IMMIGR. L. ADVISOR 6 (2017), <https://www.justice.gov/eoir/page/file/1028571/download>. However, the rate of appeal remains well above pre-2002 levels. ALEINIKOFF 8TH ED., *supra* note 76, at 267.

84. Board of Immigration Appeals: Composition of Board and Temporary Board Members, 73 Fed. Reg. 33,875 (June 16, 2008) (codified at 8 C.F.R. § 1003.1); Expanding the Size of the Board of Immigration Appeals, 80 Fed. Reg. 31,461 (June 3, 2015) (codified at 8 C.F.R. § 1003.1); Expanding the Size of the Board of Immigration Appeals, 83 Fed. Reg. 8,321 (Feb. 27, 2018) (codified at 8 C.F.R. § 1003.1).

85. 8 C.F.R. § 1003.1(e)(6); ALEINIKOFF 8TH ED., *supra* note 76, at 256.

86. U.S. DEP'T OF JUSTICE, BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL, ch. 8, r. 8.2(a). Echoing the Ashcroft reforms, Attorney General William Barr reportedly intends to re-expand the use of AWOs. Tal Kopan, *Trump's New Attorney General Launches Fresh Changes to Immigration Courts*, S.F. CHRON. (Apr. 12, 2019), <https://www.sfchronicle.com/politics/article/Trump-s-new-attorney-general-launches-fresh-13761430.php>.

87. ALEINIKOFF 8TH ED., *supra* note 76, at 255 (citing 8 C.F.R. § 1003.1(h)). The referral power exists because the Board is the delegate of the Attorney General. Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841, 850 (2016). Former Attorney General Gonzales and Glen argue for broader use of referral; Bijal Shah counters that referral "creates a unique conflict between the exceptional power afforded the Executive Branch in immigration law, and core procedural requirements of agency decision-making." Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. ONLINE 129, 131 (2017).

88. Gonzales & Glen, *supra* note 87, at 858; Jeffrey S. Chase, *The AG's Certifying of BIA Decisions* (Mar. 29, 2018), <https://www.jeffreyschase.com/blog/2018/3/29/the-ags-certifying-of-bia-decisions>.

89. A-B-, 27 I. & N. Dec. 316 (AG 2018) (overruling Board precedent to hold that domestic violence and gang violence would generally not be grounds for asylum); Castro-Tum, 27 I. & N. Dec. 271 (AG 2018) (eliminating practice of administrative closure); L-A-B-R- et al., 27 I. & N. Dec. 405 (AG 2018) (heightening good-cause standard for IJ continuances); E-F-H-L-, 27 I. & N. Dec. 226 (AG 2018) (vacating decision in which BIA had held that asylum applicants were entitled to evidentiary hearings without prima facie showings of eligibility). For more on these cases, see *infra* Part III.C.

not appealed by either party.⁹⁰

Federal courts have only narrow jurisdiction to review removal orders, further raising the stakes of the administrative process. To seek Article III review, a noncitizen must file a petition for review (PFR) before a court of appeals within 30 days of an administratively final order.⁹¹ Among other restrictions, federal courts cannot review most determinations that are discretionary by statute.⁹² Findings of fact are conclusive “unless any reasonable adjudicator would be compelled to conclude to the contrary,”⁹³ though questions of law are reviewed *de novo*.⁹⁴ Habeas review is also available in some cases.⁹⁵

C. *Bureaucratic Supervision*

The bureaucratic accountability structure for IJs, which diverges from the structure faced by traditional judges and adjudicators in other administrative agencies, provides a final dimension of context for this study. Each IJ is directly supervised by an Assistant Chief IJ (ACIJ).⁹⁶ Larger immigration courts have “embedded” local ACIJs, while smaller facilities are overseen remotely; there are also dedicated ACIJs to handle complaints against IJs and IJ training.⁹⁷ The eighteen ACIJs are supervised by two Deputy Chief IJs and one Principal Deputy Chief IJ, each of whom report to the Chief IJ; in turn, the Chief IJ reports to the Deputy Director and Director of EOIR, who report to the Deputy Attorney General and Attorney General.⁹⁸

90. OFFICE OF INFO. & REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, REFERRAL OF DECISIONS IN IMMIGRATION MATTERS TO THE ATTORNEY GENERAL, RIN 1125-AA86 (Spring 2018), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=1125-AA86>.

91. 8 U.S.C. § 1252(b)(1).

92. 8 U.S.C. § 1252(a)(2)(B)(ii).

93. 8 U.S.C. § 1252(b)(4)(B).

94. See Scott Rempell, *Judging the Judges: Appellate Review of Immigration Decisions*, 53 S. TEX. L. REV. 477, 484-85 (2012).

95. The INA severely limits habeas review for individuals in expedited removal. See sources cited *supra* note 22; 8 U.S.C. § 1252(e)(2). Circuits have split over whether these restrictions are constitutional. Compare *Thuraissigiam v. DHS*, 917 F.3d 1097, 1116-19 (9th Cir. 2019) (concluding that Suspension Clause mandates broader habeas review of expedited removal determinations), with *Castro v. DHS*, 835 F.3d 422, 445-49 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 1581 (2017) (rejecting similar Suspension Clause challenge).

96. Exec. Office for Immigration Review, *Office of the Chief Immigration Judge* (Mar. 5, 2018), <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios>; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-72, ASYLUM: VARIATION EXISTS IN OUTCOMES OF APPLICATIONS ACROSS IMMIGRATION COURTS AND JUDGES 3 (Nov. 2016) [hereinafter “GAO 2016”].

97. Statement of Juan P. Osuna, Director, Exec. Office for Immigration Review, to U.S. Senate Committee on the Judiciary, at 4 (May 18, 2011), <https://www.justice.gov/sites/default/files/eoir/legacy/2011/05/18/EOIRtestimony05182011.pdf>; TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION COURTS: STILL A TROUBLED INSTITUTION (2009), <http://trac.syr.edu/immigration/reports/210/>; TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, BUSH ADMINISTRATION PLAN TO IMPROVE IMMIGRATION COURTS LAGS (2008), <http://trac.syr.edu/immigration/reports/194/>.

98. Exec. Office for Immigration Review, *supra* note 96 (ACIJs, Deputy Chief IJs, Principal Deputy Chief IJ, and Chief IJ); Exec. Office for Immigration Review, *Organization Chart* (Nov. 2013), <https://www.justice.gov/eoir/organization-chart> (Deputy EOIR Director and EOIR Director); U.S. Dep't of

Notably, IJs do not enjoy the protections of Administrative Law Judges (ALJs). Until recently, to hire an ALJ, an agency had to select from a list of candidates prepared by the independent Office of Personnel Management (OPM) based on a merit selection process.⁹⁹ Once hired, an ALJ is not subject to a probationary period.¹⁰⁰ ALJs are removable only for good cause, as determined by the Merit Systems Protection Board through formal adjudication.¹⁰¹ Low productivity alone generally does not suffice.¹⁰² Agencies may not rate ALJ job performance,¹⁰³ though ALJs can use benchmarks to self-assess their productivity.¹⁰⁴

None of these bulwarks apply to IJs. Unlike traditional ALJ hiring, IJ hiring has always begun in EOIR, which recommends candidates to the Office of the Deputy Attorney General.¹⁰⁵ The IJ hiring process came under scrutiny during the George W. Bush Administration, when a former Justice Department counsel admitted that she “took political considerations into account” when hiring some IJs.¹⁰⁶ An investigation uncovered that White House and Justice Department officials had “treated [IJ hiring] like other political appointments” and illegally favored Republican party members for appointments.¹⁰⁷

EOIR also has a disciplinary process for allegations of IJ misconduct.¹⁰⁸ Remedial action can include counseling, training, reprimand, suspension, or

Justice, *Organizational Chart* (Feb. 5, 2018), <https://www.justice.gov/agencies/chart> (Deputy Attorney General and Attorney General).

99. VANESSA K. BURROWS, CONG. RESEARCH SERV., ADMINISTRATIVE LAW JUDGES: AN OVERVIEW 2 (Apr. 13, 2010), <http://ssaconnect.com/tfiles/ALJ-Overview.pdf>. On July 10, 2018, President Trump changed this longstanding system by executive order, allowing agencies to hire ALJs directly based on their own criteria. Excepting Administrative Law Judges from the Competitive Service, Exec. Order. No. 13,843, 83 Fed. Reg. 32,755 (July 10, 2018). Although the Trump Administration framed the executive order as an attempt to head off an Appointments Clause challenge to ALJ hiring, commentators have questioned this justification. *E.g.*, N. Peter Rasmussen, *Presidential Order Carves ALJ Hiring from Civil Service Vetting*, BLOOMBERG CORP. TRANSACTIONS BLOG (July 13, 2018), <https://www.bna.com/presidential-order-carves-b73014477436/> (noting that neither the Supreme Court nor the parties addressed ALJ hiring in *Lucia v. S.E.C.*, 138 S. Ct. 2044 (2018)); Kent Barnett, *Raiding the OPM Den: The New Method of ALJ Hiring*, 36 YALE J. ON REG.: NOTICE & COMMENT (July 11, 2018), <http://yalejreg.com/nc/raiding-the-opm-den-the-new-method-of-alj-hiring-by-kent-barnett/> (describing *Lucia* rationale as “unconvincing”).

100. BURROWS, *supra* note 99, at 8.

101. GAO 2017, *supra* note 20, at 77.

102. BURROWS, *supra* note 99, at 8.

103. *Id.* at 7 (citing 5 C.F.R. § 930.206).

104. GAO 2017, *supra* note 20, at 136.

105. *Id.* at 77.

106. Testimony of Monica M. Goodling, Former Justice Department Counsel and White House Liaison Aide, to the U.S. House of Representatives Judiciary Committee (May 24, 2007), <http://www.nytimes.com/2007/05/24/us/24mfulltext.html>; Family, *supra* note 14, at 601-02.

107. OFFICE OF THE INSPECTOR GENERAL, 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 116 (July 28, 2008). Although IJs are not protected by the APA, the civil service laws apply to their appointment. *Id.*; 5 U.S.C. §§ 2301, 2302.

108. Exec. Office for Immigration Review, *Immigration Judge Conduct and Professionalism* (Mar. 5, 2018), <https://www.justice.gov/eoir/immigration-judge-conduct-and-professionalism>. See generally Maria Baldini-Potermín, *Immigration Judges: A Review of Duties, Due Process, and (Mis)conduct*, 16-06 IMMIGR. BRIEFINGS 1 (2016) (outlining development of IJ code of ethics and disciplinary process).

termination.¹⁰⁹ IJs, unlike ALJs, may be removed by the Attorney General for cause without a hearing.¹¹⁰ In addition, new IJs are subject to a two-year probationary period during which they may be terminated without cause.¹¹¹ EOIR further asserts authority to reassign IJs at any time, even in the absence of misconduct.¹¹²

Today, EOIR states that it evaluates IJ candidates based on temperament, legal knowledge, experience with complex issues and administrative hearings, and knowledge of judicial practices.¹¹³ New IJs are trained for approximately six weeks.¹¹⁴ IJs have also been subject to ongoing performance evaluations since around 2006.¹¹⁵ Before 2018, EOIR assessed IJs based on three criteria: legal ability, professionalism, and accountability for results, including case completion.¹¹⁶ In 2018, the Justice Department also imposed case quotas on IJs, meaning that an IJ who fails to complete at least 700 cases per year is now deemed unsatisfactory.¹¹⁷

II. METHODOLOGY

The historical context, modern-day idiosyncrasies, and robust bureaucratic structure of the immigration courts all raise important questions about the system's underlying nature. To advance understandings of this system, I spoke directly with former IJs to learn about their experiences. To add to the existing literature, I used a semi-structured interview format. Semi-structured interviewing offers the opportunity to address topics of interest while also allowing participants to provide new directions for inquiry.¹¹⁸ Unlike

109. Exec. Office for Immigration Review, *OCIJ Procedure for Handling Complaints Against Immigration Judges*, https://www.justice.gov/sites/default/files/pages/attachments/2017/10/05/ijcomplaintprocessflowchart_10-5-17.pdf. EOIR does not publish information about individual complaints.

110. GAO 2017, *supra* note 20, at 77.

111. Osuna, *supra* note 97, at 4.

112. Since 2005, the agency has maintained that “a reassignment to another position, even one involving a different job title, job series, or duties, is a matter of management discretion and is not considered to be disciplinary in nature if there is no loss of pay or grade.” Legomsky, *Deportation and the War on Independence*, *supra* note 14, at 373-74.

113. Osuna, *supra* note 97, at 3. Once hired, IJ salaries range from \$128,312 to \$170,400 per year, based on experience and cost of living. Exec. Office for Immigration Review, *2016 Immigration Judge Pay Rates* (effective Jan. 10, 2016), <https://www.justice.gov/eoir/page/file/991386/download>.

114. GAO 2016, *supra* note 96, at 45. EOIR also used to hold annual conferences to provide ongoing training for all IJs, but has cancelled these conferences in most recent years. *Id.*

115. U.S. DEP’T OF JUSTICE, MEASURES TO IMPROVE THE IMMIGRATION COURTS AND THE BOARD OF IMMIGRATION APPEALS 1 (Aug. 9, 2006); Nina Bernstein, *Immigration Judges Facing Performance Reviews*, N.Y. TIMES (Aug. 10, 2006), <http://www.nytimes.com/2006/08/10/washington/10immig.html>. Some IJs have argued that EOIR performance evaluations are inaptly based on general federal employee evaluations, rather than model judicial evaluations. See Denise Noonan Slavin & Dorothy Harbeck, *A View from the Bench by the National Association of Immigration Judges*, 63-NOV FED. LAW. 66, 68 (2016).

116. GAO 2017, *supra* note 20, at 136.

117. McHenry Quota Plan, *supra* note 24, at 2-3. For more on case quotas, see *infra* Part III.C.ii.a.

118. ANNE GALLETTA & WILLIAM E. CROSS, JR., MASTERING THE SEMI-STRUCTURED INTERVIEW AND BEYOND: FROM RESEARCH DESIGN TO ANALYSIS AND PUBLICATION 24 (2013). The semi-structured interview combines features of the “interview guide” and “standardized open-ended” interview models, allowing for specific wording of questions but leaving room for follow-ups based on responses. MICHAEL QUINN PATTON, QUALITATIVE RESEARCH & EVALUATION METHODS 349 (3d ed. 2002).

surveys, semi-structured interviews also allow the researcher to probe participant responses.¹¹⁹ I interviewed former IJs out of necessity, as EOIR policy prohibits interviews with sitting IJs.¹²⁰ I chose to protect participants' identities in order to minimize any fear of professional consequences and maximize the accuracy and amount of disclosures.

There are benefits and limitations to focusing on IJs. As the central decision-makers in the immigration courts and the focal point of recent pressures and criticism, IJs are uniquely positioned to offer insights into the administrative design of the system. However, IJs also have an interest in maximizing their own autonomy and resources. Speaking to former IJs may have mitigated this bias. The choice to interview IJs also means that other individuals in the hearing (notably, the noncitizen subject) are not the focus. An emphasis on IJs can therefore only tell part of the story of immigration adjudication, and other research can fill this gap by attending to the experience of noncitizens in removal proceedings.¹²¹

The semi-structured interview format also has limitations that I have tried to take into account. For instance, it is not always possible to verify participants' narratives. Where corroboration is available, I provide it; however, some disclosures are difficult to verify by design, as they concern the internal personnel practices of a federal agency. I leave it to the reader to decide how much weight to give these statements, and I invite disagreement with my choice to credit them in my analysis.

In addition, qualitative analysis and the interview format can be susceptible to researcher biases.¹²² Framing and sequencing of questions, for example, can affect responses and introduce inconsistencies.¹²³ Analysis may also be colored by the researcher's perspective. Because I began from a position of skepticism about whether the immigration court system was truly a court system, I attempted to avoid pre-judgment while interviews were ongoing. I have also taken care to report IJ perspectives that complicate my findings.

119. GALLETTA, *supra* note 118, at 24.

120. U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL, ch. 1, r. 1.4(d).

121. See generally, e.g., Susan Bibler Coutin, *Suspension of Deportation Hearings: Racialization, Immigration, and 'Americanness'*, 8 J. LATIN AM. ANTHRO. 58 (2003) (studying criteria through which IJs assessed "deservingness" during pre-IIRIRA suspension of deportation hearings). A number of scholars have also explored the experiences of noncitizens in the immigration system beyond the hearing context. See generally, e.g., Emily Ryo, *Fostering Legal Cynicism Through Immigration Detention*, 90 S. CAL. L. REV. 999 (2017) (analyzing surveys and post-release interviews of noncitizens subject to immigration detention); Menjívar & Abrego, *supra* note 44 (documenting impact of the fear of enforcement actions on immigrants' livelihoods, including those with and without legal status); Menjívar, *supra* note 44 (undertaking ethnographic analysis of the effects of uncertain legal status on the lives of Salvadoran and Guatemalan immigrants).

122. GALLETTA, *supra* note 118, at 104-05.

123. PATTON, *supra* note 118, at 349.

A. *Process*

Before identifying topics and recruiting participants, I surveyed existing literature on the design of the immigration system to formulate a research question.¹²⁴ I then drafted a semi-structured interview protocol. The questions began from a broad frame, asking participants to describe the purposes of the system and the role of the IJ, as well as the atmosphere in each participant's hearing room and each individual's perceived authority, constraints, and decision-making process.¹²⁵ Questioning then shifted into specific inquiries about administrative accountability, relationships with other decision-makers, and background and training.¹²⁶ I closed by following up on any outstanding threads and asking participants whether they had any other relevant aspects of their experiences to share.¹²⁷

After receiving Institutional Review Board (IRB) approval, I began recruiting participants and conducting interviews between January and March of 2018. I pursued two recruitment channels simultaneously:

- First, I requested that NAIJ, the IJ union, refer me to former IJs through its online contact form. This resulted in two connections with "NAIJ-affiliated" former IJs (former IJs who continue to be active in NAIJ circles), whom I asked to serve as knowledgeable referrers.
- Second, I searched commercial internet search engines and public record databases for names of former IJs. I generated a list of 46 former IJs and Board members, and I found contact information for 20, all of whom I sent unsolicited recruitment emails.

I pursued both strategies to maximize the number of interviews I could conduct. I also wanted to maximize the chance that I could identify any systemic bias in viewpoints among NAIJ-affiliated former IJs, as opposed to non-NAIJ-affiliated individuals.

My interviews with former IJs exposed a range of views about the priorities of EOIR administrators, and each interviewee made clear that their ACIJ was their primary point of contact with these agency higher-ups. To paint a fuller picture, I secured additional IRB approval to interview former EOIR bureaucrats, and I opted to focus on ACIJs. Again, I compiled a list of former ACIJs and contact information, and I asked a subset of the former IJs I interviewed to refer former EOIR administrators. As before, I pursued every lead.

124. GALLETTA, *supra* note 118, at 11 (suggesting that "[t]he existing literature should inform your development of a research question, selection of methods for data collection, and formulation of an analytical framework").

125. *See id.* at 46-47 (recommending open-ended questions at start of interview, followed by probes for clarification).

126. *Id.* at 50.

127. *Id.* at 52.

I was able to contact four former administrators; three consented to interviews in April of 2018, and one declined.

Before each interview, I explained the study and received informed consent.¹²⁸ During each interview, I typed notes that were as close to verbatim as possible. After each interview, I summarized my notes and attempted to make sense of the data by identifying recurring themes and categorizing them based on participants' accounts and the existing scholarly literature.¹²⁹ The summary of findings below is an attempt to balance brevity with thick descriptions, with emphasis on themes that provide new texture or break new explanatory ground.¹³⁰

B. *Dataset*

I interviewed four former IJs through the NAIJ referral process, and eight through the unsolicited email process, for a total of twelve participants.¹³¹ Some of the eight unsolicited-email IJs also appeared to be NAIJ-affiliated, but at least three or four did not appear to be NAIJ-affiliated. Every time I spoke with an IJ, I asked them to refer me to other IJs. I did not notice any systematic difference in opinions expressed by NAIJ-affiliated IJs, except that the sole IJ who expressed general support for Trump Administration proposals was non-affiliated. In addition to the twelve participants, I interviewed three former EOIR administrators.

I refer to each participant as "IJ#" and use gender-neutral pronouns (they, them, their) to protect their identities. I do the same for EOIR administrators, coding them as "EOIR#." In a few instances where specifying even a code number could risk revealing an individual's identity, I have withheld it.

The twelve participants served as IJs for between two and 31 years, with the median length of service (excluding time spent on the Board) being approximately 17.5 years and the average about 16.25 years.¹³² The participants were split evenly across presidential party of appointment, with two who became IJs during the Reagan Administration, two who took the bench during the first Bush Administration, six who became IJs during the Clinton Administration, and two who became IJs during the second Bush Administration. The earliest participant to depart the IJ role did so in 1995, while the most recent retired in 2017. Four of the twelve participants stated that all or most of their docket involved detained noncitizens. Three were women and nine were men.

128. PATTON, *supra* note 118, at 407-08.

129. *Id.* at 458-62.

130. *Id.* at 467, 503.

131. Because this Article focuses on the role of the IJ, and the twelve former IJs provided the bulk of the findings, references to "participants" concern the twelve former IJ-interviewees, not the three EOIR administrators.

132. Two participants had also served as non-temporary members of the Board of Immigration Appeals, with their average length of Board service being eight years.

I also received a 751-word written response from a non-NAIJ-affiliated IJ who declined to speak with me directly but consented to corresponding in writing. This IJ served on the bench for about 15 years. The IJ did not respond to my questions but provided “comments regarding the purpose of the Immigration Court, the functions of immigration judges, and [their] experiences as an immigration judge.”¹³³ This written response lacks many of the methodological benefits of the interviews, as I was unable to probe the IJ’s answers. Nevertheless, I incorporate it where appropriate with its limitations in mind.¹³⁴

Asylum denial rates are publicly available for eleven of the twelve participants, and the one IJ who declined an interview but submitted a written response, for at least some years.¹³⁵ These rates can offer a broad indication of whether an IJ generally applies the law in a more or less restrictionist manner, though the nature of the cases that different IJs adjudicate can also vary widely. By the end of each of these IJs’ time on the bench, their denial rates were between about 20 percent and about 90 percent. Six judges had denial rates between approximately 40 percent and approximately 60 percent; four had rates above 60 percent; and two had rates below 40 percent. During these years, the national average denial rate fluctuated between around 50 percent and around 60 percent. Accordingly, the sample appears at least somewhat representative of national grant rates.

After the participant interviews, I interviewed three administrators. Each one individually served in EOIR for multiple decades and left during the Obama or Trump Administration. Two worked as ACIJs, while a third interacted with IJs and ACIJs for some portion of their time in EOIR.

Separately from the interviews, I also filed a FOIA request for documents on IJ training, evaluation, supervision, and the NAIJ-EOIR labor agreement. EOIR produced responsive documents with redactions, none of which were ultimately relevant to this study.¹³⁶

III. FINDINGS

Speaking with twelve former IJs and three former EOIR administrators yielded many insights into the nature of the immigration court system. In this Part, I briefly contextualize and summarize these findings. I then offer a detailed account of the accumulated “court-like” or “judicial” aspects of the

133. IJW1.

134. See *infra* notes 145, 384 (corroborating reports by interview participants).

135. *Immigration Judge Reports — Asylum*, TRAC IMMIGR. (last visited Mar. 5, 2018), <http://trac.syr.edu/immigration/reports/judgereports/>; *Judge-by-Judge Asylum Decisions in Immigration Courts, FY 2007-2012*, TRAC IMMIGR. (last visited Mar. 5, 2018), <http://trac.syr.edu/immigration/reports/306/include/denialrates.html>; *Judge-by-Judge Asylum Decisions in Immigration Courts Before and After the Attorney General’s Directive*, TRAC IMMIGR. (last visited Mar. 5, 2018), <http://trac.syr.edu/immigration/reports/240/include/denialrates.html>.

136. All of these documents are available for download at <https://app.box.com/s/2kxxufhui67i513ecb6ixarow4ga2llk>.

system, followed by a bevy of more “bureaucratic” mechanisms through which the Justice Department and EOIR administrators regulate IJ decision-making. I conclude this Part by qualifying these findings and explaining why they are nevertheless instructive.

A. *Summary*

The fifteen interviews revealed numerous themes relating to the judicial and bureaucratic aspects of the immigration court system. In distinguishing these two categories, I recognize that not all courts look alike. Thus, to capture prevailing U.S. conceptions of courts as independent mechanisms of dispute resolution, I adopt Robert Kagan’s framework of “adversarial legalism.”¹³⁷ Owing to the U.S.’s anti-authoritarian traditions and New Deal-era shifts towards activist government, adversarial legalism is formal, non-hierarchical, and highly participatory.¹³⁸ While adversarial legal institutions facilitate creative advocacy through their conception of the trial as a contest, they may also be inconsistent, inefficient, and unequal.¹³⁹ In contrast to the “court-like” or “judicial” nature of adversarial legalism, ideal “bureaucratic” systems are hierarchical structures of policy implementation in which decision-makers’ discretion is limited.¹⁴⁰ In practice, of course, bureaucracies often depart from this ideal—for example, due to tensions between street-level decision-makers and organizational goals.¹⁴¹

With this in mind, participants’ responses highlighted both judicial and bureaucratic facets of the immigration court system. First, participants pointed to two currents of actual or apparent judicialization: more searching review from Article III federal courts and EOIR’s self-conscious adoption of the trappings of courts. Participants shared that the Attorney General’s attempts to expedite deportations in 2002 by reforming the BIA backfired, instead triggering increased Article III scrutiny of IJ tone and decision-writing. Some participants also suggested that the Justice Department and EOIR employed the trappings of courts to enhance public perceptions of legitimacy, with one calling removal hearings “stage setting[s]” designed to provide “the illusion of due process.”¹⁴²

Second, participants emphasized deep-seated systems of bureaucratic control and related pathologies within EOIR. Many, but not all, expressed

137. See generally ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001).

138. *Id.* at 9-16.

139. *Id.* at 4 (noting that “adversarial legalism is a markedly inefficient, complex, costly, punitive, and unpredictable method of governance and dispute resolution”); *id.* at 75 (describing how lack of counsel can lead adversarial legalism to be “judge-dominated, yet without the same level of commitment to norms of legality that are inculcated in highly professional, hierarchically organized European judicial systems”).

140. MAX WEBER, *ECONOMY AND SOCIETY* 223-26 (Guenther Roth & Clause Wittich eds., 1968).

141. MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* 18-23 (1980). For more on street-level bureaucracies, see *infra* Part IV.A.

142. IJ4.

distrust for administrative supervisors and indicated that higher-ups' views of IJ responsibilities did not always align with IJs' goals, echoing characteristics of street-level bureaucracies like schools and police departments. Participants also related that they experienced hierarchical case processing pressures, starting well before EOIR imposed case completion quotas on individual IJs, and subjugation of their docket-management authority to enforcement goals. Some further perceived top-down restrictionist or expansionist policy pressures from the White House and Attorney General, which manifested in partisan hiring, firing, and rhetoric. Lastly, some IJs reported that their jobs had become less satisfying over time as changes in law constrained their discretion to grant relief.

Aside from these themes, stark resource challenges were a pervasive background condition. Eight participants and two administrators cited this as a primary frustration,¹⁴³ explaining that IJs had insufficient time, working long hours without denting their backlogs;¹⁴⁴ insufficient staff, having to split clerks across two or more IJs;¹⁴⁵ and insufficient interpreters.¹⁴⁶ EOIR's resource issues are well-documented¹⁴⁷ and longstanding.¹⁴⁸ Standing alone,

143. IJ1-IJ5; IJ7-IJ8; IJ12; *see also* IJW1 (“[T]he large backlog of cases in the court and the pressures to complete cases were daunting, stressful, and often led to ‘burnout.’”); EOIR2 (citing lack of resources as primary frustration from perspective of IJ supervisor and noting that IJs “were putting in long hours, doing as much as they could”); EOIR3 (“[Y]ou need more judges. You need more staff. And you need more space.”). Participants whose dockets were limited to cases involving detained noncitizens felt less caseload pressure. IJ6; IJ9; IJ10; IJ11. For a recent update on EOIR’s case backlog, *see* TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, DESPITE HIRING, IMMIGRATION COURT BACKLOG AND WAIT TIMES CLIMB (2017), <http://trac.syr.edu/immigration/reports/468/>.

Eight participants also expressed disappointment that morale-boosting nationwide conferences had been cancelled in recent years due to lack of funding. IJ1; IJ2; IJ3; IJ4; IJ5; IJ6; IJ8; IJ12. A Government Accountability Office report confirms that EOIR did not hold conferences in 2011, 2012, and 2013, citing resource constraints, and did not hold a conference in 2014, citing “the increase in workload” from Central American women and children seeking refuge. GAO 2016, *supra* note 96, at 45.

144. *See Strengthening and Reforming America’s Immigration Court System: Hearing Before the S. Subcomm. on Border Sec. & Immigration*, 115th Cong. (Apr. 18, 2018) (testimony of A. Ashley Tabaddor, President, Nat’l Ass’n of Immigration Judges) (describing her own 8:30 AM to 8:30 PM work schedule).

145. IJ1; IJ3; IJ4; IJ8; *accord* Tabaddor, *supra* note 144 (noting 2:1 clerk-to-IJ ratio in Los Angeles Immigration Court).

146. IJ8.

147. *E.g.*, Ani Ucar, *Leaked Report Shows the Utter Dysfunction of Baltimore’s Immigration Court*, VICE NEWS (Oct. 3, 2018), https://news.vice.com/en_us/article/xw94ea/leaked-report-shows-the-utter-dysfunction-of-baltimores-immigration-court (describing confidential Justice Department review that “show [ed] a department so understaffed that basic functions . . . were not processed or sent out as caseloads piled up”); LENNI B. BENSON & RUSSELL R. WHEELER, ENHANCING QUALITY AND TIMELINESS IN IMMIGRATION REMOVAL ADJUDICATION 31-32 (2012), <https://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf> (arguing strongly that Congress should appropriate more funds for EOIR); Jennifer Ludden, *Immigration Crackdown Overwhelms Judges*, NPR (Feb. 9, 2009), <https://www.npr.org/templates/story/story.php?storyId=100420476> (quoting former NAIJ President Dana Leigh Marks) (“For some people, these are the equivalent of death penalty cases, and we are conducting these cases in a traffic court setting.”).

148. EOIR appropriations have failed to keep pace with caseloads for years. *Empty Benches: Underfunding of Immigration Courts Undermines Justice*, AM. IMMIGR. COUNCIL (June 17, 2016), <https://www.americanimmigrationcouncil.org/research/empty-benches-underfunding-immigration-courts-undermines-justice>; *cf.* IJ2 (“[T]he answer [to the backlog] is not necessarily to have more judges, unless you want to be realistic and say, okay, we’re going to become a judge corps of 2,000. Which won’t happen—which won’t be funded.”).

they cannot explain the agency's peculiarities, but they are relevant insofar as they amplify IJs' feelings of indignity and bureaucratization.

Two final points merit emphasis. First, all twelve participants seemed to have worked diligently and in good faith while on the bench. They emphasized that they strove to meet their obligations as best as they could, often under difficult circumstances; indeed, most described working overtime to give cases the attention they deserved, and all cared enough by design to share their experiences for this study. Second, participants agreed that, except in a few unusual circumstances, they had never been pressured to decide an individual case in a specific way, evincing the persistence of at least one core norm.¹⁴⁹

B. *Forces of Judicialization*

Despite the relative informality of removal hearings, multiple participants described a gradual shift towards actual or ostensible "judicialization," or the adoption of certain features of judges in adversarial legal courts.¹⁵⁰ As one participant phrased it:

[A]s we've become more used to rights and becoming a permanent resident here has become more valuable and more scarce, [the process has] become more legal It became more and more formalized.¹⁵¹

Participants offered two explanations for this judicialization. First, a number of participants felt that Article III judges had imposed judicial norms on IJ tone and decision-writing after "streamlining" reforms in 2002; some expressed that these norms felt incongruous with the purpose and structure of removal hearings. Second, and more superficially, some participants described the effect that "trappings" of courts, like robes and benches, could have on perceptions of legitimacy, and a few suggested that the Justice Department leveraged these aesthetic tools to construct a façade of independence.

149. IJ1 ("I did not ever feel that anybody was pressuring me to decide a case differently than I wanted to decide it."); IJ2 ("[P]erformance metrics have always been careful not to dictate the outcome of the case."); IJ3 ("[N]obody ever told you, 'you should decide a case this way.'"); IJ6 ("[T]here was no one telling you in an individual case how you had to rule. It's more like general policies."); IJ7 (EOIR "would take these actions that would essentially dictate outcomes or encourage certain outcomes out of a lack of understanding . . . [but] I didn't feel I was being told specifically how to decide cases"); IJ11 (reporting no top-down pressures, and relating that evaluation metrics were "mostly out of my mind"); IJ12 ("I never was pressured to make a particular decision in a particular case."); *see also* EOIR3 ("[T]here was never, ever, any attempt to influence how a judge would decide. Which is, quite frankly, then why you do have the disparity . . . of denial rates in different courts.").

150. *See supra* notes 137-141 and accompanying text.

151. IJ10.

1. *Article III Scrutiny and the Post-Streamlining Norm Shift*

The judicial branch has occasionally imposed court-like norms on removal proceedings.¹⁵² Indeed, when asked to describe the purpose of immigration courts, one participant responded:

I think it was designed to give some appearance of due process, but not due process. And then I think over time, as they took on a title—immigration judge—and took on more of the trappings of real judges, as judicial review from the circuits began to hold them more to the standards of real judges, it's become more like an independent court.¹⁵³

Scholars have identified tensions between the judicial and political branches over the identity of the immigration system.¹⁵⁴ However, these accounts have often focused on judicial rebuttals to formal policies, rather than court-like expectations more generally.¹⁵⁵ In contrast, many participants, echoing IJ union officials,¹⁵⁶ described the tension between circuit expectations and daily EOIR supervision rather directly:

Who is your boss? Day-to-day, your boss is the EOIR, but when the Court of Appeals reverses the decision, then your boss is the Court of Appeals. . . . You have to be very careful because, if you cut corners, then the Court of Appeals is going to yell at you about violating people's due process rights.¹⁵⁷

I always think there's this tension between higher-ups at the Justice Department who really don't want [IJs] to be independent judges. They want them to appear to the public as independent judges, but really still want them to be Department of Justice employees who aren't going to go too far out in terms of their decisions.¹⁵⁸

152. An early example was *Wong Yang Sung*, in which the Supreme Court briefly imposed a role separation requirement on INS hearing officers. *See supra* notes 31-38 and accompanying text.

153. IJ3.

154. *See, e.g.,* REBECCA HAMLIN, LET ME BE A REFUGEE: ADMINISTRATIVE JUSTICE AND THE POLITICS OF ASYLUM IN THE UNITED STATES, CANADA, AND AUSTRALIA 191 (2014) (noting that U.S., Canada, and Australia are all “often construed as experiencing a judicialization of asylum policy”); *accord supra* Part I.A (describing U.S. immigration system’s historical tension between adjudication and enforcement).

155. *See, e.g.,* Brian G. Slocum, *Courts vs. the Political Branches: Immigration “Reform” and the Battle for the Future of Immigration Law*, 5 GEO. J.L. & PUB. POL’Y 509, 515-23 (2007) (outlining judicial responses to political branches’ efforts to constrict judicial review); *cf. Family, supra* note 14, at 572-76 (noting generally that immigration system is subject to “conflicting signals” with regard to mission).

156. *See, e.g.,* sources cited *supra* note 21.

157. IJ12.

158. IJ3.

Partly because they're trying to run [EOIR] as a government agency instead of as a court, there are a lot of things that don't work very well.¹⁵⁹

In [EOIR headquarters in] Falls Church they love the statistics and worry about productivity, but they really forget about the purpose of the system which is to decide cases and to [provide] due process [I]t's not an agency, it's a court.¹⁶⁰

Participants said that Attorney General John Ashcroft's efforts to "streamline" the BIA marked a paradigm shift in Article III scrutiny of IJs. Ashcroft expanded summary affirmances and one-member opinions, limited Board review of factual determinations, and removed or reassigned noncitizen-friendly Board members, all presumably to expedite proceedings.¹⁶¹ Instead, six participants reported that the reforms advanced judicialization by increasing circuit scrutiny of IJ decision-writing and tone.¹⁶² As one phrased it, before the reforms, the IJ would make the record, while the Board would clean up opinions for appellate review.¹⁶³ Multiple participants felt that the Board ceased to do this after the reforms,¹⁶⁴ and the ensuing flood of petitions for review (PFRs) to circuit courts supports their accounts.¹⁶⁵

Participants stated that these changes precipitated a shift in attention from circuit courts, which began to issue searing critiques of IJs; these critiques, in turn, often triggered disciplinary proceedings against IJs.¹⁶⁶ One participant described this as a "very stressful" time, and believed that the Justice Department's Office of Professional Responsibility would review every circuit court remand to determine whether the IJ should be disciplined.¹⁶⁷ Another said, "IJs that were getting singled out by the circuits . . . were being treated by the Department as though they had embezzled money."¹⁶⁸ An administrator agreed that "the climate at DOJ at that time" was tense.¹⁶⁹ One participant said they were removed from the bench due to circuit criticism.¹⁷⁰

159. IJ7. For more on case completion quotas, see *infra* Part III.C.ii.a.

160. IJ5.

161. See *supra* notes 78-83 and accompanying text.

162. IJ1; IJ3; IJ4; IJ5; IJ7; IJ12.

163. IJ12.

164. IJ1; IJ12.

165. E.g., Exec. Office for Immigration Review, *Fact Sheet: BIA Restructuring and Streamlining Procedures* (Mar. 9, 2006), <https://www.justice.gov/sites/default/files/eoir/legacy/2008/05/16/BIASstreamliningFactSheet030906.pdf> (noting that "more aliens are appealing BIA decisions to the federal circuit courts than ever before").

166. E.g., IJ1; IJ3; IJ6; IJ8; IJ12.

167. IJ12; *accord* IJ1.

168. IJ3.

169. EOIR2.

170. IJ code withheld to protect anonymity.

These narratives accord with other accounts.¹⁷¹ Between approximately 2003 and 2008, descriptions of the “crisis on the immigration bench” proliferated.¹⁷² Since EOIR discipline and circuit court deliberations are shielded from public view, some of participants’ impressions are difficult to verify. However, then-Attorney General Alberto Gonzales did order a nationwide IJ performance review in 2006,¹⁷³ and public reports of IJ discipline further support participants’ accounts.¹⁷⁴

Participants’ responses also indicated that circuit court pressures were largely focused on IJs’ tone and reasoning, not structural issues. In particular, participants emphasized an expectation that their decisions appear “court-like” to withstand Article III review. Circuit courts made clear that they expected “an in-depth [legal] analysis” from IJs, not the “quick process” that oral decisions were designed to be.¹⁷⁵ Participants expressed that this felt incongruous with the lack of resources and administrative pressures they faced.¹⁷⁶ One participant noted that oral decisions, which administrators encouraged IJs to use in order to process cases more efficiently, simply did not read well.¹⁷⁷ As another phrased it:

[The courts of appeals] started demanding more precision from the BIA, a lot more precision from the IJs. . . . And it was designed at the outset to be a quick process. It was never designed to be an in-depth analysis like you do in federal court. Now all of a sudden, they wanted the immigration judges to do these lengthy decisions citing cases. . . . And so decisions that used to be quick now were taking 35, 40, 50, 60 minutes or more.¹⁷⁸

171. Family, *supra* note 14, at 605-07 (describing post-streamlining surge of PFRs); John R.B. Palmer, Stephen W. Yale-Loehr, & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 43-54 (2005) (documenting same); RAMJI-NOGALES ET AL., *supra* note 20, at 65-72 (same); Nicole S. Thompson, Comment, *Due Process Problems Caused by Large Disparities in Grants of Asylum*, 22 EMORY INT’L L. REV. 385, 405-07, 419-20 (2008) (describing aftermath of streamlining and arguing against use of AWOs). But see John D. Ashcroft & Kris W. Kobach, *A More Perfect System: The 2002 Reforms of the Board of Immigration Appeals*, 58 DUKE L.J. 1991, 2011 (2009) (maintaining that “[a] more perfect system [was] achieved” by streamlining reforms “with no loss of due process and with no loss of accuracy in decisionmaking”).

172. See, e.g., Michele Benedetto, *Crisis on the Immigration Bench: An Ethical Perspective*, 73 BROOK. L. REV. 467, 468-70 (2008) (collecting scholarly, judicial, and media critiques); Susan Benesch, *Due Process and Decision-making in U.S. Immigration Adjudication*, 59 ADMIN. L. REV. 557, 559-65 (2007) (outlining reactions in circuit courts).

173. Ann M. Simmons, *Some Immigrants Meet Harsh Face of Justice*, L.A. TIMES (Feb. 12, 2006), <http://articles.latimes.com/2006/feb/12/nation/na-judges12>.

174. See Mark S. Hurwitz, *Removing Judges: The Cases of Immigration Judges Jeffrey Chase and Noel Ferris*, 30 JUSTICE SYSTEM J. 114, 114-16 (2010); Veena Reddy, Note, *Judicial Review of Final Orders of Removal in the Wake of the REAL ID Act*, 69 OHIO ST. L.J. 557, 558-60 (2008).

175. IJ4; see also IJ1.

176. IJ3; IJ4; IJ5; IJ7; IJ12; see also IJ1.

177. IJ7.

178. IJ4. The former IJ further remarked, “There’s something fine about doing that, but you can’t have any case completion goals.” *Id.* For more on such goals, see *infra* Part III.C.ii.a.

Scholars have cited federal courts' naming-and-shaming of IJs after streamlining as an example of "problem-oriented oversight," through which Article III courts identify and address entrenched problems in agency administration.¹⁷⁹ In this case, the effects seem to have been lasting but narrow, as participants' focus on the increased time it took to *write* detailed decisions, but not the time it took to *reach* them, suggests that the thrust of circuit court scrutiny may have increased the proportion of IJs' time spent on decision-writing but not decision-making (although, to be sure, the two are closely related).

More specifically, federal-court criticisms tended to fall into two categories. First, courts expressed frustration over some IJs' tenor towards noncitizens, which raised questions of bias.¹⁸⁰ Second, courts critiqued inadequate reasoning in IJ decisions, including lack of evidence or case law.¹⁸¹ In either case, courts reserved the harshest scrutiny for cases in which IJs egregiously transgressed norms of judicial demeanor and reason-giving.¹⁸² At the same time, the Article III judiciary declined to intervene structurally by striking down streamlining regulations,¹⁸³ thereby affirming the groundbreaking shift

179. Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1145-46 (2018).

180. *E.g.*, *Huang v. Gonzales*, 453 F.3d 142, 150 (2d Cir. 2006) (finding "manifest on this record" the IJ's "hostility toward [the respondent] and apparent bias against him and perhaps other Chinese asylum applicants"); *Cham v. Att'y Gen. of U.S.*, 445 F.3d 683, 690-91 (3d Cir. 2006) ("We began with a reminder of the 'dignity,' 'respect,' 'courtesy,' and 'fairness,' that a litigant should expect to receive in an American courtroom."); *Hajderasi v. Gonzales*, 166 F. App'x 580, 582 (2d Cir. 2006) (critiquing IJ's "sarcastic tone and . . . manner of questioning, which is easily perceived as badgering," but denying PFR); *Wang v. Att'y Gen. of U.S.*, 423 F.3d 260, 267 (3d Cir. 2005) (noting multiple times in which circuit had to "caution[] [IJs] against making intemperate or humiliating remarks during immigration proceedings"); *Dawoud v. Gonzales*, 424 F.3d 608, 610 (7th Cir. 2005) (remarking that IJ's "opinion [was] riddled with inappropriate and extraneous comments"); *Mece v. Gonzales*, 415 F.3d 562, 575 (6th Cir. 2005) (sharing "concern . . . about the immigration judge's objectivity" given IJ's hyperbolic language); *Fiadjoe v. Att'y Gen. of U.S.*, 411 F.3d 135, 154 (3d Cir. 2005) (noting IJ's tone "was hostile and at times became extraordinarily abusive"); *Nuru v. Gonzales*, 404 F.3d 1207, 1229 (9th Cir. 2005) ("Some of the [IJ's] comments both during the hearing and when issuing his oral ruling were highly caustic and without substance."); *Reyes-Melendez v. INS*, 342 F.3d 1001, 1007 (9th Cir. 2003) ("The record . . . indisputably demonstrates that the IJ was hostile towards [the respondent] and judged his behavior as being morally bankrupt.").

181. *E.g.*, *Recinos De Leon v. Gonzales*, 400 F.3d 1185, 1187, 1193-96 (9th Cir. 2005) (critiquing a "literally incomprehensible opinion by an [IJ]," attaching the IJ's "rambling set of oral observations" as an appendix, and naming the IJ); *Guchshenkov v. Ashcroft*, 366 F.3d 554, 560 (7th Cir. 2004) (Posner, J.) (finding that IJ's analysis "fell far below the minimum required to support an administrative decision," and deeming this "one more indication of systemic failure by the judicial officers of the immigration service to provide reasoned analysis").

182. The exception may be the Seventh Circuit, particularly the Hon. Richard A. Posner, who criticized immigration adjudication in sweeping terms for over a decade. *See, e.g.*, *Chavarria-Reyes v. Lynch*, 845 F.3d 275, 280 (7th Cir. 2016) (Posner, J., dissenting) ("[T]he Immigration Court, though lodged in the Justice Department, is the least competent federal agency, though in fairness it may well owe its dismal status to its severe underfunding by Congress . . ."); *Benslimane v. Gonzales*, 430 F.3d 828, 829-30 (7th Cir. 2005) (Posner, J.) (collecting Seventh Circuit remands and stating that "the adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice"). For eight of eleven years between 2006 and 2016, inclusive, the Seventh Circuit had the highest EOIR remand rate of any circuit court. JOHN GUENDELSBERGER, *REVERSALS AND REMANDS OVER THE LAST 11 YEARS*, 11-1 IMMIGR. L. ADVISOR 4 (2017), <https://www.justice.gov/eoir/page/file/934171/download>.

183. *E.g.*, *Blanco de Belbruno v. Ashcroft*, 362 F.3d 272, 278-83 (4th Cir. 2004); *Zhang v. U.S. Dep't of Justice*, 362 F.3d 155, 156-60 (2d Cir. 2004); *Loulou v. Ashcroft*, 354 F.3d 706, 708-09 (8th Cir.

in the role of the Board of Immigration Appeals, which had previously corrected a much broader range of errors.

Many participants agreed that pressures from federal-court review eased over time, though they never fully returned to pre-streamlining levels.¹⁸⁴ The persistence of the change reflects a shift in legal practice, as circuit review has become a normal part of immigration litigation.¹⁸⁵ It may also be attributable to some courts and commentators who continue to be critical of EOIR.¹⁸⁶ In addition to affecting Board review, streamlining also effectively decreased the Article III process available to some noncitizens. The Second Circuit, which had been the last circuit to offer oral argument to nearly all litigants, implemented its first non-argument calendar in 2005 to process post-streamlining immigration caseloads.¹⁸⁷

Streamlining prompted additional changes. Although Congress declined to respond legislatively,¹⁸⁸ criticism pushed the Justice Department to act. Attorney General Gonzales proposed twenty-two measures in 2006 to improve quality and efficiency, including hiring more Board members,

2003), *reh'g granted* (2004); Yuk v. Ashcroft, 355 F.3d 1222, 1228-32 (10th Cir. 2004); Oforji v. Ashcroft, 354 F.3d 609, 618-19 (7th Cir. 2003); Denko v. INS, 351 F.3d 717, 725-32 (6th Cir. 2003); Carriche v. Ashcroft, 335 F.3d 1009, 1013-19 (9th Cir.), *amended and superseded on denial of reh'g*, 350 F.3d 845 (9th Cir. 2003); Mendoza v. U.S. Att'y Gen., 327 F.3d 1283, 1288-89 (11th Cir. 2003); Soadjede v. Ashcroft, 324 F.3d 830, 831-33 (5th Cir. 2003) (*per curiam*); Albathani v. INS, 318 F.3d 365, 375-79 (1st Cir. 2003); Dia v. Ashcroft, 353 F.3d 228, 236-45 (3d Cir. 2003) (*en banc*); Capital Area Immigrants' Rights Coal. v. U.S. Dep't of Justice, 264 F. Supp. 2d 14, 25-39 (D.D.C. 2003).

184. IJ1 ("There were some corrections back . . . [b]ut I wouldn't say it was entirely corrected."); IJ3 ("I don't know if there's that sense of doom anymore" regarding circuit courts); IJ4 ("[T]hey hired a few more judges. The caseloads started to even out a little bit."); IJ5 ("The courts started to see . . . a little bit of improvement, and they stood down a bit . . ."); IJ7 ("Things got a little better . . ."); IJ10 ("The Board eventually got much better" in its use of AWOs).

185. See, e.g., Caplow, *supra* note 83, at 8 ("[T]he New York immigration bar has developed a culture in which lawyers regularly seek federal court review, contributing to the endurance of the surge."); Lenni B. Benson, *You Can't Get There from Here: Managing Judicial Review of Immigration Cases*, 2007 U. CHI. LEGAL. F. 405, 424 (2007) (arguing that the "largest contributing factor" to the increase in PFRs was "a growth in the number of private attorneys willing to prepare a petition for review"); Palmer et al., *supra* note 171, at 93-94 (same). Thus, immigration PFRs continued to comprise over 10 percent of circuit dockets in 2017, compared to just 3 percent in 2001. Compare Administrative Office of the U.S. Courts, Table N/A—U.S. Courts of Appeals Federal Court Management Statistics (Dec. 31, 2017), http://www.uscourts.gov/sites/default/files/data_tables/jb_b3_0930.2017.pdf [hereinafter "U.S. Courts Table 2017"], with Administrative Office of the U.S. Courts, Table B-3—U.S. Courts of Appeals Judicial Business (Sept. 30, 2005), http://www.uscourts.gov/sites/default/files/statistics_import_dir/b3_1.pdf.

186. E.g., Johnson, *supra* note 14, at 322-25 (collecting continued critiques of IJs and the BIA).

187. Caplow, *supra* note 83, at 9-17; Jon O. Newman, *The Second Circuit's Expedited Adjudication of Asylum Cases: A Case Study of a Judicial Response to an Unprecedented Problem of Caseload Management*, 74 BROOK. L. REV. 429, 432-35 (2009). In Caplow's analysis, although the Second Circuit's measures "have potential costs on the quality and individuality of the decision-making process . . . the court appears to be dealing responsibly and fairly with the caseload." Caplow, *supra* note 83, at 16.

188. Congress's proposed solutions to the crisis involved neither hiring more IJs nor protecting non-citizen respondents; rather, most legislative proposals were focused on protecting Article III judges. Some members proposed requiring a circuit judge to certify the reviewability of any immigration PFR, further constraining judicial review; the proposal failed amid resistance from circuit judges. See Jill E. Family, *Stripping Judicial Review During Immigration Reform: The Certificate of Reviewability*, 8 NEV. L.J. 499, 506-39 (2008). Around the same time, then-Senator Arlen Specter unsuccessfully suggested redirecting all immigration appeals to the Federal Circuit to shield other circuit courts from PFRs. Michael J. Wishnie, "A Boy Gets into Trouble": Service Members, Civil Rights, and Veterans' Law Exceptionalism, 97 B.U. L. REV. 1709, 1740-41 (2017).

establishing embedded ACIJ's in larger immigration courts, and implementing annual performance evaluations.¹⁸⁹ Scholars have expressed approval of these changes but contend that problems persist.¹⁹⁰ Participants generally did not report strong feelings about circuit courts in more recent years; aside from having to be familiar with circuit precedent, most did not perceive that they had any relationship with the court in their jurisdiction.¹⁹¹

2. *Accumulating Legitimacy through the Trappings of Courts*

The Justice Department and EOIR have also adopted reforms that were *not* compelled by court orders or criticism. The traditional scholarly account frames these as responsive to due process concerns.¹⁹² Participants indicated that this was only part of the story: some experienced voluntary judicialization as legitimacy-enhancing, irrespective of its effects on fairness. As one explained, “one of the reasons for the separation and the creation of EOIR was to show a sense of independence, that [IJs] weren’t just a mouthpiece for INS, but that in fact [we] were independent adjudicators.”¹⁹³ Others suggested that judicial hallmarks masked the true nature of the IJ’s role:

[W]e were sitting on a bench wearing robes, and I felt to some degree . . . [the question] was, to what degree can you bluff to make it look like you have more control over this than you really do? Because if lawyers started, like, jumping on tables singing and dancing, what could you do?¹⁹⁴

[In response to the question, “What is the purpose of immigration court?”] The illusion of due process. It’s a stage setting. It’s nothing more. . . . There is a small window in which judges, in order to do their job, exercise some discretionary function in deciding cases. But that’s about it.¹⁹⁵

Conversely, some participants expressed that certain frustrations they faced as resource-starved IJs detracted from their judge-like appearance and, in turn, their legitimacy.¹⁹⁶

First, multiple participants noted that the transition from SIOs to IJs entailed the donning of black judicial robes. One participant told an

189. See U.S. DEP’T OF JUSTICE, *supra* note 115, at 1-7.

190. Caplow, *supra* note 83, at 32-41; TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION COURTS: STILL A TROUBLED INSTITUTION, *supra* note 97; GAO 2016, *supra* note 96, at 45.

191. E.g., IJ3; IJ11; IJ12.

192. ALEINIKOFF 5TH ED., *supra* note 26, at 249.

193. IJ2.

194. IJ3.

195. IJ4.

196. E.g., IJ5 (lamenting lack of electronic filing). EOIR announced plans to pilot an electronic filing system in 2018, with the stated goal of implementing it nationwide in 2019. *Strengthening and Reforming America’s Immigration Court System: Hearing Before the S. Subcomm. on Border Sec. & Immigration*, 115th Cong. (Apr. 18, 2018) (testimony of James R. McHenry, III, Director, Exec. Office for Immigration Review).

apocryphal story from a celebration of modern immigration courts in the late 1990s.¹⁹⁷ According to this participant, a speaker at the event stated that although IJs wanted to wear judicial robes in the 1970s, the Justice Department was resistant to permitting them. The Department changed its mind, said the speaker, when a hearing officer quelled a detention center riot by donning a black robe, standing on a table, and declaring, “We have heard your complaints, and they will be answered.” After that, the speaker said, the agency agreed to allow robes; offices were turned into courtrooms, and tables into judges’ benches.¹⁹⁸

The story, while far-fetched and probably untrue, evinces a self-awareness of the legitimizing effect that the robe has on subjects of state coercion. History provides additional context. SIOs were permitted to wear robes in 1973 after a “vigorous campaign.”¹⁹⁹ For 21 years thereafter, some IJs presumably opted to dress in robes, while others may have declined to do so. That changed in 1994 with a directive from the Chief IJ:

To enhance the credibility of the proceedings, the Judge’s robe, a traditional symbol of dignity and authority, has been provided for each Immigration Judge. . . . Therefore, it is the policy of the Office of the Chief Immigration Judge that each Immigration Judge shall wear a traditional black judicial robe when conducting a hearing where one or more of the parties are present²⁰⁰

This directive, like the apocryphal story of the riot, demonstrates EOIR’s consciousness of the “credibility” that the robe would bring to removal hearings. The directive treats the robe as external-facing, and thus does not require IJs to wear it around staff.²⁰¹ Still, it requires IJs to wear robes in some circumstances in which district court judges need not do so.²⁰² More recent guidelines for cases involving minors note that the robe “is a symbol of the Immigration Judge’s independence and authority,” but permit IJs to

197. IJ3.

198. *Id.*

199. Rawitz, *supra* note 31, at 458; accord James P. Vandello, *Perspective of an Immigration Judge*, 80 DENV. U. L. REV. 770, 771 (2003).

200. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, OPPM 94-10, WEARING OF THE ROBE DURING IMMIGRATION JUDGE HEARINGS 1 (1994).

201. In contrast, one of two participants who served on the Board noted, “Most of the time the Board members just dress with pants and a polo shirt, not with a robe. We might have one and a shirt and a tie sitting in the office in case . . . but that’s not what you wear to sit in an office and crank out written material.” IJ code withheld to protect anonymity.

202. For example, the Hon. Jack B. Weinstein of the Eastern District of New York leaves behind his robes during pre-trial conferences. “The high bench, the robes, they are an impediment,” he says, to the public’s sense that “this is their courthouse . . . their justice, their system.” Arnold H. Lubasch, *Jack Weinstein: Creative U.S. Judge Who Disdains Robe and High Bench*, N.Y. TIMES (May 28, 1991), <https://www.nytimes.com/1991/05/28/nyregion/jack-weinstein-creative-us-judge-who-disdains-robe-and-high-bench.html>.

remove robes if this “would add to the child’s ability to participate.”²⁰³

Aside from robes, one participant lamented that the small size of immigration hearing rooms contributed to the feeling that removal hearings were “Mickey Mouse” proceedings.²⁰⁴ Participants also cited other, more substantive issues. Three noted the lack of in-court security.²⁰⁵ Some also complained that IJs generally had no input into hiring of staff, including clerks.²⁰⁶ Others criticized the unreliable, outdated recording and computer equipment used by EOIR.²⁰⁷ One described a computer crash that disabled EOIR’s docketing system for weeks in 2014.²⁰⁸

Lastly, some participants felt that even as they had strived to provide the parties before them with due process, EOIR’s adoption of “due process” rhetoric to justify reforms was misleading. As one said, the evolution of the immigration courts “was always sort of putting patches on a system that was really designed to do something very different back in the ‘70s.”²⁰⁹ Others were more direct, particularly when discussing case completion quotas:

If you read [the January 2018 case processing memo], Director McHenry uses the word ‘due process’ three or four times. But then if you read the whole email, my bias is, we’re just paying lip service to that.²¹⁰

[T]he agency will give lip service to due process and tell you, “you gotta respect due process,” but if they’re pressuring you to complete cases very fast, there’s no way to do that consistent with due process.²¹¹

C. *Mechanisms of Bureaucratic Control*

Many participants also discussed the day-to-day supervision provided by EOIR. Unlike the effects of the 2002-2003 Ashcroft reforms, EOIR’s mechanisms of administrative supervision over IJs are increasingly recognized but relatively under-analyzed.

203. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, OPPM 07-01, GUIDELINES FOR IMMIGRATION COURT CASES INVOLVING UNACCOMPANIED ALIEN CHILDREN 6 (2007); EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, OPPM 17-03, GUIDELINES FOR IMMIGRATION COURT CASES INVOLVING JUVENILES, INCLUDING UNACCOMPANIED ALIEN CHILDREN 5 (2017). For more on robes, see *infra* Part IV.C.

204. IJ5.

205. IJ3; IJ4; IJ5.

206. IJ5; IJ7; IJ9.

207. IJ1; IJ4; IJ5.

208. IJ1; Elizabeth Summers, *Weeks-Long Computer Crash Sends U.S. Immigration Courts Back to Pencils and Paper*, PBS NEWS HOUR (May 23, 2014), <https://www.pbs.org/newshour/nation/weeks-long-computer-crash-sends-u-s-immigration-courts-back-pencils-paper>.

209. IJ3.

210. IJ2.

211. IJ7.

Each participant stated that their primary supervisor was their assigned ACIJ. Some participants reported positive relationships with their supervisors, while others expressed concerns that echoed common pathologies of street-level bureaucracies. First, some participants related a sense of “role confusion,” or dissonance between their self-conception of the role of an IJ and Justice Department expectations. Examples included the Department’s failure to authorize IJs to hold attorneys in contempt, its use of EOIR administrators to promulgate policies, and the Attorney General’s perceived support of IJs who defied controlling law. Some participants also perceived certain EOIR administrators as not understanding the challenges of immigration adjudication and intolerant of “insubordination.”

Second, participants shared various mechanisms of bureaucratic control used by the Justice Department and EOIR higher-ups. They described formal oversight mechanisms—case completion pressures, then-impending quotas, and control of immigration court dockets—that contributed to a sense that IJs were used as tools to meet enforcement goals. They also highlighted actions or statements that generated top-down policy influences under restrictionist or expansionist administrations, including some participants who alleged partisan hiring and firing and others who complained about anti-immigrant rhetoric from EOIR. Some participants further noted that their discretion to grant relief had decreased over time, diminishing their satisfaction with their role.²¹²

1. *Competing Role Definitions and Distrust of Administrators*

a. *Frustrations with the Justice Department: Contempt, Closed Courtrooms, and “Rogue” IJs*

One participant stated that Justice Department officials had “role confusion” in that they viewed IJs as “attorneys representing a client, namely, the U.S. government.”²¹³ This reflected analogous concerns voiced by other participants.²¹⁴ One said:

We are owned lock stock and barrel by the Department of Justice. . . . They treat us like fungible employees. They have absolutely no independent respect for us. . . . The Department of Justice sets the rules, sets the regulations, does the hiring, does the disciplining.²¹⁵

212. Importantly, one IJ did not express any of these concerns. Rather, they reported positive relationships with their ACIJs and no concerns about case management pressures, docket control, or partisanship. IJ11.

213. IJ7.

214. It also accords with public statements of IJ union officials. *See, e.g., supra* note 21 and accompanying text.

215. IJ4.

Interviewees complained about three issues that they believed reflected this role confusion. First, although Congress authorized a contempt power for IJs in 1996,²¹⁶ eight of twelve participants expressed frustration that the Justice Department had declined to promulgate regulations to implement the power against DHS attorneys.²¹⁷ Participants believed that the Justice Department was reluctant to implement the contempt power because it did not want DHS attorneys to be subject to IJ sanctions. Although these participants professed that they could control their courtrooms, they felt their authority would be stronger if they could sanction fraudulent lawyers or recalcitrant agencies. Two participants suggested that authorizing contempt power would reduce inter-agency delays in processing applications for relief.²¹⁸ Echoing these complaints, scholars have criticized coordination failures between agencies tasked with immigration enforcement and adjudication.²¹⁹

Second, one administrator indicated that the Justice Department used EOIR officials to issue policy directives. As evidence, this administrator cited a memorandum issued ten days after the attacks of September 11, 2001 ordering certain “special interest” proceedings, as designated by the Attorney General “in secret, without any established standards or procedures,”²²⁰ to be closed to the public.²²¹ The administrator said then-Chief IJ Michael Creppy, who issued the memorandum, “did not agree with the policy . . . but was directed by the Department to sign and issue the document.”²²² The administrator added that new IJ quotas were similarly “not coming from the [EOIR] Director,” but “from the Attorney General through the Director.”²²³

Third, one participant charged that while Justice Department and EOIR higher-ups lacked tolerance for insubordination within the administrative

216. See 8 U.S.C. § 1229a(b)(1) (“The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge’s proper exercise of authority under this chapter.”).

217. IJ1; IJ3; IJ4; IJ6; IJ7; IJ8; IJ9; IJ12; see 8 C.F.R. § 1003.101 (permitting members of the BIA or “adjudicating official[s]” to impose disciplinary sanctions against practitioners who do not represent the federal government); Tabaddor, *supra* note 144; Slavin & Marks, *supra* note 21, at 1790-91.

218. IJ3; IJ9.

219. E.g., Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 806 (2015) (arguing that coordination issues between EOIR and DHS have resulted in “gross violations” of individual rights); Lenni B. Benson, *Breaking Bureaucratic Borders: A Necessary Step Toward Immigration Law Reform*, 54 ADMIN. L. REV. 203, 210 (2002) (arguing that multi-agency processing of immigration claims leads to redundancy and fragmentation).

220. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 710 (6th Cir. 2002).

221. For an overview of the memorandum and its implications, see generally Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R.-C.L. L. REV. 95 (2004). Circuit courts split on the memorandum’s constitutionality. Compare *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 220-21 (3d Cir. 2002) (upholding memorandum against constitutional challenge), with *Detroit Free Press*, 303 F.3d at 705 (finding memorandum to violate First Amendment right of access to deportation proceedings).

222. EOIR2.

223. *Id.* For this reason, the administrator expressed support for giving EOIR Article I status, “standing alone so that it can function as a true court, as the court should function.” *Id.* A different administrator was less concerned, stating that “the Attorney General . . . is certainly entitled to come down with policies.” EOIR3. For more on quotas, see *infra* Part III.C.ii.a.

hierarchy,²²⁴ they were encouraging “rogue” IJs who declined to follow precedents favoring noncitizens, allegedly reflecting a focus on policy implementation rather than impartial fealty to the law:

The North Carolina court is referred to as a rogue court. They have refused now, for a long time, to conduct custody hearings on detained cases, so much that a lawsuit was just filed against them to compel them to conduct bond hearings. EOIR knows about them and they have not advised them to cease and desist.²²⁵

Commentators have similarly claimed that three recent referrals and decisions by former Attorney General Jeff Sessions evinced a willingness to intervene in support of IJs who refused to apply noncitizen-friendly precedents—and to punish those who ruled favorably for noncitizens. In the first case, an IJ in Charlotte denied asylum to a woman with a domestic violence claim, and the Board reversed.²²⁶ Without further action, the IJ recertified the case for Board review and emailed EOIR Director James McHenry to alert him to the case.²²⁷ The Attorney General then referred the case to himself and overturned a landmark Board precedent to hold that individuals fleeing domestic or gang violence would “[g]enerally . . . not qualify for asylum.”²²⁸

In the second case, the Board had ruled that noncitizens who filed for asylum were entitled to evidentiary hearings without having to establish prima facie eligibility.²²⁹ However, advocates alleged that IJs in Charlotte and Atlanta had declined to provide such hearings.²³⁰ The Attorney General then referred the case to himself and vacated the Board’s prior decision.²³¹

Third, after an IJ in Philadelphia administratively closed a case on his juvenile docket out of concerns that a child had failed to receive proper notice for his hearing, DHS appealed to the Board and the Attorney General referred

224. See *infra* Part III.C.i.b.

225. IJ2. For more on the suit, see Complaint, *Palacios v. Sessions* (W.D.N.C. filed Jan. 17, 2018) (No. 3:18-cv-00026), ECF No. 1; see also *Challenging Immigration Judges’ Refusal to Conduct Bond Hearings*, AM. IMMIGR. COUNCIL (last visited Nov. 9, 2018), <https://www.americanimmigrationcouncil.org/litigation/challenging-immigration-judges-refusal-conduct-bond-hearings>; Michael Gordon, *Charlotte Judges Are Denying Bond Hearings in Deportation Cases. So an Attorney Sued.*, CHARLOTTE OBSERVER (Jan. 19, 2018), <http://www.charlotteobserver.com/news/local/article195542059.htm>.

226. A-B- at 1, 2 (BIA Dec. 8, 2016), <http://immigrationcourtside.com/wp-content/uploads/2018/03/A-B-BIA-Decision-12-08-2016-redacted-1.pdf>.

227. Bryan Johnson, *EOIR Director Condoned Immigration Judge V. Stuart Couch Misconduct Against Victims of Domestic Violence*, AMJOLAW (May 21, 2018), <https://amjolaw.com/2018/05/21/eoir-director-condoned-immigration-judge-v-stuart-couch-misconduct-against-victims-of-domestic-violence/>.

228. A-B-, 27 I. & N. Dec. 316, 320 (AG 2018) (overruling A-R-C-G-, 26 I. & N. Dec. 388 (BIA 2014)). Since the Attorney General’s decision, asylum denial rates in immigration court have increased. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, ASYLUM DECISIONS AND DENIALS JUMP IN 2018 (2018), <https://trac.syr.edu/immigration/reports/539/>.

229. E-F-H-L-, 26 I. & N. Dec. 319, 324 (BIA 2014), *vacated*, 27 I. & N. Dec. 226 (AG 2018).

230. Bryan Johnson, *Investigate Atlanta and Charlotte Immigration Judges for Knowingly Depriving Children of Right to Apply Asylum*, AMJOLAW (Sept. 29, 2016), <https://amjolaw.com/2016/09/29/investigate-atlanta-and-charlotte-immigration-judges-for-knowingly-depriving-children-of-right-to-apply-asylum/>.

231. E-F-H-L-, 27 I. & N. Dec. 226, 226 (AG 2018).

the case to himself.²³² The Attorney General not only reversed the grant of administrative closure, but held that IJs lacked power to administratively close cases altogether.²³³ He then removed the case and 86 other cases presenting similar issues from the Philadelphia IJ's docket, re-assigning all 87 to different IJs.²³⁴ The IJ union filed a formal grievance over the re-assignment, alleging that the Justice Department was working to influence case outcomes by punishing the IJ for failing to deport the noncitizen child.²³⁵

b. Resentment towards EOIR Officials

Some participants also expressed frustration with EOIR supervisors, echoing a common pathology of real-world bureaucracies. To be clear, some reported "good relationships with each of [their supervisors]." ²³⁶ Another shared only minor issues relating to IJs' lack of control over staff.²³⁷ On the other hand, some perceived a difference in attitude between "Falls Church" (EOIR's Virginia headquarters) and the IJ corps. One participant called EOIR "toxic,"²³⁸ while a second called it a "crony system."²³⁹ Others stated:

People were just so different at Falls Church, more conservative. This was the place that would emanate all those ridiculous things that we'd roll our eyes at in [my court]. . . . It was kind of like your worst views of government realized down there.²⁴⁰

[ACIJs] don't want to take a chance. They cover their ass. They do not wish to jeopardize their august positions. . . . As soon as they cast off their black robe and put on their ACIJ hats, their points of view and their tenor became strictly company-oriented.²⁴¹

You can see that the people in Falls Church don't really have much idea of what's [going on] They're always hiring analysts,

232. Nat'l Ass'n of Immigration Judges, *Grievance Pursuant to Article 8 of the Collective Bargaining Agreement Between EOIR and NAIJ 2* (August 8, 2018), <https://assets.documentcloud.org/documents/4639659/NAIJ-Grievance-Morley-2018-Unsigned.pdf> [hereinafter "NAIJ Grievance"].

233. Castro-Tum, 27 I. & N. Dec. 271 (AG 2018). For more on *Castro-Tum's* impact on IJs, see *infra* notes 309-314 and accompanying text.

234. NAIJ Grievance, *supra* note 232, at 4.

235. *Id.* at 4-5; Liz Robbins, *In Immigration Courts, It Is Judges vs. Justice Department*, N.Y. TIMES (Sept. 7, 2018), <https://www.nytimes.com/2018/09/07/nyregion/nyc-immigration-judges-courts.html>.

236. IJ11; see also IJ1 ("I felt well-respected by my supervisors."); cf. IJ2 (reporting no personal conflicts but stating, "I know that some judges I mentored . . . had significant conflict with their ACIJs"); IJ10 ("I was in a unique situation," because "I was very good friends with" certain EOIR officials.).

237. IJ9. However, this IJ also expressed regret for having adopted a "Stockholm Syndrome" mindset while in EOIR, stating, "I should have been more like my colleagues who were questioning things, not accepting them." *Id.*

238. IJ6.

239. IJ9.

240. IJ3. Separately from serving as an IJ, IJ3 worked in EOIR headquarters.

241. IJ4.

statisticians, personnel specialists. Immigration courts are dying and these guys are hiring more bureaucrats, more ACIJ's.²⁴²

One contributing factor was a sense that administrators did not understand the challenges of IJs' work. One participant found it insulting that they had to clock in and out for part of their term, given that they consistently worked overtime.²⁴³ A second expressed that administrators did not appreciate the challenge of managing dockets and coping with secondary trauma. "There's a very large beltway mentality [in EOIR]," this person complained, "where they think they know what works, and they've barely ever set foot in a courtroom."²⁴⁴ A third said that even ACIJs who had served as IJs became "nothing but foils for the Department" once promoted.²⁴⁵ A related frustration was a feeling that EOIR failed to support IJs:

I'm only saying this because it's anonymous but it's true: the support from headquarters is nonexistent. . . . I disliked the fact that there aren't enough resources, aren't enough judges to handle the overwhelming number of cases, that judges were also generally asked and still are asked to complete impossible tasks.²⁴⁶

When an IJ moved cases forward quickly, she would receive from OCIJ congratulations. When she received very critical . . . reversals from the [circuit court], OCIJ would run away from her the way someone allergic to roses would run away from a garden. . . . [That] seemed to me both hypocritical and demoralizing.²⁴⁷

Participants also criticized a "chain of command" mindset under which EOIR treated IJs' failure to adhere to supervisory orders as "insubordination."²⁴⁸ Thus, one complained, "if you don't follow the directions of the assistant chief judge, you can be deemed insubordinate, and that can be used against you for disciplinary proceedings . . . so you get discouraged from being creative."²⁴⁹ Another reported that when they issued a decision that they felt was compelled under circuit precedent, but conflicted with an administrative directive, their ACIJ and the Chief IJ berated them and threatened to fire them.²⁵⁰ This participant also described an incident in which

242. IJ5. Like IJ3, IJ5 worked in EOIR headquarters separately from their role as an IJ.

243. IJ6.

244. IJ7.

245. IJ4.

246. IJ6.

247. IJ8; *accord* IJ9 ("I did not find headquarters or management to be very helpful. . . . They were not proactive, they were reactive.").

248. IJ7; *accord* IJ1; IJ3; IJ4.

249. IJ1; *accord* Marks, *Now Is the Time*, *supra* note 21, at 50 ("[I]mmigration judges can be disciplined or downgraded in a performance review for insubordination to a supervisor and thereby punished for their good faith interpretation of the law.").

250. IJ7.

EOIR administrators ordered the Hon. A. Ashley Tabaddor, an Iranian-American IJ, to recuse herself from all cases involving Iranian respondents after attending a White House meeting with Iranian-American leaders.²⁵¹ Tabaddor sued, settled,²⁵² and is now the president of the IJ union.²⁵³

In addition, some participants felt IJ disciplinary procedures were opaque and unfair.²⁵⁴ One participant, who represented other IJs in disciplinary proceedings, felt that EOIR would allow problems with IJs to fester, making them more difficult to resolve.²⁵⁵

Interviews with administrators painted a very different picture. Although each confirmed the existence of a chain of command,²⁵⁶ all three expressed a high opinion of most IJs and professed appreciation for the challenges of the role.²⁵⁷ Moreover, both former ACIJs viewed supporting IJs as the core of any ACIJ's responsibilities.²⁵⁸ One said:

I saw my role as the person who supported the IJs and facilitated their mission. I never lost sight of the fact that while my job was difficult and stressful, it's the IJs who were on the front line, so to speak, and have the really difficult job.²⁵⁹

With regards to discipline, the other former ACIJ related that they always "wanted to hear the [IJ's] side" of any allegation. They added:

[W]e invest a lot in judges. So you don't want to just kick 'em out unless you've really reached the point that there's nothing else you can do. That was sort of a last resort.²⁶⁰

251. Richard Gonzales, *U.S. Government Settles Lawsuit Filed by Iranian-American Judge*, NPR (Nov. 3, 2015), <https://www.npr.org/sections/thetwo-way/2015/11/03/454394225/government-settles-lawsuit-filed-by-iranian-american-judge>; see also Kevin R. Johnson, *Ordered 'Recusal' Shows Lack of Autonomy*, S.F. DAILY J. (Aug. 28, 2014), <https://www.cooley.com/~media/cooley/pdf/reprints/tabaddor/orderedrecusaltabaddor.ashx?la=en>.

252. Gonzales, *supra* note 251; see also Slavin & Harbeck, *supra* note 115, at 70 (recounting Tabaddor suit and remarking that "we often feel that we are 'U.S. imitation judges'").

253. A. Ashley Tabaddor, *Greetings from Our President*, Nat'l Ass'n of Immigration Judges (last visited Feb. 21, 2018), <https://www.naij-usa.org/about/greetings-from-our-president>.

254. IJ1; IJ4; IJ5; IJ8.

255. IJ1.

256. One former ACIJ emphasized that they didn't "want to hear about [issues] from [their] superiors," so they placed a premium on being informed about incidents in the immigration courts they supervised. EOIR2. "I believe in keeping the chain of command informed on issues that could be potentially significant," they stated. *Id.* Another former ACIJ described themselves as the "first-line supervisor" for IJs, court administrators, and judicial law clerks, and confirmed that a deputy chief IJ was their "first-line supervisor." EOIR3. A third administrator mentioned "being insubordinate to your boss" as an issue that could trigger discipline, but emphasized that they were never personally involved in IJ discipline, and indicated that an IJ would be unlikely to face disciplinary sanctions for just one incident. EOIR1.

257. EOIR1; EOIR2; EOIR3.

258. EOIR2; EOIR3.

259. EOIR3.

260. EOIR2.

All three administrators stated that they found EOIR a pleasant place to work.²⁶¹

One potential reason for the gap in perceptions between former IJs and administrators is that both former ACIJ-interviewees had experience hearing removal cases, thereby increasing their understanding of the challenges IJs faced. However, this is not unusual, as fifteen of eighteen current ACIJs previously served as IJs.²⁶² A more plausible explanation is that different ACIJs managed subordinate IJs differently. Indeed, even the two former ACIJs interviewed took divergent approaches. One preferred a hands-off attitude towards IJs, liaising instead with court administrators. They explained:

My approach was that IJs were there to hear cases and complete cases, and that they should be given as much freedom to carry out that role [M]y primary contact in the local courts was with the court administrator, who oversaw the day-to-day operation of the court. . . . I interacted much more with the court administrators than with the IJs.²⁶³

The other former ACIJ prized having a direct line of communication with IJs:

There was indeed frequent communication with both the [court administrators] and the IJs and [judicial law clerks]. . . . It was as simple as, if they had a fire drill, they would just email me, “we have a fire drill going on.” . . . It was my court, and my responsibility, and I took it very seriously. And quite frankly I cared for them a lot.²⁶⁴

Regardless of the cause, the stark difference in perceptions further suggests distance, and perhaps distrust, between some members of the IJ corps and EOIR supervisors.

2. *Case Processing Pressures and Docket Shuffling*

Participants also reported that the Justice Department or EOIR controlled dockets in service of policy goals, even without pushing IJs to decide any individual case in a specific manner. First, participants related that they faced pressures from administrators to process cases more efficiently, and they criticized then-impending IJ case quotas. Second, participants provided examples of how political enforcement priorities shaped their dockets under

261. E.g., EOIR1 (“I liked it a lot. . . . The things I enjoyed less were not things that were peculiar to EOIR.”); EOIR2 (“I like what I do, and I like the people I work with, the commitment and dedication especially in the field. . . . I didn’t necessarily like disciplining people . . . but that was part of the job so you did what you had to do.”).

262. Exec. Office for Immigration Review, *Office of the Chief Immigration Judge* (Mar. 5, 2018), <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios>.

263. EOIR2; see also *id.* (“I think maybe some [ACIJs] were more hands-on with [IJs], some talked to the [IJs] more.”).

264. EOIR3.

both the Obama and Trump Administrations. Third, participants disagreed with the Attorney General's clear intention to limit administrative closures of cases, which he ultimately did in May of 2018; some retired IJs also expressed public alarm at his subsequent tightening of the standard for IJ continuances. All of these docket management issues were exacerbated by policy shifts that swelled caseloads and disrupted IJ expectations.

a. Time Pressures and Case Quotas

Numerous participants complained of pressures from administrators to process cases more rapidly.²⁶⁵ Caseload pressures existed well before the Trump Administration, but some participants believed the top-down emphasis on case processing had gradually and substantially increased starting in the George W. Bush Administration.²⁶⁶ The four participants who worked on dockets involving only detained noncitizens were less likely to report experiencing such pressures,²⁶⁷ perhaps because the noncitizens appearing before them were more likely to have criminal convictions that barred them from most forms of relief from deportation. Separately, ten IJs expressed concern over new IJ case quotas.²⁶⁸

Participants with non-detained dockets reported four ways in which administrators would exert pressure to decide cases more quickly before 2018. First, participants stated that ACIJs would initiate individual emails, calls, or meetings requesting prompt explanations for pending cases or motions, including those that had been on the docket for a long period of time or had been pending beyond statutory time limits. Some participants found these contacts irritating, particularly when they returned from lengthy hearings to find an email demanding a reply by close of business.²⁶⁹ One former ACIJ also mentioned these contacts but described them as conversations:

I would call the judge directly and talk with them about it. I would find out what was going on and what we could do to try to make it more efficient. . . . [W]hat can we do, how can we make it better? What can we do to streamline?²⁷⁰

Second, participants recounted receiving regular emails comparing IJs across metrics, all concerning case completion and workload, but none relating to affirmance rates.²⁷¹ One felt "it was clear that judges were expected to

265. *E.g.*, IJ1; IJ2; IJ3; IJ5; IJ8; IJ11; IJ12.

266. *E.g.*, IJ10.

267. IJ6 ("I had the second-highest completion rate at the time in the court."); IJ9 ("I never had any pressure in that way. Again, I was pretty quick."); IJ10 ("[B]ecause I mostly worked in the detained pool . . . there are great constraints that didn't really apply to my case."); IJ11 ("I always felt I had the legal authority and the resources" to decide cases.).

268. IJ1-IJ9; IJ12.

269. *E.g.*, IJ1; IJ2; IJ3.

270. EOIR3.

271. *E.g.*, IJ5; IJ7; IJ8; IJ12.

know their numbers,” lest they risk “being castigated by their boss for not moving cases.”²⁷² But another related that they deleted the emails to avoid pressure:

[T]here were important things that were not included in the report, so that’s why I threw them away. Most people read them, they probably were right to read them. But I just thought I would be tempting the wrong side of my nature and I threw them away.²⁷³

The metrics emails sound similar to the “Six Month List,” through which lists of federal district judges’ pending cases older than three years and motions older than six months are published on a semiannual basis.²⁷⁴ However, IJ metrics emails are sent with greater frequency, and IJs are more vulnerable to removal or reassignment than federal district judges with life tenure.

Third, EOIR would regularly praise IJs for processing cases efficiently. According to one participant, an IJ who was the subject of such praise in an EOIR-wide email was later criticized by a circuit court as a “cookie cutter” judge.²⁷⁵ Conversely, a different participant complained that other successes went without acknowledgement:

I would say most judges felt like they were really good at things that the agency didn’t thank them for. . . . [A] judge might work longer hours, or might have been particularly good at dealing with certain kinds of very difficult respondents, but that might not ever get . . . acknowledged properly anywhere.²⁷⁶

Fourth, one participant believed that mentor IJs and ACIJs, if promoted from the IJ corps, were selected largely on the basis of decisional speed.²⁷⁷

Participants did not experience these pressures uniformly. One suggested that the stresses varied by the court and the ACIJ.²⁷⁸ Others believed that they had generally increased over time.²⁷⁹ Again, participants with detained dockets felt less of a burden.²⁸⁰ Some participants who did feel pressure indicated

272. IJ12.

273. IJ8.

274. Critics argue that this improperly influences judges and increases errors. *See, e.g.,* Miguel de Figueiredo, Alexandra D. Lahav, & Peter Siegelman, *Against Judicial Accountability: Evidence from the Six Month List* 20-64 (Feb. 20, 2018), https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2989777.

275. IJ8.

276. IJ1.

277. IJ8.

278. IJ3.

279. *E.g.,* IJ10.

280. *E.g.,* IJ9 (“[T]here may have been suggestions that hey, we’d like to see you guys complete X number of cases in X number of days. Those were just guidelines, it’s not hard to pass, and no one ever gave me a hard time about it.”); IJ10 (“I had plenty of power because I mostly worked in the detention pool. A lot of other [IJs] . . . issue orders but nobody quite follows up on them and things get delayed . . .”).

that it exacerbated differences with management, with one noting: “[Management was] busy concentrating on, how do we get these numbers down? For the judges . . . these numbers are people.”²⁸¹

Many participants also expressed alarm over 2018 case processing directives, although all had left the bench by the time these were issued. Before 2018, EOIR had never included fixed case processing metrics in IJ performance evaluations. In 2002, the Justice Department established EOIR-wide goals in 11 categories of cases, and it tracked progress in Department-wide reports.²⁸² The goals were not applicable to individual IJs, but a survey indicated that some IJs viewed them as effectively mandatory.²⁸³ In 2008, the Third Circuit intervened after an IJ cited the goals when denying a continuance.²⁸⁴ On remand, the Board clarified that completion goals were “not a proper factor in deciding a continuance request.”²⁸⁵

In 2010, EOIR removed some goals and consolidated others.²⁸⁶ In 2017, Justice Department officials indicated that they would not only revive EOIR-wide goals, but also establish numeric standards for individual IJs.²⁸⁷ In 2018, EOIR Director James McHenry followed through by first implementing metrics similar to the 2002-2009 goals²⁸⁸ and later announcing individual IJ quotas. As of October of 2018, IJs are judged as “satisfactory” only if they complete at least 700 cases per year, maintain a remand rate below 15 percent, and meet certain additional case completion benchmarks.²⁸⁹ IJs are rated “needs improvement” if they process 560 to 700 cases per year, or “unsatisfactory” if they process fewer than 560.²⁹⁰

281. IJ2.

282. GAO 2017, *supra* note 20, at 60-61.

283. Lustig et al., *supra* note 11, at 65. Citing EOIR emails, Jennifer Lee Koh argues that the goals incentivized use of stipulated orders of removal. Koh, *Waiving Due Process (Goodbye)*, *supra* note 22, at 509.

284. *Hashmi v. Att’y Gen. of U.S.*, 531 F.3d 256, 258-59, 261 (3d Cir. 2008); *see also, e.g., Keller v. Filip*, 308 F. App’x 760, 762-63 (5th Cir. 2009) (finding IJ error in failure to exercise discretion to grant continuance due to fear of violating case completion goals); *Badwan v. Gonzales*, 494 F.3d 566, 568-71 (6th Cir. 2007) (reversing denial of unopposed continuance request where, *inter alia*, IJ cited case completion goals).

285. *Hashmi*, 24 I. & N. Dec. 785, 793-94 (BIA 2009). The Attorney General recently overruled this portion of *Hashmi* and expressly directed IJs to consider administrative efficiency when adjudicating continuance requests, though case completion goals still cannot serve as the sole reason for denying a continuance. *L-A-B-R- et al.*, 27 I. & N. Dec. 405, 416-17 (AG 2018).

286. GAO 2017, *supra* note 20, at 61-64.

287. Maria Sacchetti, *Immigration Judges Say Proposed Quotas from Justice Dept. Threaten Independence*, WASH. POST (Oct. 12, 2017), https://www.washingtonpost.com/local/immigration/immigration-judges-say-proposed-quotas-from-justice-dept-threaten-independence/2017/10/12/3ed86992-aeel1-1e7-be94-fabb0f1e9ffb_story.html; Am. Immigration Lawyers Ass’n, *AILA Policy Brief: Imposing Numeric Quotas on Judges Threatens the Independence and Integrity of Courts* (Oct. 13, 2017). *But see* Andrew R. Arthur, *Balancing Independence and Accountability at the Immigration Courts: A CourTools Solution*, CENTER FOR IMMIGR. STUDIES (Nov. 8, 2017), <https://cis.org/Arthur/Balancing-Independence-and-Accountability-Immigration-Courts> (supporting IJ case metrics).

288. *Compare* McHenry Memo, *supra* note 24, at 7, *with* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-771, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: CASELOAD PERFORMANCE REPORTING NEEDS IMPROVEMENT 21-22 (Aug. 2006) [hereinafter “GAO 2006”].

289. McHenry Quota Plan, *supra* note 24, at 2.

290. *Id.* at 2-3. In a congressional hearing, the EOIR director rejected the term “quota” and compared IJ benchmarks to ALJ case completion goals at the Social Security Administration and the Merit Systems

Eleven participants commented on then-rumored IJ quotas. Nine felt that quotas would threaten due process by improperly influencing decision-making,²⁹¹ while a tenth indicated more measured skepticism,²⁹² and one expressed support.²⁹³ One skeptic feared that the combined result of quotas, the end of administrative closure,²⁹⁴ and restrictionist changes in policy²⁹⁵ would be “an assault on vulnerable populations” through a policy of “get ‘em in and get ‘em out”—meaning, speedy deportations with limited process.²⁹⁶ Echoing this concern, another participant hypothesized that delays in adjudications of visa petitions by other agencies would lead “somebody in Falls Church [to tell] the judge, this case has been on your calendar forever,” which in turn would allow DHS to “basically force a person to be removed by not adjudicating the thing that would serve as relief.”²⁹⁷ Scholars have raised analogous points: Jill Family, for example, describes delay-based critiques as pretexts to obscure substantive disagreements about sovereignty and xenophobia, justify cutbacks in process, and advance restrictive immigration policies.²⁹⁸

b. Partisan Docket Shuffling and Deceptive Scheduling

Some participants also expressed concern that politically driven shifts in case priorities further deprived IJs of docket control, accelerated cases that were not ready for trial, and delayed cases that may have been ready for disposition. For instance, following an influx of Central American women and

Protection Board. McHenry, *supra* note 196. In response, the president of the IJ union distinguished aspirational goals from hard quotas in performance evaluations. Tabaddor, *supra* note 144. Indeed, because ALJs enjoy protections against firing and may not be evaluated by agencies, their disposition targets are generally used for self-evaluation, unlike IJ quotas. *See supra* notes 99-104 and accompanying text.

291. IJ1-IJ9. IJ1 stated that performance metrics were a “fair piece of the puzzle,” but expressed concern about generalizations across cases and limits on continuances.

292. IJ12.

293. IJ11 (“If private attorneys, government attorneys, and the court all know that the case is more likely than not going forward on a date certain then they will be prepared. . . . [C]hanging the expectations of everybody involved is absolutely critical to alleviate the 690,000-case backlog.”).

294. *See infra* Part III.C.ii.c.

295. *See infra* Part III.C.ii.d.

296. IJ2.

297. IJ3. The two former ACIJs expressed more measured concerns. One emphasized that “due process was the ultimate goal that [we] wanted to achieve, and . . . you couldn’t do that and impose quotas.” EOIR2. However, they noted that the announced quota of approximately three case completions a day “did not offend [them].” *Id.* Another stated, “It’s good to ensure that judges are being efficient . . . [b]ut I hope it won’t be at the expense of due process and fairness.” EOIR3.

Current and former IJs have also publicly criticized these quotas. *E.g.*, *Strengthening and Reforming America’s Immigration Court System: Hearing Before the S. Subcomm. on Border Sec. & Immigration*, 115th Cong. (Apr. 18, 2018), <http://www.aila.org/File/DownloadEmbeddedFile/75674> (statement of retired IJs and former members of the BIA); Robert Vinikoor, *Take it from a Former Judge: Quotas for Immigration Judges are a Bad Idea*, MINSKY MCCORMICK & HALLIGAN, PC (Apr. 11, 2018), <https://www.mmhpc.com/2018/04/take-it-from-a-former-judge-quotas-for-immigration-judges-are-a-bad-idea/>; Einhorn, *supra* note 8; Audie Cornish, *Immigration Judge Says Quota Will Cripple Already Overburdened System*, NPR (Apr. 4, 2018), <https://www.npr.org/2018/04/04/599579225/immigration-judge-says-case-quota-will-affect-impartiality-in-the-courtroom>; Schmidt, *supra* note 7.

298. Jill E. Family, *Removing the Distraction of Delay*, 64 CATH. U. L. REV. 99, 104-19 (2014).

children seeking asylum,²⁹⁹ the Obama Administration established new EOIR docketing priorities³⁰⁰ to “quickly return unlawful migrants to their home countries.”³⁰¹ Through such “rocket dockets,” these arriving families were fast-tracked into expedited hearings.³⁰² The Trump Administration reversed the measures, winning rare praise from advocates.³⁰³

Participants stated that these rocket dockets limited their ability to triage cases, and some described them as an example of a broader phenomenon. One participant believed that different actors in the Justice Department would implement conflicting priorities “for political show”; as a result, “pieces [got] moved around without anything getting completed.” They continued:

None of these things I’m mentioning are done for the convenience of the individual, they are done to fulfill some other political or enforcement goal or management goal. . . . [B]y hustling people through the system, often without getting a chance to get a lawyer to prepare, you can send them back and send a message.³⁰⁴

Another participant voiced similar frustrations regarding both rocket dockets and the Trump Administration’s dispatching of IJs to border detention facilities, which delayed adjudication of their home dockets for weeks—sometimes while IJs simply waited for immigration courts to be set up.³⁰⁵ A third said their ACIJ in a prior administration had criticized them for failing to volunteer for “details” to other courts, after which they started volunteering and putting their “huge caseload . . . on hold” to “do whatever it was [EOIR] thought was more important.”³⁰⁶

Finally, two participants stated that EOIR had occasionally used “smoke and mirrors” to make it appear to Congress that the case backlog was shrinking.³⁰⁷ One alleged:

299. Amanda Taub, *The Awful Reason Tens of Thousands of Children Are Seeking Refuge in the United States*, VOX (June 30, 2014), <https://www.vox.com/2014/6/30/5842054/violence-in-central-america-and-the-child-refugee-crisis> (describing children fleeing rape, kidnapping, and murder by transnational organizations in Northern Triangle).

300. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T. OF JUSTICE, MEMORANDUM ON DOCKETING PRACTICES RELATING TO UNACCOMPANIED CHILDREN CASES IN LIGHT OF THE NEW PRIORITIES 1 (Sept. 10, 2014) (updating practices in light of new docket priorities from summer 2014).

301. Letter on the Efforts to Address the Humanitarian Situation in the Rio Grande Valley Areas of Our Nation’s Southwest Border, 2014 DAILY COMP. PRES. DOC. 509 (June 30, 2014).

302. Safia Samee Ali, *Obama’s “Rocket Docket” Immigration Hearings Violate Due Process, Experts Say*, NBC NEWS (Oct. 27, 2016), <https://www.nbcnews.com/news/us-news/obama-s-rocket-docket-immigration-hearings-violate-due-process-experts-n672636>.

303. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T. OF JUSTICE, MEMORANDUM ON CASE PROCESSING PRIORITIES 1 (Jan. 31, 2017) (rescinding Obama priorities); Caitlin Dickerson & Liz Robbins, *Justice Dept. Reverses Policy that Sped Up Deportations*, N.Y. TIMES (Feb. 2, 2017), <https://www.nytimes.com/2017/02/02/us/justice-department-deportation-trump.html>.

304. IJ5; accord Tabaddor, *supra* note 144 (“And just when we think we have organized our dockets for maximum efficiency, a single executive proclamation can change prosecutorial priorities, reshuffling a delicately balanced docket into chaos and further increasing the backlog.”).

305. IJ12; accord, e.g., Preston, *supra* note 20.

306. IJ7.

307. IJ3; IJ7.

I remember when our calendar was out on a certain point, they said, put every case on for a hearing on [the same date]—just so when Congress was looking, they would see nobody’s calendar was out beyond [that date]. It was clearly ridiculous, but that’s the kind of stuff they would do.³⁰⁸

c. Limits on Continuances and Administrative Closure

Participants voiced concern over the Attorney General’s then-pending referral about administrative closure, a judicial procedural mechanism that removed a case from an IJ’s calendar to allow an event outside the parties’ control (e.g., the processing of a visa petition by a different agency) to occur. Advocates have expressed similar concerns over a subsequent referral and decision that tightened the standard for continuances, another tool used by adjudicators to manage their dockets.

Between 2012 and 2018, IJs had clear authority to administratively close cases under certain circumstances, even when a party objected.³⁰⁹ In January of 2018, then-Attorney General Jeff Sessions announced his intention to review this authority through referral.³¹⁰ Many participants cited administrative closure as a critical tool for managing dockets, and each predicted that Sessions would end it.³¹¹ As expected, Sessions ended the practice in May of 2018, finding that it “lack[ed] a valid legal foundation” and declining to delegate the authority himself.³¹² Sessions further noted that because IJs acted on his behalf, they lacked the “inherent adjudicatory authority” of Article III judges.³¹³ Participants feared that the end of administrative closure would push IJs facing quotas to deport individuals while their visa applications were pending before DHS.³¹⁴

308. IJ3.

309. W-Y-U-, 27 I. & N. Dec. 17, 17-18 (BIA 2017); Avetisyan, 25 I. & N. Dec. 688, 690-94 (BIA 2012).

310. Castro-Tum, 27 I. & N. Dec. 187, 187 (AG 2018).

311. E.g., IJ1; IJ2; IJ5; IJ7; IJ12; cf. EOIR3 (“I think where there is a legitimate reason to admin close, such as pending applications, then I hope they don’t do away with [it].”).

312. Castro-Tum, 27 I. & N. Dec. 271, 292 (AG 2018). The American Immigration Lawyers Association (AILA) called *Castro-Tum* “yet another effort by this administration to undermine due process in immigration proceedings.” *AG’s Latest Move Further Erodes the Independence of Immigration Judges*, AM. IMMIGRATION LAWYERS ASS’N (May 17, 2018), <http://www.aila.org/advo-media/press-releases/2018/ags-latest-move-further-erodes-the-independence>. A group of retired IJs and Board members stated that they “look[ed] forward” to further litigation before a circuit court. Steven R. Abrams et al., *Retired Immigration Judges and Former Members of the Board of Immigration Appeals Express Disappointment in Attorney General’s Decision in Matter of Castro-Tum*, IMMIGR. COURTSIDE 1 (May 18, 2018), <http://immigrationcourtside.com/wp-content/uploads/2018/05/castro-tum-update-aila18051806-2.pdf>.

313. Castro-Tum, 27 I. & N. Dec. 271, 291-92 (AG 2018).

314. See *supra* notes 296-297 and accompanying text; see also Christie Thompson, *The DOJ Decision that Could Mean Thousands More Deportations*, MARSHALL PROJECT (Jan. 9, 2018), <https://www.themarshallproject.org/2018/01/09/the-doj-decision-that-could-mean-thousands-more-deportations>. As explained in Part III.C.i.a, the Attorney General re-assigned a total of 87 cases away from the Philadelphia IJ who granted administrative closure in *Castro-Tum*. The IJ union filed a formal

After the IJ interviews, the Attorney General referred another case to himself, this time on the question of “good cause” for continuances “to seek adjudications of collateral matters from other authorities,” such as visa adjudications before DHS.³¹⁵ The previous summer, EOIR had issued a memorandum about the use of continuances “to ensure that adjudicatory inefficiencies do not exacerbate the current backlog.”³¹⁶ The Attorney General’s ultimate decision tightened the “good-cause” standard for continuances, required IJs to state reasons for continuances on the record, and expressly directed IJs to consider administrative efficiency.³¹⁷ A former administrator stated that attributing the backlog to IJ continuances was misguided, citing a range of other factors that had contributed in recent years.³¹⁸ The IJ union, too, has publicly argued that blaming IJ continuances for the backlog misapprehends its causes.³¹⁹

d. Unpredictability from Policy Changes

Multiple participants stated that policy shifts within DHS disrupted their expectations, further restricting their ability to triage their dockets. These participants complained that DHS would unexpectedly change its policies on consenting to administrative closure or forms of relief, which made it difficult to determine which cases could be resolved quickly.³²⁰ One lamented:

[Y]ou can come into court with a private attorney expecting that a case will be handled in a certain way . . . and the trial attorney will say, “Yeah, I want to but I can’t do that because they changed the policy yesterday.” That’s not consistency.³²¹

In addition, participants noted that their dockets would swell or constrict based on substantive policy shifts. Numerous participants remarked on the docket-expanding effect of IIRIRA, which expanded the grounds for removal.³²² One noted that legislative grants of relief for Haitians, Nicaraguans, and Cubans reduced caseloads in the 1990s.³²³ Along these lines, a former administrator stated that the Obama Administration’s creation of Deferred Action for Childhood Arrivals (DACA) was not only

grievance in response, alleging that the Justice Department had infringed on the IJ’s independence in order to sway case outcomes. NAIJ Grievance, *supra* note 232, at 4; Robbins, *supra* note 235.

315. L-A-B-R- et al., 27 I. & N. Dec. 245, 245 (AG 2018).

316. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, OPPM 17-01, CONTINUANCES 1 (2017). After the memo, grants of continuances decreased. McHenry, *supra* note 196.

317. L-A-B-R- et al., 27 I. & N. Dec. 405, 415-19 (AG 2018). Attorney General Sessions again criticized “the use of continuances as a dilatory tactic” in his decision. *Id.* at 407.

318. EOIR1.

319. Tabaddor, *supra* note 144 (“[IJs] are not responsible for the backlog. . . . We have been doing more with less for years.”).

320. IJ4; IJ7.

321. IJ4.

322. *See infra* Part III.C.iv.

323. IJ10.

“humanitarian,” but also reflected “a case management approach.”³²⁴ One participant predicted that the Trump Administration’s rescissions of DACA, Temporary Protected Status, and prior grants of prosecutorial discretion would push more individuals into removal proceedings and further limit IJs’ ability to manage their dockets.³²⁵

3. *Restrictionist and Expansionist Chilling Effects*

Some participants felt pressure to steer aggregate decision-making in a restrictionist or expansionist direction, revealing top-down policy influences more emblematic of a bureaucracy than a judiciary. These concerns manifested in a few ways. Certain participants believed that EOIR hiring and firing had grown partisan starting in the George W. Bush Administration. Two recounted Attorney General John Ashcroft’s downsizing of the Board of Immigration Appeals in 2003 as having a chilling effect on IJs, potentially discouraging them from granting relief; nevertheless, both qualified their statements:

I think I lost faith in the agency after the purge in 2002 . . . [but] I can’t personally say I know anybody who changed the way they made decisions based on it.³²⁶

[It] sent a message The judges were kind of shocked by it. I don’t know that anybody started deciding cases differently, but everybody felt like, when is he going to do the same thing to us?³²⁷

The latter participant also described partisan hiring practices under the Bush Administration, in accordance with a 2008 report by the Office of the Inspector General.³²⁸

Some interviewees alleged that partisan hiring and firing continued under subsequent administrations. Two participants believed that early into the Obama Administration, the new EOIR Director had been “fishing” for ways to remove late-stage Bush appointees.³²⁹ One stated, more directly, that political appointees had pressured IJs to change overall grant rates (but not individual decisions) under threat of supervisory scrutiny.³³⁰ One participant believed they had been a “victim of politicized firing” during their two-year

324. EOIR1.

325. IJ2. Relatedly, some have warned that the Attorney General’s cessation of administrative closure, discussed *supra* Part III.C.ii.c, may further clog dockets by resuscitating hundreds of thousands of low-priority cases. Dara Lind, *Jeff Sessions Just Reopened the Door to Deporting 350,000 Immigrants Whose Cases Had Been Closed*, VOX (May 21, 2018), <https://www.vox.com/2018/5/21/17376398/jeff-sessions-immigration-ruling-courts>.

326. IJ1.

327. IJ3.

328. See *supra* notes 106-107 and accompanying text. A former ACIJ emphasized that these issues were addressed quickly, adding, “I think the impact was, quite frankly, overall and over time rather minimal.” EOIR3.

329. IJ3; accord IJ6.

330. IJ6; see also IJ9 (stating that such politicization was worsening over time).

post-hiring probationary period for failing to satisfy expectations regarding relief rates.³³¹ Another suggested that late Obama and early Trump Administration hires might shift their decision-making while on probation, stating:

I suspect that the [IJs] who were appointed before the Trump Administration probably are less willing to sign on to whatever he's trying to sell. Whereas those who have been appointed during the Trump Administration would tend to be more in line with his thinking. . . . I suppose because they are all on a one-year probationary period, they may have to do that because they think that's the way to keep their job.³³²

In 2018, Democrats in Congress expressed concern that the Trump Administration, too, may have been “using ideological and political considerations to improperly—and illegally—block the hiring” of IJs and Board members.³³³ In addition, after the Justice Department assigned an IJ with a relatively high asylum denial rate of 86.5 percent to preside over the New York Immigration Court, a retired IJ called this “a signal to the New York judges to adhere faithfully to . . . the attorney general's program.”³³⁴

Issues of politicized hiring and reassignment have taken on special relevance as the Department of Justice implements a “50 percent surge” in the number of IJs.³³⁵ In September of 2018, the Attorney General welcomed “the largest class of [new] immigration judges in history”³³⁶—a milestone that EOIR surpassed less than three weeks later.³³⁷ A reported “rash of retirements of immigration judges” has further increased the number of vacancies to be filled.³³⁸ Former IJ Margaret McManus, who retired in 2017 after 27 years on

331. IJ code withheld to protect anonymity.

332. IJ9. The probationary period for new IJs actually appears to be two years, not one year. *See supra* note 111 and accompanying text.

333. Rep. Elijah E. Cummings et al., *Letter to James R. McHenry, III, Director, Exec. Office for Immigration Review* 1 (Apr. 17, 2018), <https://cummings.house.gov/sites/cummings.house.gov/files/Dems%20to%20DOJ%20re.%20EOIR%20Politicization.pdf>; *see also* Rep. Elijah E. Cummings et al., *Letter to Michael E. Horowitz, Inspector General, U.S. Dep't of Justice* 1 (May 8, 2018), <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Dems%20to%20Horowitz.pdf> (alleging “more whistleblowers ha[d] come forward with information that corroborate[d] the allegations detailed in [the April] letter”).

334. Robbins, *supra* note 235.

335. Hugh T. Ferguson, *Sessions Says He Plans a 50 Percent Surge in Immigration Judges*, POLITICO (Sept. 10, 2018), <https://www.politico.com/story/2018/09/10/sessions-immigration-judges-813573>.

336. Jefferson B. Sessions III, Attorney General of the United States, *Remarks to the Largest Class of Immigration Judges in History for the Executive Office for Immigration Review* (Sept. 10, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-largest-class-immigration-judges-history>.

337. Exec. Office for Immigration Review, *EOIR Announces Largest Ever Immigration Judge Investiture* (Sept. 28, 2018), <https://www.justice.gov/opa/pr/eoir-announces-largest-ever-immigration-judge-investiture>.

338. Robbins, *supra* note 235; *accord* McHenry, *supra* note 196 (noting that IJ attrition rates were higher in 2017 than in previous years); Hamed Aleaziz, *Being an Immigration Judge Was Their Dream. Under Trump, It Became Untenable*, BUZZFEED NEWS (Feb. 13, 2019), <https://www.buzzfeednews.com/>

the immigration bench, told The New York Times that her final year “was not . . . very nice” and implied that the Trump Administration’s “dramatic” policy changes were unusually “outcome-oriented.”³³⁹

Beyond direct hiring and firing, participants expressed concern that White House and Justice Department rhetoric would encourage rulings against noncitizens.³⁴⁰ For example, one took issue with a press release, linked from the EOIR website, entitled “Return to Rule of Law in Trump Administration Marked by Increase in Key Immigration Statistics.”³⁴¹ Participants believed that while some IJs could resist restrictionist pressures, particularly if they had prior relationships with administrators,³⁴² newer IJs would be susceptible to following the party line.³⁴³ One alleged that even some experienced IJs they knew had decided to “cav[e]” and “drink[] the Kool Aid” rather than push back:

Yes, it’s true that the leadership should be subject to [the] political viewpoint of the executive branch, maybe, but the regular rank and file judges should be immune and exempt from all that, and they’re not. And so now you have judges who . . . would gladly grant cases . . . and now they’re afraid to do that.³⁴⁴

Said another:

[U]nder the current administration, any judge who wants to be tougher on respondents is now emboldened, not by the facts of cases, but by the worldview and political attitude of this administration to do so.³⁴⁵

Relatedly, a former administrator emphasized that the success of management efforts would depend on morale and trust among the IJ corps:

[Y]ou have to have some level of trust with your leadership. I’m not sure that exists right now Ashcroft was restrictionist, but the president he worked for, George Bush, was not known for being . . . violently anti-immigrant.³⁴⁶

In addition to reports of retirements and public criticism from IJ union officials,³⁴⁷ there is some evidence for the notion that trust between EOIR

article/hamedaleaziz/immigration-policy-judge-resign-trump (quoting current IJ: “It has become so emotionally brutal and exhausting that many people I know are leaving or talking about finding an exit strategy.”).

339. Robbins, *supra* note 235.

340. IJ3; IJ4; IJ6; IJ8; IJ9; IJ10.

341. IJ3; Office of Public Affairs, U.S. Dep’t of Justice, *Return to Rule of Law in Trump Administration Marked by Increase in Key Immigration Statistics* (Aug. 8, 2017), <https://www.justice.gov/opa/pr/return-rule-law-trump-administration-marked-increase-key-immigration-statistics>.

342. IJ4; IJ8; IJ10.

343. IJ8; IJ9.

344. IJ6.

345. IJ8.

346. EOIR1.

347. See, e.g., NAIJ Grievance, *supra* note 232, at 4-5; Tabaddor, *supra* note 144.

management and line IJs is diminishing. “Dozens” of IJs at a summer 2018 EOIR conference “expressed anxiety over their treatment” under the current administration, and “[s]cores of attendees wore American flag pins in support of ‘judicial independence and integrity in our courts.’”³⁴⁸

4. *Limitations on Positive Discretion*

Although some participants enjoyed the challenge of substantive immigration law,³⁴⁹ others found it unfair, inconsistent,³⁵⁰ or even technically sloppy.³⁵¹ Beyond this, some participants felt that changes in substantive immigration law had limited IJ discretion over time, potentially contributing to a sense that IJs were policy-implementing bureaucrats rather than adjudicators. Multiple participants cited the 1996 passage of IIRIRA as a turning point:

[Before IIRIRA,] everybody got their day in court and got to be heard on why they deserved a second chance and why they shouldn’t be deported. . . . [This] dramatically changed after the preclusion of aggravated felonies.³⁵²

[After IIRIRA,] there was a huge number of people for a period of time where, a year earlier you could have granted a green card to them, and they were now mandatory removal. And that was a difficult time to be an IJ.³⁵³

[After IIRIRA,] there was really a disconnect between the people who deserved relief and the people who were entitled to relief . . . and that’s really frustrating for a judge. You want to not just punch the clock but also maybe do the right thing.³⁵⁴

Another participant added, “[I]t seems like Congress has been, over the past 20 years, restricting the ability of judges to make decisions favorable to the respondents,” which made their job less pleasant.³⁵⁵

Critiques of the harshness of immigration law abound.³⁵⁶ It may be incorrect to assert that IJs have lost discretion overall: although IIRIRA made

348. Katie Benner, *Immigration Judges Express Fear that Sessions’s Policies Will Impede Their Work*, N.Y. TIMES (June 12, 2018), <https://www.nytimes.com/2018/06/12/us/politics/immigration-judges-jeff-sessions.html>.

349. IJ9; IJ11; IJ12.

350. E.g., IJ3; IJ4; IJ6; IJ7. However, when asked whether they felt the law ever yielded outcomes that were substantively unfair, two participants replied that it wasn’t their job to decide if the law was unfair. IJ9; IJ11.

351. IJ10.

352. IJ2.

353. IJ1.

354. IJ10.

355. IJ9.

356. E.g., Family, *supra* note 14, at 551-63; Jill E. Family, *Murky Immigration Law and the Challenges Facing Immigration Removal and Benefits Adjudication*, 31 J. NAT’L ASS’N ADMIN. L. JUDICIARY 45, 54 (2011).

many individuals ineligible for relief or bond, IJs have since gained discretion to *deny* relief, as Congress has expanded the grounds for adverse credibility determinations.³⁵⁷ And if IJs lacked all discretion, the well-documented dispersion of outcomes across IJs would be difficult to explain.³⁵⁸ Rather, as Jill Family writes, modern immigration law is infused with “negative discretion” to deny relief.³⁵⁹ IJs’ lack of positive discretion has shifted consideration of equities to immigration enforcement officials, as manifested in policies like Deferred Action for Childhood Arrivals,³⁶⁰ as well as state and local criminal prosecutors and law enforcement officers.³⁶¹

D. Conclusion

These findings reveal mechanisms of top-down influence over IJs and highlight sites of contestation between the IJ corps, EOIR, and the Justice Department. They also clarify the extent to which reforms to the Board of Immigration Appeals caused unintended judicialization of IJ decisions and tone, as well as the ways in which EOIR self-judicialized through the conscious adoption of court symbols. Thus, they tie together threads that advocates and commentators, including IJs themselves,³⁶² have previously discussed. Taken together, participants suggested that—depending on the nature of their docket, their practices, and their supervisor—pressure from the Department of Justice and the White House had taken on a sufficiently dominant role for some of them to view it as a threat to independence, even absent express directions to decide any given case in a specific manner.

The results also make clear that these influences are uneven.³⁶³ Still, participants’ accounts are worth crediting for three reasons. First, government and

357. See *supra* note 56 and accompanying text.

358. See, e.g., RAMJI-NOGALES ET AL., *supra* note 20, at 34-44 (identifying wide disparities in outcomes for asylum-seekers); HAMLIN, *supra* note 154, at 71-72; MILLER ET AL., *supra* note 19, at 15-16. See generally Ming H. Chen, *Explaining Disparities in Asylum Claims*, 12 GEO. PUB. POL’Y REV. 29 (2007) (testing hypotheses to explain disparities in asylum grant rates based on case characteristics, adjudicator characteristics, and resource scarcity).

359. Family, *Murky Immigration Law*, *supra* note 356, at 55; see also Jill E. Family, *The Future Relief of Immigration Law*, 9 DREXEL L. REV. 393, 414-15 (2017) (“One repercussion of the lack of relief from removal is that it turns the job of the immigration judge into a mostly punitive one.”); cf. *Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (“While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation.”).

360. Family, *The Future Relief of Immigration Law*, *supra* note 359, at 408-10; Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 668, 694-98 (2015).

361. Family, *The Future Relief of Immigration Law*, *supra* note 359, at 409-10; Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 566, 573 (2013); Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1857 (2011).

362. See generally, e.g., sources cited *supra* note 21; Slavin & Harbeck, *supra* note 115; Lustig et al., *supra* note 11.

363. Indeed, at least one participant did not mention any of them except a slight frustration with case-loads. IJ11.

media reports verify much of what they shared.³⁶⁴ Second, while I was concerned about bias among IJ union-affiliated participants before the interviews, the results did not reveal systematic differences between NAIJ-affiliated and non-NAIJ-affiliated participants.³⁶⁵ In other words, the results do not indicate that NAIJ-affiliated participants were “crying wolf.” Third, even though the phenomena were experienced unevenly, the fact that at least some participants experienced each one shows that they exist, even if they are not universal. Therefore, although interviews cannot quantify the effect of any given mechanism of administrative control, the results nevertheless offer important insight into the constraints under which IJs operate, as well as the structural mechanisms available to influence their decision-making.

IV. ANALYSIS: IMMIGRATION “COURTS”?

Interviews with former IJs and administrators painted a nuanced picture of an institution that has occasionally adopted court-like attributes but faces growing time pressures, top-down partisan influences, and intermeddling with docket management. Based on these results, it seems mostly inapt to describe immigration courts as “courts” in the first place. Rather, participants’ responses illustrated that the immigration court system departs from traditional U.S. conceptions of courts, including under-resourced and high-volume courts, at both conceptual and practical levels. Accordingly, I begin this Part with a comparative analysis of the pathologies identified above, and I conclude that the immigration court system is a mixed institution that increasingly resembles a hierarchical bureaucracy more than a prototypical U.S. court.

After the diagnosis, I turn to its ramifications. Standing alone, the idea of an immigration bureaucracy is not normatively undesirable. Expansionists, restrictionists, and everyone in between could imagine a version of an immigration bureaucracy that meets their preferred goals more effectively than an archetypal court. For example, in light of the power disparities between non-citizens and the federal government, a non-adversarial process may be a better fit for removal hearings than an adversarial model. The problem is not that bureaucracy is bad, but that the status quo offers the worst of both worlds. Although the trappings of courts enhance EOIR’s perceived legitimacy, by obscuring the agency’s hierarchical and enforcement-driven aspects, these

364. For government reports, see, for example, GAO 2017, *supra* note 20, at 10, 13, 60-64, 77, 136; GAO 2016, *supra* note 96, at 3, 45; *see also* Ucar, *supra* note 147 (citing confidential Justice Department review of Baltimore Immigration Court). Corroborating media accounts include, for instance, Preston, *supra* note 20; Simmons, *supra* note 173; Summers, *supra* note 208; Gordon, *supra* note 225; Robbins, *supra* note 235; Gonzales, *supra* note 251; Sacchetti, *supra* note 287; Ali, *supra* note 302; Benner, *supra* note 348.

365. The one exception is that the participant who expressed relatively few concerns about the system was non-NAIJ-affiliated. In contrast, all NAIJ-affiliated former IJs (and all other non-NAIJ-affiliated former IJs) expressed concern about case quotas, administrative closure, political docket shuffling, and/or partisan influences.

symbols can erode many benefits of both models and shield harsh immigration law from appropriate scrutiny. Given this phenomenon, any solution will not entail a change in agency structure alone: additional procedural protections for noncitizens and substantive legal reforms to restore positive IJ discretion are also necessary.

A. *Classifying the Immigration Adjudication System*

The fifteen interview results illuminate major departures between immigration courts and adversarial legal courts. At the same time, they highlight substantial commonalities between the immigration courts and a bureaucracy. Although the immigration court system features many external hallmarks of courts, these findings indicate that behind the scenes, it is a mixed institution that increasingly functions as a bureaucracy. In this way, the system continues to reflect the tension between adjudication and enforcement that has shaped it for decades.³⁶⁶

As noted above, I adopt the framework of adversarial legalism to capture U.S. conceptions of “courts” as formal, non-hierarchical, and highly participatory institutions.³⁶⁷ Under this framing, removal hearings depart substantially from court proceedings in both concept and practice. First, removal hearings are less participatory and more hierarchical than true adversarial legal proceedings, given the top-down administrative pressures on IJs, the power imbalance between the oft-unrepresented noncitizen and the repeat-player DHS attorney, and the lack of meaningful information-gathering tools for noncitizens. In addition, as IJ discretion to grant relief and manage dockets has decreased, the Justice Department’s top-down influence has grown. This is not to say that IJs, many of whom surely strive to be impartial adjudicators, lack any discretion to push back against their superiors. For example, although the Attorney General severely limited domestic violence-related asylum claims in June of 2018,³⁶⁸ a study participant emailed me in September of that year noting that IJs in San Francisco had already approved new legal theories to continue granting protection to survivors of extreme and unchecked domestic violence.³⁶⁹ The IJ union also continues to publicly criticize quotas and other Justice Department policy changes. These incidents of resistance, the ongoing influence of lawyers, and the fact that many noncitizens remain entitled to full hearings all demonstrate that immigration courts are not fully hierarchical; nevertheless, they feature substantially more administrative hierarchy than other U.S. courts.³⁷⁰

366. See *supra* Part I.A.

367. See *supra* notes 137-139 and accompanying text.

368. A-B-, 27 I. & N. Dec. 316, 320 (AG 2018) (holding domestic violence and gang violence generally not to be grounds for asylum).

369. IJ code withheld to protect anonymity.

370. In 1986, Mirjan Damaška developed a distinct typology of court systems that emphasized the distinction between hierarchical and “coordinate,” or decentralized, decision-making structures. MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 16-28 (1986). In Damaška’s framework,

Similarly, although removal hearings have evolved to feature some formal procedures, they continue to lack the formalities of many generalist courts. IJs are not bound by formal rules of evidence; the APA's formal hearing provisions do not apply; approximately 63 percent of all respondents and 86 percent of detained respondents proceed without counsel;³⁷¹ and while IJs must at least provide some reasoning in support of a final decision, neither they nor Board members are required to issue written justifications. Again, some nuance is in order, as participants related that the post-streamlining increase in scrutiny from federal courts did engender some degree of judicialization. However, due to appellate courts' limited jurisdiction and deferential standard of review, even this trend was limited to egregious transgressions of judicial demeanor and instances where EOIR's reasoning was utterly deficient; at the same time, the courts of appeals uniformly sanctioned the de-judicialization of the BIA through Attorney General Ashcroft's streamlining procedures.³⁷² In other words, although removal hearings may look like adversarial legal proceedings, in practice they feature major distinctions.³⁷³

It may be tempting to explain away the substantial gaps between immigration courts and adversarial legal institutions as mere byproducts of resource constraints. But even on a practical level, comparing removal hearings with high-stakes, poorly resourced misdemeanor courts³⁷⁴ only underscores that removal hearings are not "court" proceedings. At first glance, criminal courts would seem quite analogous to immigration courts: individual liberty is often at stake in both systems, and both have a veneer of adversarialism. The racialized fears that inflect substantive immigration law are similarly omnipresent in criminal law, giving both systems a high political salience and leading

U.S. courts are largely coordinate structures because their decision-makers are generalists, most of whom are rough equals, and many of whom enjoy discretion to consider substantive justice. *Id.* at 38-47. In contrast, IJs are highly specialized, and they are the lowest in a vertical network of administrative hierarchy from ACIJs up to the Attorney General. Although IJs do possess negative discretion to deny relief, they are also constrained by technical standards and have increasingly limited positive discretion. Thus, Damaška's framework generates further conceptual doubts regarding the categorization of the immigration court system as a "court."

371. Eagly & Shafer, *supra* note 14, at 2. Although there is no right to appointed counsel in most civil proceedings, the combination of high stakes, labyrinthine law, and potential language barriers places non-citizens in immigration proceedings in a unique position. Under an adversarial legal conception of the trial as a vigorous contest, appointed counsel would seem particularly necessary here.

372. See *supra* notes 180-183 and accompanying text.

373. In a comparative study of refugee status determination regimes, Rebecca Hamlin argues that U.S. immigration hearings embrace adversarial legalism. HAMLIN, *supra* note 154, at 66. Hamlin notes that hearing procedures have grown increasingly formalized through federal appellate scrutiny and the adoption of the REAL ID Act of 2005. *Id.* at 79-81. However, this analysis may not capture the system's current identity. Although Hamlin does consider the 2002-2003 BIA reforms and Bush-era politicized hiring, her stakeholder interviews took place in 2007. Because the administrative pressures faced by IJs may have changed over time, Hamlin's conclusion warrants re-examination. In addition, because Hamlin did not interview IJs, the administrative pressures IJs experienced from their perspective may have remained concealed, even to the extent that they existed then.

374. One former president of the IJ union has frequently compared immigration hearings to "death penalty cases in a traffic court setting." Dooling, *supra* note 4; see also Marks, *supra* note 4; Ludden, *supra* note 147.

both to disproportionately focus legal violence on people of color.³⁷⁵ Not to mention, the high-volume, procedurally complex aspects of criminal court that can make it feel impersonal and even Kafkaesque have spurred critiques of “assembly-line” justice that echo many complaints about immigration proceedings.³⁷⁶

Despite these surface-level similarities, misdemeanor courts retain features of “courts” that immigration courts lack. First, lower criminal courts generally do not face the top-down pressures that IJs have reported. Rather, misdemeanor court is characterized in part by “decentralization of authority” and “the virtual absence of any real hierarchical structure.”³⁷⁷ This contrasts sharply with EOIR, in which IJs are enmeshed in a tightening administrative hierarchy. Although both IJs and criminal judges face case pressures and resource constraints, only IJs must answer to supervisors with authority over their work pace, dockets, openness to the public, and job security.

Second, even underfunded criminal court systems feature more procedural formality than removal hearings. Criminal judges often employ procedural workarounds analogous to those described by IJs, including mass rights advisals and stipulations that expedite proceedings.³⁷⁸ Still, indigent criminal defendants are entitled to appointed counsel for any case in which a sentence of incarceration is imposed.³⁷⁹ Criminal trials (though rare) feature discovery and are regulated by rules of evidence. More constitutional violations are remediable through suppression of evidence in criminal court than in removal hearings,³⁸⁰ and defendants retain the privilege against compelled testimony on the dispositive issue at trial. Noncitizens in removal hearings lack any of these procedures or rights, except the right to counsel at their own expense.³⁸¹

Third, despite the proliferation of mandatory minimum sentencing laws, misdemeanor judges continue to enjoy discretion that allows their views of substantive justice to play a greater role. For example, these judges generally

375. *E.g.*, Menjívar & Abrego, *supra* note 44, at 1397-1412. Relatedly, both legal systems “embody choices about who should be members of society: individuals whose characteristics or actions make them worthy of inclusion in the national community.” Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 397 (2006).

376. *E.g.*, Brandon Buskey & Lauren Sudeall Lucas, *Keeping Gideon’s Promise: Using Equal Protection to Address the Denial of Counsel in Misdemeanor Cases*, 85 FORDHAM L. REV. 2299, 2304 (2017). *But see, e.g.*, Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 619-29 (2014) (problematizing stereotype of “assembly-line justice” by demonstrating that New York City lower criminal courts channel discretion to differentiate between individuals in service of social control); MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* 13 (1979) (“[T]he assembly-line metaphor ignores the complexity of the criminal process, and the casualness and confusion characteristic of decision making in the lower criminal courts.”).

377. FEELEY, *supra* note 376, at 13. This is not to say that top-down accountability is necessarily harmful. For example, a lack of meaningful hierarchy could allow criminal judges to prioritize their own notions of substantive justice over the law’s requirements.

378. *Id.* at 10.

379. *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972).

380. *See* Chacón, *supra* note 68, at 1611-15.

381. Again, this is not necessarily objectionable in all cases. Feeley, for example, argues that formality in misdemeanor proceedings counterproductively heightens transaction costs for defendants. FEELEY, *supra* note 376, at 292-93.

retain some discretion in sentencing, and the combination of procedural costs and docket management authority affords further discretion at earlier stages.³⁸² In contrast, and particularly because Congress and the Attorney General have cabined IJ discretion to run predominantly in a negative direction, once an IJ finds an individual removable and ineligible for relief, the IJ has no option but to order the noncitizen removed. As a result, some participants felt that the laws they implemented as IJs were often unfair;³⁸³ others seemed to reconcile the gap between immigration law and substantive justice by defining their role to exclude fairness entirely.³⁸⁴

How we classify immigration courts matters, both to advance our understanding of the system and to work towards desired outcomes. Because the role of the IJ is so different from that of other U.S. judges, it may not be useful to frame quotas or other efforts to impose top-down controls on IJ decision-making strictly as attacks on IJ “independence.”³⁸⁵ Instead, I suggest analyzing EOIR as a street-level bureaucracy. To be clear, I do not claim that EOIR is a purely rational, technical, and centralized Weberian bureaucracy.³⁸⁶ Rather, I assert that reforms that have strengthened hierarchy and reduced IJ discretion appear to be pushing IJs further in the direction of line bureaucrats, and that many of the system’s departures from the bureaucratic ideal are manifestations of common problems in real-world bureaucracies.

Indeed, research on street-level bureaucracy echoes participant interviews to a surprising degree. Because street-level bureaucrats construct policy on a daily basis, they play a key role in mediating relationships between subjects and the state.³⁸⁷ IJs’ experiences resonate with core pathologies of such bureaucracies, which are often characterized by disagreements between bureaucrats and managers about priorities, inadequate resources and conflicting expectations, evaluation difficulties due to tension between client-centered and organizational goals, bureaucrats’ lack of control over inputs and work pace, managerial pressures to emphasize decisional quantity over

382. If anything, criminal judges may overuse this broad discretion, thus undermining the legitimacy of the system. *E.g.*, *id.* at 286-90. Issa Kohler-Hausmann further explains how misdemeanor courts utilize discretion in support of social control by marking individuals, imposing procedural costs for compliance, and demanding performance, all of which allow these courts to “trace, engage, and discipline subjects even as they are shown leniency.” Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AM. J. SOC. 351, 353 (2013). Immigration law can also be viewed as a mechanism of social control, and IJs may facilitate this through their discretion in whether to set bond, as well as their discretion to deny relief. Still, IJs correctly perceive that their discretion for “leniency” is shrinking, complicating the comparison.

383. *E.g.*, IJ3; IJ4; IJ6; IJ7.

384. Specifically, two participants stated that it wasn’t their job to decide if the law was unfair. IJ9; IJ11. Another IJ who declined an interview stated, in writing, that “fairness” in the colloquial sense was “not the objective.” IJW1.

385. *E.g.*, Sacchetti, *supra* note 287; Legomsky, *Deportation and the War on Independence*, *supra* note 14, *passim*.

386. Any such claim would be undermined by the well-documented disparities in relief rates across IJs, which are influenced largely by personal ideology. *E.g.*, MILLER ET AL., *supra* note 19, at 68-69 (showing that asylum liberalism has a substantial effect on relief outcomes before individual IJs, much greater than any other factor considered).

387. LIPSKY, *supra* note 141, at 3-4, 13.

quality, the use of symbolically infused settings to control clients, and bureaucrats' self-denial of discretion to limit their responsibility for outcomes.³⁸⁸ Thus, while the analogy is imperfect,³⁸⁹ accounts of bureaucracies' challenges pair with salient aspects of the immigration court system, in line with longstanding public critiques by IJs and their union.³⁹⁰

The notion of courts as street-level bureaucracies is not completely novel. Michael Lipsky includes judges in his seminal analysis of street-level bureaucrats,³⁹¹ and other scholars have analyzed ALJs from a bureaucratic perspective.³⁹² But most treatments of true adversarial legal systems as bureaucracies necessarily entail an imprecise use of the latter term, since such institutions are non-hierarchical by design.³⁹³ Moreover, despite the fact that IJs enjoy fewer decisional independence protections than ALJs, few analyses of the immigration system from a bureaucratic perspective have focused on IJs.³⁹⁴ In fact, only a handful of scholarly works take seriously the idea of IJs as street-level bureaucrats.³⁹⁵ Interview results demonstrate that this is a mistake: although EOIR is a mixed institution with some features of both Anglo-American courts and bureaucracies, its core increasingly appears more bureaucratic than judicial.

388. *Id.* at 18, 27, 44, 48, 78-79, 99, 117-18, 149; *see also infra* Part IV.C (on invoking court symbols to legitimate legal violence).

389. For example, Lipsky emphasizes "relatively high degrees of discretion and relative autonomy from organizational authority" as two "interrelated facets" of street-level bureaucrats' positions. LIPSKY, *supra* note 141, at 13. To the extent that IJ discretion is shrinking while administrative hierarchy is tightening, the street-level bureaucracy frame may grow less effective.

390. *See generally* sources cited *supra* note 362.

391. *E.g.*, LIPSKY, *supra* note 141, at 3 ("Typical street-level bureaucrats" include "judges."). *But see* FEELEY, *supra* note 376, at 13-18 (firmly disputing the notion of lower criminal courts as bureaucracies and describing them instead as open systems).

392. *E.g.*, Cole D. Taratoot & Robert M. Howard, *The Labor of Judging: Examining Administrative Law Judge Decisions*, 39 AM. POL. RESEARCH 832, 835-51 (2011); *see also* Daniel E. Ho & Sam Sherman, *Managing Street-Level Arbitrariness: The Evidence Base for Public Sector Quality Improvement*, 13 ANNU. REV. L. SOC. SCI. 251, 253, 255-56, 258, 263-64 (2017) (collecting studies on improving street-level decision-making, including studies on ALJ performance).

393. Federal courts do have some hierarchical attributes, including the "Six Month List" for U.S. district court judges, *see supra* note 274 and accompanying text, and the Judicial Conference of the United States (JCUS), *see Governance & the Judicial Conference* (last visited Apr. 26, 2018), <http://www.uscourts.gov/about-federal-courts/governance-judicial-conference>. JCUS and subsidiary councils can investigate and adjudicate complaints of judicial misconduct; as sanctions, they can decline to assign cases to a judge, censure a judge in public or private, or urge the judge to retire. 28 U.S.C. §§ 351-61. Still, JCUS does not exercise nearly the same extent of top-down control over case processing, evaluation, hiring and firing, or dockets as the Justice Department does over IJs.

394. A number of studies have, however, focused on immigration enforcement officials. *E.g.*, Joseph Landau, *Bureaucratic Administration: Experimentation and Immigration Law*, 65 DUKE L.J. 1173, 1180-1221 (2016); Marjorie S. Zatz & Nancy Rodriguez, *The Limits of Discretion: Challenges and Dilemmas of Prosecutorial Discretion in Immigration Enforcement*, 39 L. & SOC. INQ. 666, 668-82 (2014).

395. Ho & Sherman, *supra* note 392, at 264; Mark Richard Beougher, *Who Controls Immigration Judges?: Towards a Multi-Institutional Model of Administration Judge Behavior* (Dec. 2016), <https://scholarworks.wmich.edu/cgi/viewcontent.cgi?article=3466&context=dissertations>; Katherine R. Abbott, *The Real American Court: Immigration Courts and the Ecology of Reform* (Apr. 2013), https://repository.asu.edu/attachments/110290/content/Abbott_asu_0010E_12666.pdf.

B. *In Defense of Bureaucracy*

It might be tempting to stop here and assume that any immigration adjudication apparatus without decisional independence in the Anglo-American mode is undesirable. True, hierarchical bureaucracies can be susceptible to volatile shifts across administrations with differing policies.³⁹⁶ The current president, a fervent restrictionist, has railed against IJs' decisional independence and advocated eliminating IJs entirely in favor of summary deportations.³⁹⁷ Understandably, then, some readers may be concerned about the eroding independence of the IJ corps. My point here is that even for those who favor consistent or increased levels of immigration, it is possible to envision a neutral or pro-immigrant bureaucracy that is more effective and humane than a court might be, given adversarial legalism's inefficiency, complexity, and susceptibility to power imbalances. In other words, at the very least, there is nothing inherently problematic about an immigration bureaucracy. Furthermore, analyzing the immigration court system through the lens of a bureaucracy could help us better diagnose its pathologies and develop creative reforms, beyond adoption of the procedures characteristic of prototypical courts.

Adversarial legalism's procedural intricacy and contest-oriented nature make it a poor fit for immigration adjudication, in which a noncitizen is likely to face a sharp power disparity due to harsh and confusing law, limited access to counsel, and potential language barriers. In contrast, there is some evidence that the structure of the non-adversarial Asylum Office engenders an ethos more favorable to asylum applicants than prevailing IJ attitudes.³⁹⁸ Some scholars therefore suggest transforming removal hearings into a non-adversarial model akin to that utilized in the Asylum Office, other U.S. bureaucracies, and many continental European courts.³⁹⁹

In line with this, multiple participants in this study expressed that they adopted a more inquisitorial and less detached judicial role when noncitizens

396. For example, the rate of child asylum approvals by the non-adversarial Asylum Office fell from 85.1 percent in the third quarter of 2014 to 28.1 percent in the fourth quarter of 2018. Nicholas Wu, *The Trump Administration Is Closing the Door on Migrant Children*, THE ATLANTIC (Dec. 25, 2018), <https://www.theatlantic.com/politics/archive/2018/12/asylum-approvals-children-have-plummeted-under-trump/578614/>. Immigration court asylum denial rates have also risen under the Trump Administration, but at less of a breakneck pace. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, *supra* note 228.

397. Itkowitz, *supra* note 6; Katie Rogers & Sheryl Gay Stolberg, *Trump Calls for Depriving Immigrants Who Illegally Cross Border of Due Process Rights*, N.Y. TIMES (June 24, 2018), <https://www.nytimes.com/2018/06/24/us/politics/trump-immigration-judges-due-process.html>.

398. Chen, *supra* note 358, at 40-42.

399. E.g., Kidane, *supra* note 14, at 652-57; see also Koelsch, *supra* note 14, at 794-804 (advocating for U.S. to adopt elements of Canada's independent bureaucratic system of immigration adjudication); Chapman, *supra* note 14, at 1569-78 (advocating for non-adversarial proceedings at relief phase); cf. Peter W. Billings, *A Comparative Analysis of Administrative and Adjudicative Systems for Determining Asylum Claims*, 52 ADMIN. L. REV. 253, 296-97 (2000) (suggesting mixed inquisitorial and adversarial approach).

went *pro se* or were represented poorly.⁴⁰⁰ Although such role modification is increasingly recognized as appropriate in adversarial settings,⁴⁰¹ EOIR recently repudiated it by admonishing IJs not to limit the process afforded to *DHS attorneys* and reminding them that “[t]he immigration court process is adversarial.”⁴⁰² Abandoning this pretense of an immigration “court” in favor of a bureaucracy might force a deeper examination of the profound power disadvantage that unrepresented noncitizens face against repeat-player DHS attorneys, in turn freeing IJs to move towards a more respondent-protective and less adversarial system of adjudication. Recognition of this imbalance could also push Congress to impose firmer limits on executive discretion and empower Article III federal courts to apply increased scrutiny to EOIR determinations.

Short of such fundamental changes, analyzing the immigration court system through a bureaucratic lens could help develop more precise critiques and creative reforms that may differ from those in an adversarial legal framework. For instance, some participants complained that IJ quotas evinced an improper treatment of EOIR as an agency instead of a court. But case quotas do not align with best practices for bureaucracies, either. It has been understood for decades that a narrow focus on such quantitative measures can interfere with decisional quality due to numerical metrics’ susceptibility to deception, bureaucrats’ tendency to focus on measured activities at the expense of other goals, and the relative privacy in which bureaucrats operate.⁴⁰³ In this frame, quotas are not just bad because they infringe on independence; they are misguided because they warp incentives and reduce

400. *E.g.*, IJ1 (“If I felt an attorney was making a grave mistake, I would try to make sure it wasn’t going forward. I think that the judge has a huge, potentially dispositive impact on a case.”); IJ8 (“A lot of my colleagues took the position that they had to call balls and strikes, and the respondents would do the best they could, and the respondents were responsible for the lawyer’s behavior in most cases and that’s that. . . . I thought that ignored reality.”); IJ10 (“I felt very responsible for making the record so that it had everything I needed It’s a little different to the impartial referee who only listens to what’s said in court by the lawyers that we imagine in the adversarial process.”).

401. For example, since 2012, the Conference of Chief Justices and the Conference of State Court Administrators have supported an amendment to the Model Code of Judicial Conduct to permit judges to “facilitate the ability of all litigants, including self-represented litigants, to be fairly heard.” Conf. of Chief Justices & Conf. of State Court Admins., *Resolution 2: In Support of Expanding Rule 2.2 of the ABA Model Code of Judicial Conduct to Reference Cases Involving Self-Represented Litigants* (July 25, 2012); see also Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423, 426-40, 445-47 (2004) (distinguishing judicial neutrality and disengagement, and suggesting reforms to Model Code and appellate practices to improve *pro se* litigants’ access to justice).

402. OPPM 17-03, *supra* note 203, at 6-7 (“Due process and fundamental fairness require that testimony by a juvenile witness, like that of any other witness, be subject to cross-examination”); see also *id.* at 6 (directing IJs to be cognizant of “due process for the opposing party”—the government—when granting accommodations for noncitizen children in removal proceedings).

403. LIPSKY, *supra* note 141, at 166-69. Management experts also warn that “individuals with multiple goals are prone to concentrate on only one goal,” and that “[g]oals that are easier to achieve and measure (such as quantity) may be given more attention than other goals (such as quality) in a multi-goal situation.” Lisa D. Ordóñez et al., *Goals Gone Wild: The Systematic Side Effects of Over-Prescribing Goal Setting* 7-8 (Harv. Bus. Sch., Working Paper No. 09-083, 2009); see also Gelbach & Marcus, *supra* note 179, at 1136-37 (citing Ordóñez et al. and providing examples).

quality. In addition, if policymakers wish to improve accuracy, consistency, efficiency, and fairness, analyzing the immigration system as a bureaucracy could highlight effective (but not traditionally judicial) techniques, like peer review of removal orders.⁴⁰⁴

A full treatment of the relative benefits and downsides of an immigration bureaucracy lies beyond the scope of this Article. That being said, the interview results at least suggest that a thorough engagement with the immigration court system as bureaucracy could yield further directions for critique, reform, and experimentation.

C. *The Misdirection of the Judicial Robe*

If the idea of an immigration bureaucracy is not anathema, the question remains: what ails the immigration “courts”? Adversarial legal courts and bureaucracies each have their benefits, and a productive path forward for immigration adjudication could draw from either or both models. Yet by appropriating the symbols of a formal, adversarial court to conceal an increasingly hierarchical and policy-driven core, the current system likely offers the worst of both worlds.

Consider the mystique of the robe. The Hon. Jerome N. Frank, an early twentieth-century Second Circuit judge and legal philosopher, attacked the judicial robe as “historically connected with the desire to thwart democracy by means of the courts.”⁴⁰⁵ In contrast to the U.K., where judges’ colorful robes connote their positions in the institutional hierarchy, U.S. judges wear uniform black robes to symbolize the subsuming of the judge’s personal identity to the responsibilities of an impartial judiciary.⁴⁰⁶ Frank advocated abolition of the robe, which he hoped would end false conceptions of judicial uniformity and divinity.⁴⁰⁷ In response to Frank’s critique, one scholar contended that robes actually assisted judges in “discharging the judicial function” by providing “an overt symbol stressing [their] dedication to justice.”⁴⁰⁸

Recent empirical studies support the notion that robes matter, at least from the perspective of court subjects. All else equal, people tend to view

404. Ho & Sherman, *supra* note 392, at 265.

405. JEROME N. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 255 (1949). Frank noted that most state judges began wearing robes towards the end of the 19th century, at the same time that conservative lawyers sought to utilize the judiciary to combat populism. *Id.*; see also Glenn W. Ferguson, *To Robe or Not to Robe? – A Judicial Dilemma*, 39 J. AM. JUD. SOC. 166, 169 (1956) (documenting that state court judges in at least 33 states did not wear robes before 1900, and that judges in five states did not wear robes as of 1956). Along the same lines, Jeremy Bentham advocated for use of the term “judiciary” instead of “court” to limit association of judges with the monarchy. Judith Resnik, *The Democracy in Courts: Jeremy Bentham, ‘Publicity,’ and the Privatization of Process in the Twenty-First Century*, 10 NoFo 77, 82 (2013).

406. James Zagel & Adam Winkler, *The Independence of Judges*, 46 MERCER L. REV. 795, 814-15 (1995); see also Louis E. Newman, *Beneath the Robe: The Role of Personal Values in Judicial Ethics*, 12 J.L. & RELIGION 507, 529-30 (1995-96) (“[The robe’s] primary intent, of course, is to make all judges outwardly the same, to reinforce their anonymity.”).

407. FRANK, *supra* note 405, at 258-61.

408. Ferguson, *supra* note 405, at 171.

proceedings in formal courtrooms as more dignified than proceedings in conference rooms, and they view judges in formal courtrooms as more respectful.⁴⁰⁹ People also view judges in robes as more knowledgeable than the same judges without robes.⁴¹⁰ It stands to reason that such courtroom hallmarks advance perceptions of legitimacy and fairness, thus building public trust in legal institutions and generating increased compliance.

EOIR expressed similar ideas when it required IJs to wear robes in the presence of parties. At that time, the Chief IJ noted that “[t]he dignity of and the respect for” the immigration courts had “risen considerably” since EOIR’s creation, and he emphasized the importance of “attract[ing] highly professional individuals” to serve as IJs.⁴¹¹ EOIR has since repeatedly reaffirmed that the robe “is a symbol of . . . independence and authority,”⁴¹² and that it “contributes significantly to the solemnity” of a given event.⁴¹³ The agency likely invested in court-like hearing rooms, judicial benches, and looming Justice Department seals for analogous reasons.⁴¹⁴ Other stakeholders also benefit from these symbols. IJs garner prestige, respect, and compliance. Immigration lawyers gain esteem.⁴¹⁵ Respondents, in turn, may be more likely to find counsel. And austere court symbols may well encourage IJs to view themselves as impartial adjudicators and strive to achieve fairness, even in the face of increasing managerial pressure.⁴¹⁶

But, of course, a robe does not a judge make. The “spectacle of symbols” in a U.S. courtroom legitimizes the exercise of coercive power.⁴¹⁷ Yet there are additional reasons why we allow judges to make consequential decisions about people’s lives. In the adversarial legal ideal, judges enjoy at least some discretion to advance substantive justice.⁴¹⁸ They make legal and factual

409. Oscar G. Chase & Jonathan Thong, *Judging Judges: The Effect of Courtroom Ceremony on Participant Evaluation of Process Fairness-Related Factors*, 24 YALE J.L. & HUMAN. 221, 233-34, 236 (2012).

410. *Id.* at 234, 236; see also James L. Gibson, Milton Lodge, & Benjamin Woodson, *Losing, but Accepting: Legitimacy, Positivity Theory, and the Symbols of Judicial Authority*, 48 LAW & SOC’Y REV. 837, 838 (2014) (finding empirical evidence that “the symbols of judicial authority play a crucial moderating role in the legitimacy-acquiescence linkage” at the U.S. Supreme Court).

411. OPPM 94-10, *supra* note 200, at 1.

412. OPPM 07-01, *supra* note 203, at 6; OPPM 17-03, *supra* note 203, at 5.

413. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, OPPM 97-8, NATURALIZATION OATH CEREMONIES 6 (1997).

414. *Cf. generally* JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (2011) (cataloging court architecture and iconography, and expressing concern that both celebrate modern adjudication without reflecting on its challenges).

415. Family, *The Future Relief of Immigration Law*, *supra* note 359, at 415; Family, *supra* note 14, at 569-72.

416. For examples of how current and former IJs have defended their self-conceived roles as adjudicators against growing top-down influences, see sources cited *supra* notes 7, 8, 21, 144, 232, 251, 297, 368-369.

417. Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 372-73 (1982).

418. As Abram Chayes writes, judges and courts gain legitimacy “by responding to, indeed by stirring, the deep and durable demand for justice in our society. . . . In practice, if not in words, the American legal tradition has always acknowledged the importance of substantive results for the legitimacy and

determinations in the public crucible of a robust, well-matched contest.⁴¹⁹ And, yes, they are independent, which enables them to exercise their decision-making powers in service of the law and no other master.

As we have seen, each of these premises is weakened, if not eroded entirely, in the case of the immigration judge. Every interview participant tried admirably and in good faith to embody norms of judicial independence. Some believed they came closer than others. And many IJs who continue to serve are committed to issuing fair rulings and withstanding political pressure. But no individual IJ's best efforts can change the structural facts that IJs are constrained by an increasingly harsh legal regime and subject to a chain of command running up to the Attorney General, who can control their priorities, pace, resources, public access, and job security, if not individual case outcomes. Thus, the tension between enforcement and adjudication that the Supreme Court found so objectionable in 1950⁴²⁰ lives on in the role of the IJ today. The president of the IJ union recently stated as much:

It is the fundamental institutional defect of trying to administer a court system under a law enforcement model that has proven to be the biggest obstacle. Because of this structural flaw, the solutions that have been proposed or implemented have all been tainted and failed. Each has tried to maintain the veneer of a court and judges, while using law enforcement or politically motivated fixes to address the problems. The two are simply incompatible.⁴²¹

This adjudicatory gloss on an enforcement apparatus erodes many of the advantages that a more transparent bureaucracy might provide. As outlined above, a bureaucratic model could allow for non-adversarial adjudications that are fairer for individuals lacking counsel than prototypical Anglo-American courts, which rely on presumed equality between adverse parties.⁴²² To the extent that federal judges, too, are influenced by court symbols, a removal order issued by a "bureaucrat" might appropriately receive less deference from the Article III judiciary (or Congress, which sets the boundaries of judicial review) than one issued by a superficial immigration "court." There is reason to think that this could have an impact on outcomes: after the 2002-2003 BIA reforms, federal appellate judges evinced particular concern for, and gave closest scrutiny to, cases in which IJs acted in a blatantly non-judicial fashion. Further, the leading U.S. system of non-adversarial agency adjudication—the Social Security Administration (SSA) disability system—

accountability of judicial action." Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1316 (1976).

419. Cf. Resnik, *supra* note 405, at 78 (defining "courts" as "government invitations to the public to invest in and engage with norm generation under structured processes," and noting that "if openness remains a robust attribute of 'courts,' then the phrase 'closed . . . court' becomes an oxymoron").

420. See *supra* notes 34-36 and accompanying text.

421. Tabaddor, *supra* note 144.

422. See, e.g., Kidane, *supra* note 14, at 714-15; Chapman, *supra* note 14, at 1569-78.

has a federal-court remand rate approximately four times as high as that of EOIR, despite featuring a more applicant-protective agency process and *greater* adjudicator independence.⁴²³

Beyond diluting these benefits of bureaucracies, the hallmarks of courts can also mitigate public discontent with the severity of modern immigration law. The very need for legitimation through symbols “arises because people will not accede to the subjugation of their souls through the deployment of force alone. They must be persuaded, even if it is only a ‘pseudo-persuasion,’ that the existing order is both just and fair, and that they themselves desire it.”⁴²⁴ In other words, symbols may work to obscure the underlying unfairness of a system.⁴²⁵ Reflecting on pre-*Hamdan v. Rumsfeld* military commissions at Guantánamo Bay, Muneer Ahmad observes that “the terminologically and ritualistically rich discourse of a courtroom [can] mask, soften, and plausibly deny the operation of political power, thereby preserving the prevailing power relationship.”⁴²⁶

423. Over three times as many SSA disability cases as EOIR decisions reach the federal courts each year. In FY 2017, for example, 18,445 new district court cases were filed from Appeals Council decisions, which constituted 13.41 percent of all appealable dispositions. Soc. Sec. Admin., *Appeals to Court as a Percentage of Appealable AC Dispositions* (last visited Apr. 7, 2018), https://www.ssa.gov/appeals/DataSets/AC04_NCC_Filed_Appealable.html. During this timeframe, noncitizens filed 5,210 PFRs from BIA decisions. U.S. Courts Table 2017, *supra* note 185, at 1. The federal courts are also more likely to reverse an SSA adjudication than an EOIR one. In FY 2017, the federal-court remand rate for SSA adjudications was 48 percent. Soc. Sec. Admin., *FY 2019 Congressional Justification* 206, <https://www.ssa.gov/budget/FY19Files/2019CJ.pdf>. In contrast, the EOIR remand rate between 2006 and 2016 fluctuated between 9.3 percent and 17.5 percent. GUENDELSBERGER, *supra* note 182, at 4. For more on SSA procedures, see Jonah Gelbach & David Marcus, *A Study of Social Security Disability Litigation in the Federal Courts* 16-30 (July 28, 2016), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2669&context=faculty_scholarship (outlining SSA disability review procedures, including right to written ALJ determination, and noting that three-fourths of claimants have counsel at the hearing stage). Although members of Congress have criticized case processing pressures within SSA similar to those disclosed by former IJs, ALJs enjoy structural protections on hiring and firing that IJs lack. H.R. COMM. ON OVERSIGHT AND GOV'T REFORM, MISPLACED PRIORITIES: HOW THE SOCIAL SECURITY ADMINISTRATION SACRIFICED QUALITY FOR QUANTITY IN THE DISABILITY DETERMINATION PROCESS 32, 33, 35-43 (Dec. 18, 2014), <https://republicans-oversight.house.gov/wp-content/uploads/2014/12/2014-12-18-Misplaced-Priorities-How-SSA-Sacrificed-Quality-for-Quantity.pdf>.

424. Gabel & Harris, *supra* note 417, at 372; see also Dennis E. Curtis & Judith Resnik, *Images of Justice*, 96 YALE L.J. 1727, 1734 (1987) (“All sovereigns claim (notwithstanding evidence to the contrary) that their violence goes forth in the name of Justice.”).

425. Cf. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2058-67 (2017) (critiquing procedural justice frameworks for related reasons and proposing alternative framework of “legal estrangement”).

426. Muneer I. Ahmad, *Commission Law*, in *THE GUANTÁNAMO LAWYERS: INSIDE A PRISON OUTSIDE THE LAW* 176, 177 (Mark P. Denbeaux & Jonathan Hafetz eds., 2009). Elsewhere, Ahmad elaborates:

The government went to great lengths to make the commissions look as much like real courts as possible, even as they were emptied of the substantive rights that ordinarily inhere in a courtroom. Although there was no judge in these proceedings, the presiding officer was ordered to wear a robe (and ours carried a gavel); although this was a commission and not a court, the commission room, formerly a dental clinic, was swathed with blue velvet curtains and rich, dark wood furniture so as to look like a courtroom. The curtains only went two thirds of the way up the painted cinder block wall—just high enough to fill the frame of the closed-circuit video cameras. For those of us appearing as defense lawyers in the commissions, we knew we were on a hastily constructed set, where costume and props and scenic design attempted to consecrate the once-barren space.

Muneer I. Ahmad, *Resisting Guantánamo*, 103 NW. U. L. REV. 1683, 1721 (2009) (internal footnotes omitted).

I do not argue that immigration courts are as unfair as Guantánamo military commissions. I posit only that symbols of courts serve similar functions in both cases. The Justice Department and the White House exert growing control over IJs through pressures to process cases more quickly, demands to arrange dockets to accord with enforcement priorities, repeated reminders that IJs serve at the pleasure of the Attorney General, and partisan rhetoric. Meanwhile, EOIR is hiring new IJs at an unprecedented clip, without the protections enjoyed by ALJs.⁴²⁷ A recent Attorney General used his referral power to tighten immigration law by further limiting IJ discretion to grant relief, enhancing IJ discretion to deny relief, and reducing process.⁴²⁸ These restrictionist moves appear to be achieving restrictionist results,⁴²⁹ notwithstanding instances of individual and collective resistance from IJs. Yet these policies are at odds with public attitudes towards immigration, which are the most favorable they have been in at least a half-century.⁴³⁰

EOIR's appropriation of the hallmarks of courts likely serves to mediate the disjuncture between these policies and public opinion. The symbols of the courtroom help U.S. residents stomach the harsh consequences of immigration law and the violence of deportation, not because the outcomes themselves are just, but on the mistaken belief that they are ordered by traditional courts and are therefore legitimate. Similarly, these symbols can allow Article III federal judges to paper over the "loss of dignity and humanity" that they might otherwise suffer from being forced to ratify such violence.⁴³¹ And to the extent that Americans are uneasy about making immigration adjudication openly bureaucratic and hierarchical, the trappings of courts can

427. Last year, the EOIR director stated that streamlined hiring procedures implemented by the Attorney General in April of 2017 had reduced the time it took to hire an IJ by approximately one-half. Interview by Andrew R. Arthur with James R. McHenry, III, Director, Exec. Office for Immigration Review, in Washington, D.C. (May 1, 2018).

428. See *supra* notes 226-231 and accompanying text; Dara Lind, *Jeff Sessions's Carefully Built Deportation Machine Will Outlast Him*, VOX (Nov. 8, 2018), <https://www.vox.com/2018/11/8/17871310/jeff-sessions-immigration-trump>.

429. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, FINDINGS OF CREDIBLE FEAR PLUMMET AMID WIDELY DISPARATE OUTCOMES BY LOCATION AND JUDGE (2018), <http://trac.syr.edu/immigration/reports/523/> (finding "plummet" in immigration court credible fear findings between late 2017 and early 2018); TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, *supra* note 228 (documenting increase in asylum denials in immigration court); Wu, *supra* note 396 (noting decrease in child asylum approvals by Asylum Office).

430. *Immigration*, GALLUP (last visited Apr. 7, 2018), <http://news.gallup.com/poll/1660/immigration.aspx>.

431. *Ortiz v. Sessions*, 857 F.3d 966, 968 (9th Cir. 2017) (Reinhardt, J., concurring); see also *Castro v. DHS*, 163 F. Supp. 3d 157, 158 (E.D. Pa.) (describing asylum officer interview followed by brief and rudimentary "hearing before an immigration court judge" as "extensive Executive Branch process"), *aff'd on other grounds*, 835 F.3d 422 (3d Cir. 2016). These problems are further exacerbated by the "exceptionalism" that plagues constitutional law in the immigration context. See generally, e.g., Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (describing immigration plenary power doctrine and highlighting instances of judicial resistance through statutory interpretation); Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965 (2013) (questioning assumptions underlying plenary power doctrine); David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583 (2017) (summarizing and critiquing various treatments of immigration exceptionalism).

soothe that discomfort without addressing one of its root causes: substantive immigration law.

In light of this phenomenon, creating an independent “Article I” immigration court may indeed be one important step towards fixing immigration adjudication.⁴³² Separating EOIR from the Justice Department would remove some mechanisms of top-down influence discussed above. In addition, increased prestige could attract high-quality IJs and lawyers and endow hearings with solemnity to match their stakes. Both discovery mechanisms and rules of evidence might offer some protection for noncitizens. Such a court might, in many ways, offer a process more deserving of the robes IJs must wear.

But this move’s effectiveness would be severely limited without additional procedural protections for noncitizens and substantive reforms to restore positive IJ discretion. In fact, further judicialization without addressing these flaws could even be counterproductive. More formality will not necessarily cause cases to be processed with more care.⁴³³ “Rogue” adjudicators might be even more shielded from accountability than they are now, and seasoned DHS attorneys would likely invoke new procedural tools to greater effect than the 63 percent of respondents who go unrepresented. Most importantly, even the fairer Article I process would occur within the same legal regime in which IJs are increasingly constrained to deny relief. As a result, simply creating an Article I immigration court without countering the downsides of adversarial legalism and restoring IJ discretion could further legitimize the power imbalances and substantive injustices that have rotted the core of our immigration system.⁴³⁴

Ironically, hardworking IJs’ understandable frustration that they are not seen as “real judges” may unmask the trappings of courts for what they are: trappings, and little more. That is, if court symbols enhance perceptions of legitimacy, then fundamentally legitimate systems need not thirst for court symbols. As Ahmad writes of the Guantánamo commissions, “an established legal system, secure in its own legitimacy, would not be so easily offended.”⁴³⁵

CONCLUSION: A CALL FOR REFORM

This Article has sought to advance understandings of the administrative design of the immigration court system, clarify previously reported issues, and suggest new directions for research. According to twelve former IJs,

432. The IJ union, the American Immigration Lawyers Association, and the American Bar Association have all endorsed the creation of an Article I immigration court. *See* sources cited *supra* note 16.

433. For example, Malcolm Feeley argues that high caseloads do not explain the cursory disposition of cases in many lower criminal courts, and that one alternative explanation is the organization of courts’ business, which creates incentives for employees to quickly process cases so they can leave early in the day. FEELEY, *supra* note 376, at 246-47, 270-72.

434. *E.g.*, Family, *The Future Relief of Immigration Law*, *supra* note 359, at 415; Family, *Murky Immigration Law*, *supra* note 356, at 54-64.

435. Ahmad, *Resisting Guantánamo*, *supra* note 426, at 1724.

three former EOIR administrators, and a range of corroborating evidence, even as circuit courts have imposed some judicial expectations on the IJ corps and EOIR has appropriated the symbols of courts, the Justice Department has developed mechanisms to pressure IJs to process cases more quickly, prioritize enforcement targets, and apply expansionist or restrictionist policies. These growing administrative and political influences over IJ decision-making sharpen the system's divergence from U.S. conceptions of "courts," and in turn, suggest avenues for bureaucratic analysis. In the meantime, the system's co-opting of the judicial identity serves to obscure these tensions, likely legitimating a fundamentally imbalanced and unjust system.

To close, I suggest that if "get[ting] rid of judges"⁴³⁶ and creating an immigration bureaucracy makes us uncomfortable, the reason may have less to do with process than with substance. Thus, any effort to redesign immigration adjudication, whether through the creation of an Article I court or otherwise, must also involve reconsideration of the harshness, opacity, and complexity of substantive immigration law. The ad-hoc development of this substantive law, often driven by fear and racism, has enabled the toxic mix of adversarialism, veiled bureaucracy, and exceptionalism that characterizes the system today. To move past this, policymakers cannot simply transpose existing laws onto a more independent court system. Rather, they must openly debate the values underlying U.S. immigration policies, as well as the level of legal violence that the American citizenry will tolerate in service of immigration restrictions. Policymakers must then craft a system that balances these values transparently and within constitutional constraints.

In other words, achieving fairness in the immigration "courts" will necessitate both a restructuring of procedures and a reimagining of substance. It will require us to collectively rethink when deportation is just.

436. Itkowitz, *supra* note 6 (quoting President Trump).