Executive Overreaching in Immigration Adjudication

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Executive Overreaching in Immigration Adjudication

Fatma E. Marouf*

While Presidents have broad powers over immigration, they have traditionally shown restraint when it comes to influencing the adjudication of individual cases. The Trump Administration, however, has pushed past such conventional constraints. This Article examines executive overreaching in immigration adjudication by analyzing three types of interference. First, the Article discusses political interference with immigration adjudicators, including politicized appointments of judges, politicized performance metrics, and politicized training materials. Second, the Article addresses executive interference with the process of adjudication, examining how recent immigration decisions by former Attorney General Jeff Sessions curtail noncitizens’ procedural rights instead of making policy choices and promote prosecution rather than fair adjudication. Third, the Article examines executive policies that prevent adjudication from taking place, such as turning asylum seekers away at ports of entry, criminally prosecuting them if they enter illegally, and separating them from their children. After discussing how these forms of executive interference threaten constitutional and statutory rights, the Article explores how the judiciary, Congress, and agencies can help protect against presidential influence in immigration adjudication.

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The scope of the President's power over immigration has been the subject of much debate. Commentators dispute the division of immigration powers between the executive and legislative branches, as well as the scope of judicial review over immigration laws and policies. A key point of consensus, however, is that the President is most constrained when it comes to executive adjudication. In the
EXECUTIVE OVERREACHING

immigration context, executive adjudication involves hundreds of thousands of decisions made by immigration judges (IJhs) and asylum officers each year to determine whether a noncitizen will be allowed to remain in the United States. The Trump Administration, however, has pushed past these traditional constraints, raising important questions about how much interference in executive branch adjudication is permissible.

Unlike federal judges who are part of the judicial branch, IJhs are part of the executive branch. Specifically, the immigration courts and the Board of Immigration Appeals (BIA or the Board), the appellate body that reviews the decisions of immigration courts, are part of the Executive Office for Immigration Review (EOIR), an agency within the Department of Justice (DOJ). IJhs and Board members are career attorneys in the DOJ appointed by the Attorney General. The Attorney General may only remove them for cause, but they can be reassigned as a matter of discretion. A direct chain-of-command exists between the immigration courts and the nation’s chief prosecutor, as the EOIR Director reports directly to the Deputy Attorney General. Thus, although IJhs are not part of the Department of Homeland Security (DHS), which is responsible for immigration enforcement, they have long complained that their position under the Attorney General undermines their independence.

Because IJhs and Board members are not administrative law judges (ALJs), they do not enjoy the same protections for independence provided by the Administrative Procedure Act (APA). Furthermore, the APA’s rules about ex parte communications regarding the merits of a case, which are clearly prohibited with ALJs, do not apply as

3. 8 C.F.R. § 1003.0 (2018).
4. Id. (discussing the organization of the EOIR within the DOJ); id. § 1003.1 (discussing the organization of the BIA); id. § 1003.10 (discussing IJhs).
7. 8 C.F.R. § 1003.0(b).
forcefully to the EOIR. The President of the National Association of Immigration Judges recently testified to Congress that “[i]t is no secret that the DHS, whose attorneys appear before the Court, regularly engages in ex-parte communication with the DOJ.” She further testified that “these communications have directly led to the use of the Immigration Court system as a political tool in furtherance of law enforcement policies.” There is also at least one documented case of government attorneys under prior administrations contacting managers at the EOIR to pressure IJs to reach a certain outcome in a specific case.

Civil service laws do provide some protection from political discrimination against IJs and Board members. Because these are career positions, they “are not of a confidential or policy-determining character.” Civil service laws prohibit discrimination in hiring for career positions, including based on politics. Furthermore, IJs and Board members have a duty to “exercise their independent judgment and discretion” in deciding the individual cases before them. This responsibility, however, exists in tension with Board members’ duty “to act as the Attorney General’s delegates in the cases that come before them,” which appears prominently in the first paragraph of the federal regulations describing the Board.

The duty to exercise independent judgment and discretion is also undercut by rules and policies that give special advantages to DHS attorneys not enjoyed by immigrants or their representatives. For example, DHS and the EOIR have shared access to certain databases

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11. Statement of J. A. Ashley Tabaddor, supra note 8, at 3.
12. Id. In fact, “individual judges have been tasked with responding to complaints voiced by DHS to [EOIR] management about how a particular pending case or cases are being handled, in disciplinary proceedings without the knowledge of the opposing party.” Id. at 4.
13. See Legomsky, supra note 6, at 373.
16. 8 C.F.R. § 1003.1(d)(1)(ii) (2018) (board members); id. § 1003.10(b) (IJs).
17. Id. § 1003.1(a)(1) (emphasis added); see also Peter J. Levinson, The Facade of Quasi-Judicial Independence in Immigration Appellate Adjudications, 9 BENDER’S IMMIGR. BULL. 1154, 1164 (2004) (explaining the issuance of a new rule in 2002 that placed the Board’s duty to act as delegates of the Attorney General above the duty to exercise independent judgment in ordering the sections of the regulation).
that immigrants and their representatives cannot access. DHS also has ready access to the noncitizen’s complete alien file, which the noncitizen’s attorney can only procure through a time-consuming Freedom of Information Act (FOIA) request. These things create a level of symbiosis between DHS and the EOIR that immigrants and their attorneys do not enjoy.

Additionally, certain regulations explicitly favor DHS. For example, a regulation specifies that DHS may refer cases to the Attorney General for review but does not give immigrants the same power. Another regulation gives DHS a one-sided veto of an IJ’s bond decision by allowing DHS to effectively override the judge’s decision through automatic stay powers. DHS attorneys have also benefited from the DOJ’s refusal to pass a regulation implementing the contempt authority that Congress provided IJs in 1996, which is a way for the DOJ to protect fellow government attorneys. Thus, no matter how many times a DHS attorney is unprepared for a hearing, does not have the file, misses a filing deadline, or fails to submit a court-ordered brief, an IJ cannot hold the DHS attorney in contempt. An attorney representing the immigrant, on the other hand, is subject to discipline and risks the client being ordered deported for the same actions.

These built-in forms of favoritism for DHS, however, pale in comparison to the bias that results when the Attorney General and President explicitly push for more deportations. Both President Trump and former Attorney General Jeff Sessions have equated the rule of law with deportation, not fair adjudication. On August 8, 2017, the DOJ issued a press release titled “Return to Rule of Law in Trump Administration Marked by Increase in Key Immigration Statistics,” which boasted about a 27.8% increase in the total number of removal orders compared to the same period in 2016, stressing that “[o]ver 90

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20. 8 C.F.R. § 1003.1(b)(1)(iii).
21. Id. § 1003.19(i)(2).
22. Statement of J. A. Ashley Tabaddor, supra note 8, at 4.
23. See id.
percent of these cases have resulted in orders requiring aliens to depart or be removed from the United States." This press release was also posted on the EOIR's website, undermining any appearance of impartiality.

In September 2017, the White House issued a Fact Sheet titled "President Donald J. Trump Restores Responsibility and the Rule of Law to Immigration," which announced Trump's decision to rescind Deferred Action for Childhood Arrivals (DACA) and confirmed that "President Trump supports the swift removal of those who illegally enter the United States or violate the conditions of their visas." A month later, on October 8, 2017, President Trump released a list of his "Immigration Principles & Policies." His top priorities included "tighten[ing] standards ... in our asylum system" and "[closing] [l]oopholes in current law [that] prevent 'Unaccompanied Alien Children' ... that arrive in the country illegally from being removed."

He also listed hiring more judges and Immigration and Customs Enforcement (ICE) attorneys in order to "ensure swift return of illegal border crossers." This list makes it clear that what Trump expects from IJs and asylum officers is the rapid denial of asylum applications. Then-Attorney General Sessions implemented Trump's immigration policy preferences, which closely aligned with his own, confirming the goal of rapid deportations. In a speech delivered on October 12, 2017, Sessions endorsed Trump's call for "significant asylum reform, swift border returns, and enhanced interior


28. Id.

29. Id.
enforcement." He advocated for enforcing penalties for fraudulent asylum applications, elevating the standard of proof in credible fear interviews, expanding the ability to return asylum seekers to safe third countries, and closing "loopholes" in asylum laws. In his speech, Sessions stated that the "system is being gamed" by immigrants who are just claiming a fear of persecution because "it has become an easy ticket to illegal entry into the United States." He also claimed "dirty immigration lawyers" provide clients with "the magic words needed to trigger the credible fear process."

How are IJs and Board members, who are delegates of the Attorney General, supposed to exercise independent judgment in light of these clear marching orders to issue deportation orders and tighten asylum standards? The relationship between immigration adjudicators, the Attorney General, and the President becomes even more complicated when one considers how brazenly Trump has denigrated immigration laws and the immigration court system. Trump has called U.S. immigration laws "weak [and] ineffective," "the worst immigration laws in the history of the world," and "so bad that I don't even call them laws." He has described the U.S. immigration system as a "mockery" and a "joke."

Trump has specifically complained about the right to apply for asylum under our law, saying, "You walk across the border, you put

31. Id.
32. Id.
37. Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 10:02 AM EST), https://twitter.com/realDonaldTrump/status/1010900865602019329.
38. Valverde, supra note 35.
one foot on the land, and now you’re tied up in a lawsuit for five years. It’s the craziest thing anyone’s ever seen.” Time and again, he has questioned why immigrants get to go to court at all, saying, “Whoever heard of a system where you put people through trials? Where do these judges come from?” Trump has made it clear that he thinks “going through a long and complicated legal process, is not the way to go” and “will always be disfunctional [sic].” His express preference is to deport people immediately, “with no Judges or Court Cases.” In addition to these comments denigrating and dismissing immigration courts, Trump has suggested that IJs are vulnerable to corruption and “graft.” Trump’s comment, “We don’t want judges; we want security on the border,” summarizes his desire for rapid deportation and suggests contempt for adjudication.

Given Trump’s explicit statements about immigration courts and the asylum process, his Administration’s efforts to influence immigration adjudication are not surprising. Yet they are highly unconventional and show a lack of restraint in an area where Presidents have traditionally been hands-off. This Article explores the question of executive overreach into immigration adjudication by examining three types of actions: (1) political interference with immigration adjudicators themselves, (2) abuse of the Attorney General’s authority to review immigration decisions, and (3) the adoption of policies that prevent adjudication from taking place.

These actions have had an enormous impact on immigration cases under the Trump Administration, especially asylum cases, which raise unique concerns because they involve life-or-death decisions and


42. Donald J. Trump (@realDonaldTrump), *Twitter* (June 24, 2018, 10:02 AM EST), https://twitter.com/realdonaldtrump/status/1010900865602019329.


44. *Id.*
implicate international obligations. The Refugee Act of 1980, codified in the Immigration and Nationality Act (INA), implemented the United States' obligations under the 1967 U.N. Protocol Relating to the Status of Refugees and the 1951 U.N. Convention Relating to the Status of Refugees. These treaties establish the norm of non-refoulement, the prohibition against returning refugees to countries where their life or freedom is threatened. Thus, it is critical to ensure that the executive’s influence on asylum cases does not violate the rights of asylum seekers.

This Article explores that border between permissible and impermissible presidential influence on immigration adjudication, which has received little attention from scholars thus far. Part II discusses the sources of presidential power over immigration, including inherent, constitutional, and delegated powers, as well as constraints on those powers. This Part specifically examines constraints on presidential power in matters of adjudication. Additionally, Part II examines the immigration powers of executive leadership below the President, including powers delegated specifically to the Attorney General, who is authorized to review decisions of the Board.

Parts III through V explore the three categories of executive overreaching that are the focus of this Article. Part III discusses political interference with immigration adjudicators themselves, including asylum officers, IJs, and Board members. This Part discusses


46. See Alice Farmer, Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures That Threaten Refugee Protection, 23 GEO. IMMIGR. L.J. 1, 2 (2008) (discussing the principle of non-refoulement and its importance in refugee protection); see also U.N. High Commissioner for Refugees, Conclusions Adopted by the Executive Committee on the International Protection of Refugees, No. 6 (XXVIII), U.N. Doc. A/37/12/Add.1 (2009) (“Recalling that the fundamental humanitarian principle of non-refoulement has found expression in various international instruments ….”); Cartagena Declaration on Refugees, § 3(5), Nov. 22, 1984, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1 (“To reiterate the importance and meaning of the principle of non-refoulement … as a corner-stone of the international protection of refugees.”).

47. See Kim, supra note 1 (discussing the President’s role in immigration adjudication).
politicization of the process of appointing, reassigning, and removing immigration adjudicators; new performance metrics for IJs that create improper incentives to issue swift deportation orders; and revised training materials to "reeducate" asylum officers about the standards for passing a credible fear interview, which is the first step in applying for asylum.

Part IV then turns to executive interference in the process of adjudication, focusing specifically on the Attorney General's power to take over individual immigration cases and issue decisions that overrule the Board. While agency head review is an accepted form of policy making among administrative agencies, Part IV argues that former Attorney General Sessions used the process to curtail noncitizens' procedural rights rather than to make policy choices. Part IV further argues that Sessions crossed the line between policy making and prosecution by making decisions aimed at promoting deportation rather than fair adjudication. Specifically, Sessions issued a series of decisions that end the practice of administrative closure, heighten the standard for obtaining a continuance, and facilitate summary dismissals of asylum cases without a full hearing.

Part V argues that executive interference also takes the form of preventing adjudication from happening. The Trump Administration, for example, has adopted policies that prohibit or deter asylum seekers from exercising the statutory right to apply for asylum. Policies to turn asylum seekers away at ports of entry, criminally prosecute them, and separate them from their children all fit into this category. Although policies that prevent adjudication may be a more attenuated form of executive interference than the actions described in Parts III and IV, they remain an important piece of the puzzle with significant ramifications for the U.S. asylum system.

Lastly, Part VI explores ways to protect against executive overreaching. This Part examines how the judiciary, Congress, and agencies themselves can protect against undue presidential influence in immigration adjudication.

II. EXECUTIVE POWER OVER IMMIGRATION

A. Sources and Scope of Presidential Power

The President's power over immigration comes from several sources, including inherent powers related to sovereignty and foreign affairs, enumerated and implied constitutional powers, and powers delegated by Congress in the INA. The United States Supreme Court has recognized "the inherent power of a sovereign to close its borders," as well as to conduct "foreign relations and international commerce." Early immigration cases dating back to the late 1800s, including the Chinese Exclusion Case, invoke the doctrine of inherent powers to give the political branches plenary power over the admission and exclusion of noncitizens, rendering these decisions largely immune from judicial review.

In United States v. Curtiss-Wright Export Corp., a case arising in the context of President Roosevelt's Embargo Proclamation on May 28, 1934, prohibiting the sale of arms in Bolivia and Paraguay, the Supreme Court also found that the President has inherent power over foreign affairs that exists independent of the Constitution. The Court explained, "The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality." There, too, the Court stated, "The power to expel undesirable aliens . . . exist[s] as inherently inseparable from the conception of nationality." Although commentators have criticized

49. Plyler v. Doe, 457 U.S. 202, 225 (1982); see also United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (stating that the power to exclude noncitizens "is inherent in the executive power to control the foreign affairs of the nation").

50. See Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581, 609 (1889) (upholding the "power of exclusion of foreigners . . . [as] an incident of sovereignty"); see also Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893) ("The right to . . . expel all aliens . . . [is] an inherent and inalienable right of every sovereign and independent nation . . ."); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, . . . to forbid the entrance of foreigners . . .").


52. Id. at 318 (holding that a joint resolution delegating to the President authority to criminalize foreign arms sales did not violate the non-delegation doctrine).

53. Id. (citing Fong Yue Ting, 149 U.S. at 705).
Curtiss-Wright as providing an anomalous or inaccurate description of a government of limited powers, courts continue to rely on it.\(^{54}\)

Much more recent cases, such as \textit{Trump v. Hawaii} and \textit{Arizona v. United States}, confirm the political branches' plenary power over immigration.\(^{55}\) Over the years, however, the Court has reined in the plenary power by recognizing that it is subject to certain constraints. For example, although noncitizens have no constitutional right to enter the United States, the Court has engaged in a limited judicial inquiry when their exclusion burdens the constitutional rights of U.S. citizens.\(^{56}\) In this situation, the Court looks to see whether the executive has provided a "facially legitimate and bona fide" reason for its action.\(^{57}\)

The Court has stressed that this "narrow standard of review 'has particular force' in admission-related cases that overlap with 'the area of national security.'"\(^{58}\) While the Court has thus far declined to define the precise contours of this inquiry, in reviewing the third version of Trump's travel ban, it assumed, without deciding, that the "facially legitimate and bona fide" standard permitted looking behind the face of the ban "to the extent of applying rational basis review."\(^{59}\) Under rational basis review, the Court reasoned that the ban must be upheld "so long as it can reasonably be understood to result from a justification..."\(^{60}\)


\(^{55}\) \textit{Trump v. Hawaii}, 138 S. Ct. 2392, 2418 (2018) ("'For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977))); Arizona v. United States, 567 U.S. 387, 394-95 (2012). In \textit{Trump}, Justice Thomas's concurrence focuses on inherent power far more than Justice Roberts's majority opinion. \textit{Compare Trump}, 138 S. Ct. at 2403-23 (making no reference to the President's inherent powers), \textit{with id.} at 2424 (Thomas, J., concurring) ("Section 1182(f) does not set forth any judicially enforceable limits that constrain the President. Nor could it, since the President has \textit{inherent} authority to exclude aliens from the country." (citations omitted)).

\(^{56}\) \textit{Trump}, 138 S. Ct. at 2419-20 (majority opinion).


\(^{58}\) \textit{Trump}, 138 S. Ct. at 2419 (quoting Kerry v. Din, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring)).

\(^{59}\) \textit{Id.} at 2420.
independent of unconstitutional grounds." 60 Although the Court recognized cases striking down policies under rational basis review where there was evidence of animus against an unpopular group, it found that the ban did not fit this pattern. 61

When it comes to executive policies pertaining to noncitizens already inside the United States, rather than policies to exclude them, the constitutional constraints on the executive are greater. 62 Critically, the Supreme Court has recognized that noncitizens in removal proceedings have procedural due process rights under the Fifth Amendment, since deportation involves a loss of liberty. 63 Due process in removal proceedings requires a full and fair hearing, including, but not limited to adequate notice of the proceeding, 64 the right to be represented by counsel at no expense to the government, 65 effective assistance of counsel if the noncitizen is represented, 66 adequate translation of the proceedings, 67 an unbiased adjudicator, 68 the right not

60. Id. at 2418-20.
61. Id. at 2420-21.
63. See, e.g., Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); Mathews, 426 U.S. at 77 ("Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection [of due process]."); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) ("It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment."); Bridges v. Wixon, 326 U.S. 135, 154 (1945) ("[D]eportation . . . deprives [a noncitizen] of the right to stay and live and work in this land of freedom. . . . Meticulous care must be exercised lest the procedure by which [a noncitizen] is deprived of that liberty not meet the essential standards of fairness.").
64. Khan v. Ashcroft, 374 F.3d 825, 829 (9th Cir. 2004) (holding that due process requires notice of an immigration hearing that is reasonably calculated to reach the noncitizen).
65. Tawadrus v. Ashcroft, 364 F.3d 1099, 1103 (9th Cir. 2004) ("Although there is no Sixth Amendment right to counsel in an immigration hearing, Congress has recognized it among the rights stemming from the Fifth Amendment guarantee of due process that adhere to individuals that are the subject of removal proceedings.").
66. Blanco v. Mukasey, 518 F.3d 714, 722 (9th Cir. 2008) (explaining that ineffective assistance of counsel claims are analyzed under the Fifth Amendment’s Due Process Clause for individuals in removal proceedings).
67. He v. Ashcroft, 328 F.3d 593, 598 (9th Cir. 2003); see also Augustin v. Sava, 735 F.2d 32, 36-37 (2d Cir. 1984) (finding that an adequate translation of foreign documents is both a statutory and constitutional right for asylum applications).
68. Zolotukhin v. Gonzales, 417 F.3d 1073, 1075 (9th Cir. 2005) (finding that the noncitizen did not receive a full and fair hearing where the IJ showed prejudgment of the case by excluding the testimony of several key witnesses); Reyes-Melendez v. INS, 342 F.3d 1001, 1006 (9th Cir. 2003) ("A neutral judge is one of the most basic due process protections." (quoting Castro-Cortez v. INS, 239 F.3d 1037, 1049 (9th Cir. 2001))); Colmenar v. INS, 210
to be pressured to withdraw an application, advice by the IJ on apparent eligibility for relief from removal, an adequate explanation of the procedures for the hearing, a reasonable opportunity to testify, and a decision that provides a reasoned explanation and addresses the arguments raised.

Courts apply the three-part balancing test from *Mathews v. Eldridge* to determine the scope of a noncitizen’s procedural due process rights in removal proceedings, just as in other types of administrative proceedings. In applying *Eldridge*, the Supreme Court has distinguished procedures necessary to “meet the essential standard of fairness under the Due Process Clause” from “choices of policy.” For example, appellate courts have applied *Eldridge* in holding that certain accelerated procedures for processing asylum claims violated due process.

The executive is also constrained by the doctrine of separation of powers. A fundamental aspect of that doctrine is that powers given to Congress must not be usurped by the executive. Among the enumerated powers related to immigration in the Constitution, most are given to Congress. Congress has the authority to “establish an uniform Rule of Naturalization,” “regulate Commerce with foreign

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69. Cano-Merida v. INS, 311 F.3d 960, 964-65 (9th Cir. 2002) (holding that due process was violated where the IJ pressured a pro se asylum applicant to withdraw his application and accept voluntary departure, without an opportunity to testify at a hearing).

70. United States v. Lopez-Velasquez, 629 F.3d 894, 896-97 (9th Cir. 2010) (en banc) (explaining that the court has repeatedly held that an IJ’s failure to advise a noncitizen of apparent eligibility for relief violates due process and can serve as the basis for a collateral attack to a deportation order).

71. Agyeman v. INS, 296 F.3d 871, 877 (9th Cir. 2002) (“[T]he IJ must adequately explain the hearing procedures to the alien, including what he must prove to establish his basis for relief.”).

72. *Colmenar*, 210 F.3d at 971.

73. Su Hwa She v. Holder, 629 F.3d 958, 963 (9th Cir. 2010) (“Due process and this court’s precedent require a minimum degree of clarity in dispositive reasoning and in the treatment of a properly raised argument.”).

74. 424 U.S. 319, 334-35 (1976). This test weighs the private interests at stake, the government’s interests, and the risk of erroneous deprivation of the private interests without the additional procedures at issue. *Id.; see also* Haitian Refugee Ctr. v. Smith, 676 F.2d 1023, 1040 (5th Cir. 1982) (applying the test in *Eldridge* and concluding that Haitian asylum seekers were “due more process than they received”).


76. *Haitian Refugee Ctr.*, 676 F.2d at 1039-40.

77. U.S. CONST. art. I, § 8, cl. 4.
Nations,"78 "declare War,"79 and prohibit "[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit."80 Based on these enumerated powers, together with the Necessary and Proper Clause, the Supreme Court has stated that "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens."81

However, the Constitution also gives the President certain enumerated powers related to immigration and foreign affairs, including the power to make treaties and receive ambassadors, which is associated with the authority to conduct diplomacy.82 As the Commander in Chief, the President also has military powers.83 Consequently, the President's immigration power is at its peak during national emergencies, when these Article II powers become directly relevant.84 Even in national security cases that implicate foreign affairs and military powers, however, the Supreme Court has applied due process constraints.85

78. Id. § 8, cl. 3.
79. Id. § 8, cl. 11.
80. Id. § 9, cl. 1.
82. U.S. CONST. art. II, § 2, cl. 2.
83. Id. § 2, cl. 1.
85. See Hamdi v. Rumsfeld, 542 U.S. 507, 537-38 (2004) (holding that due process constrained the executive's ability to detain Hamdi without giving him the opportunity to rebut the proffered evidence and noting that "[a]ny process in which the Executive's factual
Because the Supreme Court has never clearly defined the allocation of immigration power between Congress and the President, it is difficult to determine when the executive violates separation of powers.\textsuperscript{86} Cases such as \textit{Youngstown Sheet & Tube Co. v. Sawyer} offer some guidance by providing a general formulation of separation of powers.\textsuperscript{87} Under that formulation, the President’s immigration power is at its peak when aligned with Congress and at its lowest ebb when in conflict with Congress.\textsuperscript{88}

In addition to the inherent and constitutional powers discussed above, the executive has vast authority over immigration delegated by Congress. A perceived national security threat triggers some of the broadest delegations of power to the President in the INA,\textsuperscript{89} not to mention delegations of power under other statutes that apply to emergencies.\textsuperscript{90} For example, Congress delegated to the President the power to “suspend the entry of all aliens or any class of aliens” when he or she “finds that [their] entry . . . into the United States would be detrimental to the interests of the United States.”\textsuperscript{91} This was the statutory delegation of authority at issue in the travel ban case, and the assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short”); Joseph Landau, \textit{Due Process and the Non-Citizen: A Revolution Reconsidered}, \textit{47 Conn. L. Rev.} 879, 913-22 (2015); see also \textit{Boumediene v. Bush}, 553 U.S. 723, 787-90 (2008) (holding that the review mechanisms of the Detainee Treatment Act were an inadequate substitute for habeas corpus).

\textsuperscript{86} Supreme Court cases tend to group Congress and the President together as the political branches of government when discussing immigration. See, e.g., \textit{Kerry v. Din}, 135 S. Ct. 2128, 2141 (2015) (noting that “the political branches[] [hold] broad power over the creation and administration of the immigration system”); see also \textit{Cox & Rodriguez}, supra note 1, at 460-61 (analyzing two different accounts of the history of the Supreme Court’s immigration jurisprudence); \textit{Pratheepan Gulasekaram \& S. Karthick Ramakrishnan, The President and Immigration Federalism}, \textit{68 Fla. L. Rev.} 101, 116 (2016) (noting “the opportunities for divergent action, or even tension and conflict, between the two branches” and explaining that “[c]larifying the division of responsibility between Congress and the President has profound consequences for the viability of state and local immigration laws”).

\textsuperscript{87} 343 U.S. 579 (1952)

\textsuperscript{88} \textit{Id.} at 637 (Jackson, J., concurring).

\textsuperscript{89} 8 U.S.C. \textsection 1182(f) (2012) (authorizing the President to suspend the entry of immigrants “detrimental to the interests of the United States”); see also \textit{Id.} \textsection 1182(a)(3)(B) (stating that those involved in “terrorist activities” are ineligible for a visa or admission into the United States).

\textsuperscript{90} See, e.g., 50 U.S.C. \textsection 21 (2012) (empowering the executive to deport noncitizens of the enemy state during times of war); \textit{Id.} \textsection 1702 (outlining the President’s broad economic powers during a national emergency).

\textsuperscript{91} 8 U.S.C. \textsection 1182(f).
Court ultimately construed it as allowing Trump to suspend the entry of individuals from six predominately Muslim countries.\textsuperscript{92}

Despite the broad scope of the President's inherent, constitutional, and delegated powers over immigration, there is one area where Presidents have traditionally exercised constraint: adjudication. As discussed below, the adjudication of individual immigration cases is distinct from general policies regarding the admission and exclusion of immigrants. Adjudication also represents an area where due process protections are well-established and where the use of presidential power to influence case outcomes would go against longstanding conventions.

\textbf{B. Executive Influence in Adjudication}

Commentators generally agree that presidential interference is problematic in the context of administrative adjudication, as "even the most ardent presidentialists have been careful to insist that the Chief Executive could not intervene to direct the outcome of particular cases."\textsuperscript{93} For example, then-Judge Brett Kavanaugh wrote that when it comes to direct presidential control, it "makes sense generally to treat administrative adjudications differently from policy decisions, rulemakings, and enforcement actions."\textsuperscript{94} Before joining the Supreme Court, then-Professor Elena Kagan observed that presidential participation in executive branch adjudication would "contravene procedural [due process] norms and inject an inappropriate influence into the resolution of controversies."\textsuperscript{95}

\begin{itemize}
  \item \textsuperscript{92} Trump v. Hawaii, 138 S. Ct. 2392, 2410-15 (2018); see also 8 U.S.C. § 1152(a)(1)(A) (prohibiting discrimination in the allocation of immigrant visas based on nationality and other traits).
  \item \textsuperscript{93} Cynthia R. Farina, \textit{Undoing the New Deal Through the New Presidentialism}, 22 HARV. J.L. & PUB. POL’Y 227, 233-34 (1998); see also Heidi Kitrosser, \textit{Accountability and Administrative Structure}, 45 WILLAMETTE L. REV. 607, 616 n.39 (2009) (noting that "those exercising discretion in quasi-adjudicative contexts" ought to be protected against at-will removal by the President); Jon D. Michaels, \textit{The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond}, 97 VA. L. REV. 801, 876-77 (2011) ("Simply put, the political accountability that generally legitimizes White House control over the administrative state is not likely to ensure fundamental fairness in individualized decisions.").
  \item \textsuperscript{94} Brett M. Kavanaugh, \textit{Separation of Powers During the Forty-Fourth Presidency and Beyond}, 93 MINN. L. REV. 1454, 1474 (2009).
  \item \textsuperscript{95} Elena Kagan, \textit{Presidential Administration}, 114 HARV. L. REV. 2245, 2363 (2001) (discussing Londoner v. City & Cty. of Denver, 210 U.S. 373 (1908), and Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915), as well as the APA's stricter procedural requirements for adjudication compared to rulemaking).
\end{itemize}
While scholars widely agree that Presidents are constrained when it comes to executive adjudication, they disagree about why Presidents are constrained. Adrian Vermeule argues that the background norms that constrain the President in this context are not related to due process, as Kagan suggested, but to conventions, explaining that "presidential direction of administrative adjudication would be seen as an unprecedented exertion of power, violating longstanding unwritten traditions, and would for that reason provoke a storm of protest."

In an article titled *The Morality of Administrative Law*, Cass Sunstein and Adrian Vermeule suggest that moral intuitions also act as constraints in this context. They write that "judges possess widely shared, inarticulate intuitions about administrative law's inner morality, and recite 'due process' as a kind of shorthand or placeholder for such intuitions," even though those intuitions may be "legally dubious or unconvincing." They contend, for example, that precedents prohibiting the President from having ex parte communications with an agency official involved in administrative adjudication are based on "unclear or at best highly contestable" legal reasoning.

What happens, then, if a President is elected who does not heed conventions or moral intuitions? Is such a President free to interfere in executive adjudication and direct the outcome of individual cases? Do the procedural due process rights of noncitizens constrain the President in this context? Immigration policies and decisions made by the Trump Administration require us to grapple with these difficult questions. In addition, we must consider the scope of immigration authority exercised by executive leadership below the President, and what constraints these officials face in matters of adjudication. That question is discussed further below.

97. Id.
99. Id.
100. Id. at 1963 (discussing Myers v. United States, 272 U.S. 52 (1926), Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981), and Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534 (9th Cir. 1993)). Sunstein and Vermeule characterize the reasoning in such cases as circular because the executive position is that "the agency adjudicator is ultimately exercising the President's own power to execute the law, as a subordinate to the President, so that it is a categorical mistake to see the President as 'interfering' in the decision of the tribunal." Id.
C. Executive Leadership Below the President

Most of the executive branch’s authority over immigration is wielded through powerful administrative agencies.\textsuperscript{101} The DOJ, headed by the Attorney General, includes the EOIR, which encompasses the immigration courts and the Board. These are the adjudicators in removal proceedings. They make determinations about who is inadmissible or deportable and have the authority to grant different types of applications for relief from removal, including applications for asylum.

DHS is another agency with enormous power over immigration and includes several subagencies with different roles. Customs and Border Protection (CBP) is an agency within DHS that is responsible for border security. CBP officers are often the first point of contact for asylum seekers who present themselves at ports of entry along the U.S.-Mexico border or who enter the United States illegally.\textsuperscript{102} One of the most important duties of CBP officers is to conduct credible fear screenings, which require asking certain questions to apprehended individuals to determine if they fear being harmed in their home country.\textsuperscript{103}

DHS also includes U.S. Citizenship and Immigration Services (USCIS), which is an agency that grants immigration benefits, including, but not limited to, asylum, lawful permanent residence, and citizenship. The Asylum Office is part of USCIS and conducts credible fear interviews for individuals referred by CBP officers, as well as regular asylum interviews.

In addition, DHS includes ICE, which is responsible for detention and deportation. As law enforcement agents, ICE officers and attorneys have prosecutorial discretion to decide whom to place in removal proceedings, detain, and deport, based on priorities identified by the President.\textsuperscript{104} Shortly after becoming President, Trump issued an

\textsuperscript{101}. See Developments in the Law—Immigration Rights & Immigration Enforcement, 126 HARV. L. REV. 1565, 1602 (2013) (“[T]he executive’s power over immigration has increased with the rise of the modern administrative state and decline of the nondelegation doctrine.”).


\textsuperscript{104}. SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 7-13 (2015) (describing the extent of prosecutorial discretion in the immigration system); Cox & Rodriguez, supra note 1, at 462-63.
executive order that dramatically changed the immigration enforcement priorities adopted by President Obama. While Obama focused primarily on deporting individuals with criminal convictions and recent entrants, under Trump’s policy, almost everyone lacking legal status is a priority for deportation.

Although the INA gives extremely broad discretion to these executive agencies, relatively little scholarship has explored the constraints on this level of executive leadership below the President. An important insight offered by Catherine Kim is that plenary power over immigration “is not freely delegable to unelected agency officials,” suggesting greater constraints on executive leadership below the President than on the President himself.

Scholars have also explored whether the President has directive power when Congress gives authority to an agency head, rather than to

107. See Arizona v. United States, 567 U.S. 387, 396 (2012) (describing the “broad discretion exercised by immigration officials” as a “principal feature” of the immigration system); Catherine Y. Kim, Plenary Power in the Modern Administrative State, 96 N.C. L. REV. 77, 96, 101 (2017) (arguing that “[n]owhere is the administrative exercise of policymaking authority more evident than in the immigration context” and that “the power to promulgate national immigration policy is increasingly exercised less by Congress, and more by the officials populating our nation’s administrative agencies”); see also 8 U.S.C. § 1103(a)(3) (authorizing the Secretary of Homeland Security to “perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter”).
108. See Bijal Shah, The Attorney General’s Disruptive Immigration Power, 102 IOWA L. REV. 129, 154 (2017) (explaining that examining the potential overreach of the Attorney General’s use of the referral and review process adds “to the nascent study of how Executive Branch leadership besides the President wields power in the immigration context” (footnote omitted)).
109. Kim, supra note 107, at 115.
110. Some scholars have argued that plenary power does not apply to the President at all, only to Congress. See John C. Eastman, The President’s Pen and Bureaucrat’s Fiefdom, 40 HARV. J.L. & PUB. POL’y 639, 653 (2017) (“Absent some extraordinary foreign policy crisis that would trigger the President’s direct Article II powers over foreign affairs, the Constitution assigns plenary power over immigration and naturalization to the Congress, not to the President.”); see also Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 201 (1993) (Blackmun, J., dissenting) (“Congress . . . has plenary power over immigration matters.”); INS v. Chadha, 462 U.S. 919, 940-41 (1983) (“The plenary authority of Congress over aliens under Art. 1, § 8, cl. 4, is not open to question . . . .”); Boulter v. INS, 387 U.S. 118, 123 (1967) (“Congress has plenary power to make rules for the admission of aliens . . . .”).
the President. Peter Strauss contends that “where Congress has assigned a function to a named agency subject to its oversight and the discipline of judicial review, the President’s role—like that of the Congress and the courts—is that of overseer and not decider.” However, even if Presidents do not direct appointees to undertake particular actions, they can simply make “requests” that convey their preferences and expectations. Indeed, it is often assumed that this type of presidential influence over agency heads takes place. As Nina Mendelson observes, “Congress is likely to expect potentially substantial presidential oversight of a wide range of executive branch agency actions.”

Both Obama and Trump aggressively used their executive power to implement major immigration policies, either directly through executive orders or indirectly through agency heads. For example, under Obama, the DACA policy was adopted in a memorandum from the Secretary of Homeland Security, not in an executive order issued by the President, but was clearly based on the President’s directives. In many cases, the President’s appointees share the President’s policy preferences, but there may be situations where these interests diverge. Situations also inevitably arise where the preferences and priorities of career staff within agencies diverge from those of appointed agency heads. Jennifer Nou notes that “[o]ne of administrative law’s anxieties is the problem of authority delegated from more politically accountable actors to the unelected ones within administrative agencies.”


112. Coglianese, supra note 111, at 70.

113. Nina A. Mendelson, Another Word on the President’s Statutory Authority over Agency Action, 79 FORDHAM L. REV. 2455, 2459 (2011); see also Kagan, supra note 95, at 2251 (“[A] statutory delegation to an executive agency official . . . usually should be read as allowing the President to assert directive authority, as Clinton did, over the exercise of the delegated discretion.”).


115. Id at 563-64.

equally vexing is the problem of political interference into adjudications normally handled by career staff.

Parts III through IV below explore three categories of executive action where presidential power, exercised either directly by the President or appointed agency heads, has interfered in immigration adjudication. These categories involve political interference with immigration adjudicators themselves, using the Attorney General review mechanism to curtail procedural rights and promote prosecution, and adopting policies that prevent adjudication from taking place.

III. POLITICAL INTERFERENCE WITH IMMIGRATION ADJUDICATORS

This Part discusses three forms of political interference with immigration adjudicators that have become prominent under the Trump Administration: politicized appointment, reassignment, and removal of IJs and Board members; politicized performance metrics for IJs to achieve a policy goal of swift deportations; and politicized training materials for asylum officers to reduce positive credible fear determinations and grants of asylum.

A. Politicized Appointment, Reassignment, and Removal of Judges

As mentioned in the introduction, civil service laws prohibit discrimination in hiring for career positions, including based on politics. Since IJs and Board members have career positions in the DOJ, they are protected by these laws. Nevertheless, under both the Bush and Trump Administrations, politicized appointments became a serious concern. In 2008, during the Bush Administration, an internal DOJ investigation concluded that high-ranking DOJ officials had systematically violated civil services laws and DOJ policy “by considering political or ideological affiliations in soliciting and evaluating candidates” for positions as IJs and Board members.


Instead of advertising vacant positions following normal hiring procedures, DOJ officials directly identified candidates based on recommendations from the White House and Republican members of Congress.120

Over half of the IJs hired between 2004 and 2006 lacked any immigration experience, suggesting they were hired based on their politics rather than their professional qualifications.121 Among those who had immigration experience, all were government prosecutors or enforcement officers.122 In 2007, after an experienced government immigration lawyer was denied a position as an IJ and sued the DOJ for discrimination, then-Attorney General Alberto Gonzales suspended the hiring of all IJs and Board members and eventually approved a new hiring process that returned responsibility for selecting judges to the EOIR.123 However, the illegally appointed judges remained on the bench.124

Political discrimination in the hiring of IJs and Board members once again reared its ugly head under the Trump Administration. On April 17, 2018, four members of Congress sent Attorney General Sessions a letter expressing concerns that the DOJ was “using ideological and political considerations to improperly—and illegally—block the hiring of IJs and members of the Board of Immigration Appeals.”125 The letter indicated that the DOJ had “delayed multiple offers for these positions for unusually long amounts of time and, in
one case, withdrew an offer with an explanation that raises suspicions about the actual motive for the withdrawal.”

The DOJ responded by denying any political motive and stating that its needs had simply “evolved.” It proceeded to appoint all six of the individuals concerned, but it failed to produce the requested documents and never addressed the detailed allegations in the Congressmen’s letter.

The qualifications to serve as an IJ still do not require any immigration law experience. The “six quality ranking factors” that applicants for IJ positions must address emphasize high-volume litigation experience, which favors individuals with law enforcement experience over private immigration attorneys who tend to handle a more diverse caseload. These hiring criteria provide more subtle ways to politicize appointments.

Politics has influenced not only appointments, but also the reassignment and removal of IJs and Board members. Reassignment is not considered disciplinary as long as there is no loss in pay or grade, but it can be used in punitive or political ways, especially if it involves being moved to a less desirable part of the country or taken off the bench and given desk duties. In 2003, under the Bush

126. Id.
129. See Kathryn Troutman, Attorneys with 7 Years Post-Bar Experience Wanted Urgently for Immigration Judges, RESUME PLACE (May 17, 2018), https://www.resume-place.com/2018/05/attorneys-wanted-urgently-for-immigration-judges/. Applicants must address six quality ranking factors, which include “[k]nowledge of immigration laws and procedures, if any.” Id. (emphasis added). The instructions state, “[I]f you do not have immigration experience, write about other knowledge of laws and procedures.” Id. (emphasis omitted).
130. Id.
131. Legomsky, supra note 6, at 373-74; see also Michele Benedetto, Crisis on the Immigration Bench: An Ethical Perspective, 28 J. NAT’L Ass’n ADMIN. L. JUDICIARY 471, 518 (2008) (“Given recent examples of political removals . . . immigration judges are left with an ‘emerging fear that ruling against the government in a deportation case can be hazardous to one’s job.’” (quoting Legomsky, supra note 6, at 373-74)). For example, in March 2008, Immigration Judge Jeffrey Chase was “reassigned” to a desk job and relieved of courtroom duties. See Nina Bernstein, U.S. Relieves Judge of Duties in Courtroom, N.Y. TIMES (Mar. 13, 2007), https://www.nytimes.com/2007/03/13/nyregion/13judge.html.
Administration, Attorney General John Ashcroft reassigned Board members whose decisions tended to favor noncitizens rather than DHS.\footnote{Family, supra note 119, at 602-03; Legomsky, supra note 6, at 375-76; see Ricardo Alonso-Zaldivar & Jonathan Peterson, 5 on Immigration Board Asked to Leave; Critics Call It a 'Purge,' L.A. TIMES (Mar. 12, 2003), http://articles.latimes.com/2003/mar/12/nation/na-immigl2.} Although Ashcroft defended his decision to shrink the Board as streamlining its work, IJs viewed the firings as politically motivated.\footnote{See Complaint at 17-19, Tabaddor v. Holder, 156 F. Supp. 3d 1076 (C.D. Cal. 2015) (No. 14-cv-06309); Family, supra note 119, at 602-03; Tara Lundstrom, Lasting Lessons from the Border Surge: It's Time We Fund an Independent Immigration Court System, FED. LAWYER, Jan./Feb. 2015, at 3, 5.} The Honorable Dana Leigh Marks, who was then the president of the National Association of Immigration Judges, called it “selective downsizing” and expressed concern that it would have a “chilling effect” on independent decision making.\footnote{Hon. Dana Leigh Marks, An Urgent Priority: Why Congress Should Establish an Article I Immigration Court, 13 BENDER'S IMMIGR. BULL. 3, 3-4, 10-11, 14 (2008).}

Just as downsizing the Board is a way to shift its political balance, so is expanding it. In 2015, the DOJ increased the maximum number of Board members from fifteen to seventeen.\footnote{Expanding the Size of the Board of Immigration Appeals, 80 Fed. Reg. 31,461 (June 3, 2015).} Before Trump took office, the Board had sixteen full-time members. Eleven of those sixteen members had been appointed by Attorney Generals-selected by Democratic Presidents.\footnote{Andrew R. Arthur, Expand the Board of Immigration Appeals, CTR. FOR IMMIGR. STUD. (July 26, 2017), https://cis.org/Arthur/Expand-Board-Immigration-Appeals.} In 2018, the DOJ published a final rule increasing the number of Board members from sixteen to twenty-one, allowing five additional Board members to be appointed, which could “correct” the Board’s political imbalance, although the proclaimed purpose of the expansion was to reduce the backlog of cases.\footnote{See 8 C.F.R. § 1003.1(a)(1) (2018); see also Expanding the Size of the Board of Immigration Appeals, 83 Fed. Reg. 8321, 8321 (Feb. 27, 2018) (“The [DOJ] is taking steps to address the unprecedented pending caseload. The [DOJ] hired 64 additional immigration judges in FY 2017 and continues to hire new immigration judges.”).}

The Trump Administration has also attempted to use the reassignment of IJs to meet its policy goal of ramping up deportations, or at least to create the optics of achieving that goal. In 2017, one-third of all IJs were uprooted from their regular positions and temporarily reassigned to “border courts” to demonstrate the Administration’s commitment to border enforcement, even though this delayed cases in their home courts.\footnote{Statement of J. A. Ashley Tabaddor, supra note 8, at 3.} The reality for many judges deployed to border,
courts was that they had “no work to do and faced malfunctioning equipment, often with no internet connection, or files.”  

One of the most controversial decisions that the DOJ made under the Trump Administration was to remove a specific case from an IJ and substitute a different judge in order to achieve a particular outcome. The National Association of Immigration Judges accused the Trump Administration of transferring the case of Renaldo Castro-Tum from Immigration Judge Steven Morley in Philadelphia because he did not issue a deportation order. In 2010, when Castro-Tum was an unaccompanied minor who failed to show up in court, Judge Morley administratively closed his case because he was not confident that Castro-Tum had received proper notice of the hearing. The government filed an appeal, which the Board granted, ordering Judge Morley to reopen the case. In May 2017, Attorney General Sessions stepped in, certifying the case to himself for a decision and using it to limit the general authority of IJs to administratively close cases, as discussed in Part IV below.

Upon remand, when Judge Morley granted a continuance instead of issuing a deportation order, a manager at the EOIR reassigned the case to an assistant chief IJ, who traveled to the Philadelphia Immigration Court to conduct a single hearing and order Castro-Tum deported. Judge Morley subsequently discovered that the EOIR had also reassigned over eighty of his other cases where he had questioned whether unaccompanied minors had received adequate notice of their hearings. The union for IJs filed a grievance demanding that the EOIR return Judge Morley’s cases to him and issue a written statement acknowledging that cases should not be reassigned in a way that undermines the independence of IJs. An open letter signed by fifteen former IJs and Board members condemned the EOIR’s “interference

139. Id.
140. Antonio Olivo, Immigration Judges, Worried Trump Is Seeking to Cut Them Out, Fight Back, WASH. POST (Aug. 9, 2018), https://www.washingtonpost.com/local/social-issues/immigration-judges-worried-trump-is-seeking-to-cut-them-out-fight-back/2018/08/09/3d7e915a-9bd7-11e8-8d5e-c66c59402495a_story.html; see also Elise Foley, Immigration Judges Union Slams Trump Administration for Undermining Courts, HUFFINGTON POST (Aug. 8, 2018), https://www.huffingtonpost.com/entry/immigration-judges-sessions_us_5b6b0128e4b0de86b4a774ef ("[T]he agency usually only applies [reassignment] for administrative reasons, such as if a judge retires or goes on leave.").
141. Foley, supra note 140.
143. See Olivo, supra note 140.
144. Id.
145. Id.
with judicial independence” as “unacceptable.” The letter states, “In the absence of another explanation, it would seem that EOIR’s management did not believe Sessions’ purpose in remanding the case was for an IJ to then exercise independent judgment to ensure due process.”

Noting that the EOIR had “removed the case from the docket of a capable judge in order to ensure an outcome that would please its higher-ups,” the statement concluded that “we expect our judges to reach results based on what is just, even where such results are not aligned with the desired outcomes of politicians.”

Politicized appointments, reassignments, and removal of IJs is the most obvious way that the executive improperly influences adjudication. But it is not the only way. As discussed below, performance metrics and training materials are also being used to politicize immigration adjudicators and sway the outcome of cases towards deportation.

B. Politicized Performance Metrics to Promote Deportations

A second way that the executive can interfere politically with immigration adjudicators is by using performance evaluations of judges to achieve policy goals. Unlike ALJs, who are exempt from performance evaluations under the APA due to the nature of their duties, IJs have been evaluated for over a decade using the traditional federal employee performance review system. This process is not public, does not consider outside input, and “can result in career-ending discipline to a Judge who makes a good faith legal decision that his or her supervisor considers to be insubordinate.”

Under the Bush and Obama Administrations, the EOIR set court-wide case completion goals to allocate resources and address the backlog of cases. While this put some pressure on IJs to complete cases efficiently, case completion quotas were not part of their individual performance reviews. In fact, the EOIR prohibited rating judges on that basis, recognizing that quotas conflict with an IJ’s duty

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147. Id.
148. Id.
150. Statement of J. A. Ashley Tabaddor, supra note 8, at 5.
151. See id. at 7.
152. Id.
to exercise independent judgment in each case and that strict timelines could compromise an immigrant’s right to a full and fair hearing.\textsuperscript{153}

This process changed under the Trump Administration. In March 2018, the EOIR announced new performance metrics that threaten to undermine the independence and integrity of IJs by pressuring them to complete cases quickly at the expense of ensuring a fair process.\textsuperscript{154} Under this new system, which took effect on October 1, 2018, the performance of an IJ is deemed unsatisfactory or in need of improvement if the judge completes fewer than 700 cases per year, completes less than 95\% of credible fear and reasonable fear reviews at the first hearing, or has over 15\% of cases remanded on appeal.\textsuperscript{155}

These performance metrics were adopted despite vehement opposition by the National Association of Immigration Judges.\textsuperscript{156} The President of the organization, Judge A. Ashley Tabaddor, described the individual production quotas as “tantamount to transforming a judge into an interested party in the proceedings.”\textsuperscript{157} In her testimony to Congress, she pointed out that the metrics create financial conflicts of interest for IJs, whose livelihoods will depend on decisions about whether to grant a continuance or hear additional testimony that would delay completing a case.\textsuperscript{158} She observed, “Immigration Judges will become bean-counting employees instead of fair and impartial judges, and their supervisors will become traffic cops monitoring whether the cases are completed at the correct speed.”\textsuperscript{159} Similarly, former Immigration Judge Jeffrey Chase opined that the completion quotas

\begin{footnotesize}
\begin{enumerate}
\item 153. Id.
\item 157. Statement of J. A. Ashley Tabaddor, supra note 8, at 7.
\item 158. Id. at 7-8; see also Jeffrey S. Chase, EOI R Imposes Completion Quotas on IJS, OPINIONS/ANALYSIS ON IMMIGR. L. (Apr. 7, 2018), https://www.jeffreyschase.com/blog/2018/4/7/eoir-imposes-completion-quotas-on-ijis (“Fair-minded judges who will continue to hold full hearings and consider legal arguments in favor of granting relief may find it more difficult to meet all of the above benchmarks.”).
\item 159. Statement of J. A. Ashley Tabaddor, supra note 8, at 10.
\end{enumerate}
\end{footnotesize}
were "likely designed to pressure judges with more liberal approaches into issuing more removal orders."160

By increasing the pressure on IJs to deny continuances in order to achieve case completion goals, the new performance metrics also create potential conflicts with appellate court precedents. For example, the United States Court of Appeals for the Third Circuit has held that "[t]o reach a decision about whether to grant or deny a motion for a continuance based solely on case-completion goals, with no regard for the circumstances of the case itself, is impermissibly arbitrary."161 The United States Court of Appeals for the Fifth and Sixth Circuit have similarly reversed cases where the denial of a continuance was based, even in part, on an IJ's expressed need to proceed expeditiously and achieve case completion goals.162 IJs fearing disciplinary action for not achieving case-completion goals may now be deterred from allowing any type of delay, even if delay is necessary to ensure a fair outcome.163

Under Obama, ICE based deportation officers' performance metrics on the number of cases they processed or charged, and "the pressure to hit these metrics pervasively shaped the work of the agency's front-line operators."164 Now the Trump Administration is doing the same thing to IJs. The difference is that deportation officers' job is to pursue deportation, whereas an IJ's job requires being an impartial adjudicator and making fair decisions based on the law. By rewarding the IJs who issue swift deportation orders and penalizing those who do not, the new performance metrics politicize adjudicators and undermine their independence.

162. See Keller v. Filip, 308 F. App'x 760, 763 (5th Cir. 2009) (finding that the Board erred in affirming the IJ's denial of a continuance that was based on the "judge's fear of repercussions for violating case completion goals set by her superiors"); Badwan v. Gonzales, 494 F.3d 566, 570 (6th Cir. 2007) (holding that an IJ cannot deny a motion for continuance solely based on a need to adjudicate expeditiously).
163. Chase, supra note 158.
C. Politicized Training Materials for Asylum Officers

A third way that the executive has influenced immigration adjudication is by politicizing legal training materials for asylum officers. Both the Obama and Trump Administrations revised legal training materials around credible fear interviews to achieve policy goals. Immigrants who request asylum at a port of entry or who are apprehended after entering illegally and express a fear of persecution in their country of origin should go through a credible fear screening process to determine if they deserve an opportunity to submit a full asylum application.\(^\text{165}\)

A CBP officer initially asks questions to screen for credible fear.\(^\text{166}\) Immigrants who express a credible fear are referred to a USCIS asylum officer for a credible fear interview.\(^\text{167}\) Those who pass the credible fear interview are placed in a removal proceeding and given a chance to apply for asylum in immigration court.\(^\text{168}\) Those who fail the credible fear interview can submit a request for reconsideration to the asylum officer or seek review of the negative credible fear determination by an II.\(^\text{169}\) Otherwise, they are subject to expedited removal, meaning they are deported without a court hearing.\(^\text{170}\)

Congress introduced expedited removal and the credible fear process in legislation enacted in 1996.\(^\text{171}\) The INA defines a “credible fear of persecution” as “a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum.”\(^\text{172}\) In 1997, when the DOJ

\(^\text{156}\) Id.
\(^\text{156}\) Id.; id. § 1225(b)(1)(B)(i).
\(^\text{156}\) Id. § 1225(b)(1)(B)(ii).
\(^\text{156}\) Id. § 1225(b)(1)(B)(iii); 8 C.F.R. § 1208.30(g)(2) (2018).
\(^\text{156}\) 8 U.S.C. § 1225(b)(1)(B)(v). A similar process called a “reasonable fear determination” is used for people with prior removal orders. 8 C.F.R. § 208.31(b). The main difference is that individuals with prior deportation orders are only eligible for withholding of removal, not asylum. 8 U.S.C. § 1231(a)(5). Withholding of removal is very similar to asylum but has a higher burden of proof, requiring the individual to demonstrate a greater than fifty percent chance of future persecution. Unlike asylum, it does not create a path to permanent residence or citizenship.
EXECUTIVE OVERREACHING

introduced a rule to implement those statutory provisions, it chose not to further define credible fear.\textsuperscript{173}

The DOJ explained that, instead, immigration officials would receive "extensive training" on "the purpose of the credible fear standard and how it is to be applied to particular cases" in order to "ensure that the standard is implemented in a way which will encourage flexibility and a broad application of the statutory standard."\textsuperscript{174} The Obama and Trump Administrations, however, each revised the training materials for immigration officers to provide an increasingly less flexible and heightened standard for credible fear.\textsuperscript{175}

In 2014, under the Obama Administration, the USCIS revised its training materials for asylum officers on credible fear determinations in response to an escalating number of credible fear referrals caused by the surge of Central American asylum seekers.\textsuperscript{176} Between Fiscal Year (FY) 2009 and FY2014, the number of credible fear interviews completed by asylum officers increased nearly ten-fold, from around 5275 to 47,870.\textsuperscript{177} Similarly, the number of credible fear reviews by IJs increased nearly eight-fold from 861 to 6483 during that time period.\textsuperscript{178} The revised lesson plan required asylum officers to find the asylum seeker's testimony to be credible, persuasive, and specific in


\textsuperscript{174} Id. (emphasis added).


order to satisfy the "significant possibility" standard. 179 The guidance further instructed officers that claims with a "minimal or mere possibility, of success" do not satisfy the standard. 180 But in cases "[w]hen there is reasonable doubt regarding the outcome of a credible fear determination," the guidance instructed asylum officers to find in favor of the noncitizen.181

The number of credible fear interviews by asylum officers continued to increase in the final years of the Obama Administration, ballooning to 91,786 in FY2016, 182 while the number of credible fear reviews by IJs increased to 7469. 183 Within days of becoming President, Trump issued an executive order that discussed expanding the use of expedited removal.184 The following month, in February 2017, the USCIS again revised its lesson plan on credible fear determinations.185 The Trump Administration asserted that the purpose of the revisions was to prevent abuse of the system.186 Additionally, a memo from John Kelly, then Secretary of Homeland Security, claimed that "[t]he surge of illegal immigration at the southern border has overwhelmed federal agencies and resources and has created a significant national security vulnerability to the United States."187

While the 2014 guidance had stressed that asylum officers do not make final credibility determinations because the credible fear determination is preliminary, the 2017 guidance requires officers to make credibility determinations, instructing them to consider "the same factors considered in evaluating credibility in the affirmative asylum context."188 The 2017 guidance also directs asylum officers to give more weight to any inconsistencies with the applicant's initial

180. Id. at 14 (emphasis omitted).
181. Id. at 16.
182. U.S. DEP’T OF HOMELAND SEC., supra note 177.
187. Memorandum from John Kelly to Kevin McAleenan, supra note 175, at 6-7.
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statement to the CBP. However, reports by the U.S. Commission on International Religious Freedom document that the CBP frequently fails to ask the requisite credible fear questions and fails to record responses accurately. In addition, the 2017 guidance raises the standard for establishing identity to a "preponderance of the evidence." Finally, the 2017 guidance deletes the language added in 2014 about making a positive credible fear determination in cases where there is a reasonable doubt.

Human Rights First has argued that the new guidance heightens the standard for establishing credible fear. After the USCIS implemented this new lesson plan, the percentage of cases where asylum officers found credible fear dropped from 78% in February 2017 to 68% in June 2017, consistent with a heightened standard. The percent of cases where IJs reversed a credible fear denial plummeted even more dramatically, from over 30% in the last six months of 2017 to under 15% by June 2018. These changes indicate that the revisions in the training materials affected the interpretation and application of the statutory credible fear standard by asylum officers and IJs. In other words, the training materials that were revised to achieve certain policy goals effectively changed the legal standard and directly impacted adjudication, although Congress never revised the definition of credible fear.

189. Id. at 21.

190. ELIZABETH CASSIDY & TIFFANY LYNCH, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL 20-23 (2016); MARK HETFIELD ET AL., U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 57 (2005); see also HUMAN RIGHTS FIRST, HOW TO PROTECT REFUGEES AND PREVENT ABUSE AT THE BORDER: BLUEPRINT FOR U.S. GOVERNMENT POLICY 12 (2014), http://www.humanrightsfist.org/sites/default/files/Asylum-on-the-Border-final.pdf ("In approximately half of inspections observed by USCIRF researchers, inspectors failed to inform the immigrant of the information in [the credible fear] part of the script."). The Board ignored these reports in Matter of J-C-H-F-., 27 I. & N. Dec. 211 (B.I.A. 2018), which addressed the criteria that an IJ should use in assessing the reliability of a statement taken at the border or at an airport.

191. 2017 Lesson Plan on Credible Fear, supra note 188, at 17.

192. Id. at 21; see Katherine Shattuck, Comment, Preventing Erroneous Expedited Removals: Immigration Judge Review and Requests for Reconsideration on Negative Credible Fear Determinations, 93 WASH. L. REV. 459, 489 (2018).


194. Id.

The Trump Administration has made no secret of its policy goal of reducing the number of asylum cases in immigration court and its skepticism of the credible fear process. President Trump and former Attorney General Sessions have both described the credible fear process as a “loophole” in our laws.\(^\text{196}\) In an October 2017 speech to the EOIR, Sessions dismissed the credible fear process as “an easy ticket to illegal entry into the United States.”\(^\text{197}\) He claimed that “vague, insubstantial, and subjective” asylum applications have “swamped our system.”\(^\text{198}\) Sessions explicitly stated his goal to “elevate the threshold standard of proof in credible fear interviews” and claimed that asylum was being granted in meritless cases.\(^\text{199}\) Secretary of Homeland Security Kirstjen Nielsen has also explicitly stated her goal of “tighten[ing] case processing standards, including the ‘credible-fear’ standard.”\(^\text{200}\)

In short, by simply revising the training materials on credible fear determinations, the Trump Administration achieved its goal of elevating the standard of proof without going through the normal rulemaking process or having Congress amend the statute.

IV. EXECUTIVE INTERFERENCE IN AGENCY ADJUDICATION

While Part III discussed the politicization of adjudicators, this Part examines how the Attorney General review mechanism can be used to politicize the process of adjudication. The following sections describe the Attorney General review mechanism and argue that former Attorney General Sessions misused this process. While the purpose of the review mechanism is to allow a political appointee to make difficult policy choices, Sessions used it to curtail noncitizens’ procedural rights and facilitate prosecution.


\(^{197}\) Att’y Gen. Jeff Sessions, supra note 30.

\(^{198}\) Id.

\(^{199}\) Id.

A. The Attorney General Review Mechanism

Agency head review exists in many agencies and is a generally accepted practice. It is seen as a way for a politically accountable figure to maintain control over important policy issues that may arise in individual cases or that are simply easier to address through adjudication than the more time-consuming rulemaking process. It is also touted as promoting consistency in agency adjudication.

Under regulations issued by the DOJ, the Attorney General has the power to review Board cases that are referred to him by the Board or by DHS, or that he certifies to himself. Before 1956, Attorney Generals often used the review mechanism to summarily affirm or deny Board decisions. Since then, however, the review mechanism has been rarely used. Nevertheless, this mechanism has proven to be a powerful tool with important ramifications.

The Attorney General review mechanism has been criticized for many reasons. As some commentators point out, the relative lack of immigration subject matter expertise by the Attorney General compared to members of the Board, the Attorney General’s focus on


202. Weaver, supra note 201, at 294. Of course, this can also be seen as an end-run around rulemaking that deprives affected individuals the opportunity to provide input through the notice-and-comment process. Id. (“Since agency heads are free to declare policy through adjudication, they have less incentive to articulate policy legislatively.”); see also 5 U.S.C. §§ 553(b)-(c) (2012) (explaining that informal rulemaking requires the agency to give interested parties notice and an opportunity to respond, and requires the agency to respond to the comments that it receives).


204. 8 C.F.R. § 1003.1(h) (2018).

205. Gonzalez & Glen, supra note 203, at 857-58.

206. Id. at 858-59.

207. Id. (discussing how the mechanism has been used to change immigration law and policy); see also Joseph Landau, DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law, 81 FORDHAM L. REV. 619, 639 n.89 (2012) (calling the mechanism a “powerful tool”).
enforcement, and IJs' unique status as the only judges within the DOJ undermine the usual arguments for agency head review.\textsuperscript{208}

One significant criticism of Attorney General review is that it can occur without the meaningful participation of the parties, creating a perception of unfairness.\textsuperscript{209} The Attorney General may exercise review without giving notice to the parties, identifying the issues that he or she plans to address, or providing an opportunity for briefing by the parties or amici curiae.\textsuperscript{210}

Second, because the Office of Immigration Litigation (OIL) within the DOJ represents DHS in immigration appeals pending before the federal courts, there are concerns about OIL recommending certification of cases to the Attorney General in order to advance its own litigation positions.\textsuperscript{211} Attorney Generals have self-certified old and unpublished Board decisions that did not even raise the issues ultimately addressed,\textsuperscript{212} raising questions about how the Attorney General even became aware of these cases, much less selected them for certification, without consulting with OIL or DHS.

Third, commentators have argued that Attorney General review disrupts the coherent development of immigration law. Bilal Shah persuasively demonstrates that immigration decisions by Attorney Generals under the Bush and Obama Administrations unsettled judicial doctrine, disrupted the traditional application of legislative standards, and changed longstanding agency practices.\textsuperscript{213} For example, Attorney Generals adopted and elevated a minority court's view when faced with a circuit split, interrupted the development of circuit court case law by vacating prior Attorney General decisions, and adopted new

\begin{footnotes}
\footnote{209. See Trice, supra note 201, at 1773-74. Concerns about lack of participation are not unique to the immigration context. See Weaver, supra note 201, at 290 ("The major problem with agency review is that the agency head’s review is often the most meaningful part of the adjudicative process, but litigants often have little opportunity to participate.").}
\footnote{210. See Gonzales & Glen, supra note 203, at 913.}
\footnote{211. See Memorandum of Law for Amici Curiae American Immigration Lawyers Ass’n et al. at 9-10, Matter of Silva-Trevino, 24 I. & N. Dec. 687 (A.G. 2008) (No. A013 014 303) [hereinafter AILA Memorandum]; see also Weaver, supra note 201, at 293 ("[T]he agency head may consult with many different people within the agency. Parties outside the agency will generally know little about who discussed what with whom, and may question the fairness of the process.").}
\footnote{212. AILA Memorandum, supra note 211, at 10.}
\footnote{213. Shah, supra note 108, at 143.}
\end{footnotes}
interpretations of the statute that resulted in circuit splits and destabilized agency norms.\textsuperscript{214}

Fourth, Attorney General review raises pressing questions about the appropriateness of making decisions on political rather than legal grounds.\textsuperscript{215} The use of Attorney General review to advance partisan goals is undisputed. A law review article authored by former Attorney General Alberto Gonzalo and Patrick Glen openly acknowledges that the referral and review mechanism is a political tool used to advance the President’s immigration policies.\textsuperscript{216} The partisan nature of the review mechanism is also highly visible to the public, as Democratic and Republican Attorney Generals have reversed each other on numerous issues, such as the appropriate standard for demonstrating that a noncitizen received ineffective assistance of counsel,\textsuperscript{217} how to determine whether a conviction constitutes a “crime involving moral turpitude” under the INA,\textsuperscript{218} and whether asylum may be granted based on domestic violence.\textsuperscript{219}

While these criticisms are longstanding, former Attorney General Sessions pushed the use of the review mechanism to a new extreme, raising more serious concerns about the process than ever before. In

\textsuperscript{214} Id. at 143-152.
\textsuperscript{215} Id
\textsuperscript{216} Gonzales & Glen, supra note 203, at 843-47, 920.
less than one year, he used the review mechanism four times.\textsuperscript{220} By comparison, Attorney Generals under Clinton and Obama used their review powers a total of seven times in eight years.\textsuperscript{221} Furthermore, while prior Attorney Generals relied primarily on referrals from the Board, which is positioned to identify cases that raise important policy issues, Sessions chose to self-certify—that is, hand pick—the cases he wanted to decide.\textsuperscript{222} Even more remarkable, Sessions took on issues that were never raised by the parties or addressed by the Board, suggesting a manipulation of individual cases to achieve political ends.\textsuperscript{223}

Most striking of all is Sessions’s use of the review power to curtail the procedural rights of noncitizens in removal proceedings, rather than to make the types of policy choices that agency head review was designed to preserve for a political appointee. In addition, his decisions are replete with language that makes expeditious enforcement the highest priority, above fair adjudication. Both of those issues are discussed below.

B. Procedural Rights Versus Policy Choices

The four cases that Attorney General Sessions decided during his tenure scaled back the procedural rights of noncitizens in removal proceedings, clearing the path to swift deportations. The Supreme Court has distinguished between procedures that are necessary to “meet the essential standard of fairness under the Due Process Clause” and “choices of policy.”\textsuperscript{224} While the Attorney General review mechanism is best suited for policy choices, Sessions used it to curtail the procedural rights of noncitizens in removal proceedings.

1. Administrative Closure

Administrative closure is a procedure that involves removing a case from an IJ’s active docket. It does not result in a final order, and either party may move to re-calendar the case at an appropriate time.


\textsuperscript{221} Chase, supra note 208. Had he remained Attorney General, Sessions was also on track to outpace George W. Bush’s three Attorney Generals, who exercised review fifteen times in eight years. Id.

\textsuperscript{222} Id.

\textsuperscript{223} See id.

Two of the decisions that Sessions issued as Attorney General involved administrative closure.

In *Matter of E-F-H-L-*, Sessions self-certified a well-established Board precedent without providing any explanation of why he chose the case or what he hoped to accomplish. The Board had held that asylum applicants are entitled to a full hearing on their applications, consistent with prior Board and federal court precedents. The IJ had denied the respondent a full hearing after determining that his asylum application did not establish a prima facie case. In reversing the IJ, the Board relied on statutory and regulatory provisions addressing procedural rights in removal proceedings.

On remand, the respondent withdrew his application for asylum because he became eligible to legalize his status through a family-based application, which provides a much more straightforward path to permanent residence. Since the USCIS, not the immigration court, has jurisdiction over family-based petitions, the parties filed a joint motion to administratively close the removal proceedings, which would allow the judge to take the case temporarily off the court’s docket to give USCIS time to make a decision. The IJ naturally granted that joint motion.

At that point, Sessions stepped in, vacated the Board’s four-year-old decision holding that asylum seekers have a right to a full hearing, and ordered that the case be re-calendared with the immigration court. Sessions reasoned that the case became moot when the respondent withdrew his asylum application. He did not address any of the statutory provisions, regulations, or precedents that the Board had analyzed. Sessions’s cryptic decision, less than one page in length, makes little sense when viewed on its own. Administrative

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228. Id. at 320-21, 324 (citing 8 U.S.C. § 1229a(b)(4) (2012); 8 C.F.R. § 1240.11(c)(3) (2013)).
230. Id.
231. Id.
232. Id.
233. Id.
234. See id.
closure in this situation was standard practice, especially when unopposed by DHS, and serves the interests of judicial efficiency. When viewed together with subsequent decisions and policy statements, however, it becomes clear that E-F-H-L- was the first step in an effort to use the Attorney General review mechanism to curtail noncitizens’ procedural rights and speed up removal cases.

In May 2018, a couple months after issuing his decision in E-F-H-L-, Sessions issued his decision in Castro-Tum, holding that IJs and the Board do not have general legal authority to administratively close cases. The issue that Sessions addressed in Matter of Castro-Tum was totally different than the issue that had been presented to the Board. The Board considered whether DHS had met its burden of establishing proper notice of the removal hearing. Finding that notice was adequate, the Board vacated the IJ’s administrative closure order and remanded the case. Thus, there was no need for the agency head to intervene.

Yet Sessions certified the case to himself to decide a much broader question: whether any IJ has the legal authority to administratively close a case. In holding that IJs do not have general authority to administratively close a case, Sessions overruled prior Board precedents and flew in the face of decades of agency practice. Sessions asserted that administrative closure is only justified if it is based on a specific regulation or judicially approved settlement. Castro-Tum attacked the practice of administrative closure as “encumber[ing] the fair and efficient administration of immigration cases” and complained that DHS had used this practice under the Obama Administration “as a way to decline to prosecute low priority cases.” Sessions explicitly stressed the need to “swiftly adjudicate immigration cases” and issue deportation orders when the respondent fails to appear.

Sessions did not mention the role that administrative closure plays in safeguarding due process rights in immigration cases. For example,

236. Id. at 281.
237. Id. at 274, 281.
239. Id. at 274.
240. Id. at 273.
241. Id. at 276.
242. Id. at 290.
the Board has indicated that administrative closure may be appropriate to safeguard the due process rights of mentally incompetent noncitizens. Nor did Sessions explain how his holding in *Castro-Tum* squares with IJs’ delegated authority to “exercise their independent judgment and discretion in considering and determining the cases coming before the Board ... [and how judges’] may take any action ... appropriate and necessary for the disposition of the case.” Courts have construed this regulatory language as empowering IJs “to take various actions for docket management,” including administrative closure. In *Matter of Avetisyan*, the Board reasoned that denying IJs the power to administratively close cases was an impermissible violation of their delegated responsibility to adjudicate cases. The United States Court of Appeals for the Ninth Circuit concurred, explaining that “administrative closure is a tool that an IJ or the BIA must be able to use, in appropriate circumstances, as part of their delegated authority, independence and discretion.”

Not only did *Castro-Tum* undermine the delegated authority of IJs and make administrative closure much harder for noncitizens to obtain by overruling *Avetisyan*, but it also included ominous language about continuances. The decision described continuances as a “docket-management device” and warned IJs that they remain accountable for the delay. Attorney General Sessions subsequently addressed continuances directly in *Matter of L-A-B-R-*, discussed below.

2. Continuances

Continuances in removal proceedings are critical to give noncitizens time to find a representative, obtain corroborating evidence, present relevant witness testimony, and receive a decision from the USCIS on a pending visa petition that would create a path to legal status. In July 2017, the Chief IJ explained that “the appropriate

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244. 8 C.F.R. §§ 1003.1(d)(1)(ii), 1003.10(b) (2018).


247. *Gonzalez-Caraveo*, 882 F.3d at 890.

use of continuances serves to protect due process, which Immigration Judges must safeguard above all.\textsuperscript{249}

Under the regulations, “good cause” must be shown for a continuance to be granted.\textsuperscript{250} In 2009, the Board identified five nonexclusive factors for IJs to use in evaluating whether good cause exists to grant a continuance when there is a collateral application with a different agency such as a pending visa petition with the USCIS.\textsuperscript{251} Federal courts have consistently applied these factors and found error in cases where all of the factors were not properly considered.\textsuperscript{252}

In \textit{L-A-B-R-}, Sessions decided to review “issues relating to when there is ‘good cause’ to grant a continuance for a collateral matter to be adjudicated.”\textsuperscript{253} After self-certifying the case, Sessions issued a notice directing the Board to refer him other cases raising this issue. All of the decisions referred to him involved situations where the Board had declined to hear an interlocutory appeal by DHS that challenged an IJ’s

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\textsuperscript{249} See Memorandum from MaryBeth Keller, Chief Immigration Judge, Exec. Office for Immigration Rev., to All Immigration Judges, Court Administrators, Attorney Advisors, Judicial Law Clerks, and Court Staff, Regarding Operating Policies and Procedures 3 (July 31, 2017), https://www.justice.gov/eoir/fleloppml7-01/download.

\textsuperscript{250} 8 C.F.R. § 1003.29 (2018) (“The Immigration Judge may grant a motion for continuance for good cause shown.”); id. § 1240.6 (“After the commencement of the hearing, the immigration judge may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the [DHS].”); see also Matter of M-, 5 I. & N. Dec. 622, 624 (B.I.A. 1954) (“[The special inquiry officer may at the commencement of the hearing, grant a reasonable adjournment for good cause shown.”).

\textsuperscript{251} Matter of Hashmi, 24 I. & N. Dec. 785, 790 (B.I.A. 2009). These factors are:

1. the DHS response to the motion [to continue];
2. whether the underlying visa petition is prima facie approvable;
3. the respondent’s statutory eligibility for adjustment of status;
4. whether the respondent’s application for adjustment merits a favorable exercise of discretion; and
5. the reason for the continuance and other procedural factors.

\textit{Id.} The decision further states that the judge “may also consider any other facts that he deems appropriate.” \textit{Id.} at 794; see also Matter of Sanchez Sosa, 25 I. & N. Dec. 807, 815 (B.I.A. 2012) (“As a general rule, there is a rebuttable presumption that an alien who has filed a prima facie approvable application [for a U visa] with the USCIS will warrant a favorable exercise of discretion for a continuance for a reasonable period of time.”).

\textsuperscript{252} See, e.g., Marube v. Sessions, 712 F. App’x 246, 247-48 (4th Cir. 2018) (per curiam) (finding that the Board abused its discretion in failing to consider all of the Hashmi factors); Ferreira v. U.S. Att’y Gen., 714 F.3d 1240, 1242-43 (11th Cir. 2013) (holding that the Board “failed to apply its own precedent when it denied [the petitioner]'s motion for a continuance” based only on the length of time before a visa would become available).

decision to grant a continuance, consistent with the Board’s practice disfavoring interlocutory review.\(^{254}\)

Attorney General Sessions’s decision in *L-A-B-R-*, issued in August 2018, confirms the “good cause” standard and the same multifactor test that the Board adopted in *Matter of Hashmi* for evaluating a continuance request based on a collateral application.\(^{255}\) Like *Hashmi*, *L-A-B-R-* also states that the IJ must *primarily* consider “the likelihood that the collateral relief will be granted and will materially affect the outcome of the removal proceedings.”\(^{256}\) However, *L-A-B-R-* goes on to instruct IJs about how they should exercise their discretion by identifying situations where good cause “may not” or “does not” exist.

*L-A-B-R-* states that good cause “may not exist” when the alien has not demonstrated reasonable diligence in pursuing the collateral adjudication, DHS justifiably opposes the motion, or the requested continuance is unreasonably long, among other possibilities.\(^{257}\) The decision further states that good cause “does not exist if the alien’s visa priority date is too remote.”\(^{258}\) This assertion will likely lead to the denial of continuances for many categories of noncitizens, such as those waiting for a family-based visa to become available, including spouses of permanent residents, as well as unaccompanied minors waiting for the USCIS to make a Special Immigrant Juvenile Status determination and victims of crimes with pending U-visa applications.

Perhaps the most notable aspect of *L-A-B-R-* is its description of continuances as a “case-management tool,” rather than a safeguard for due process.\(^{259}\) *L-A-B-R-* directs IJs to consider “administrative efficiency” in deciding whether to grant a continuance, asserting that, “at bottom, continuances are themselves intended to promote efficient case management.”\(^{260}\) Sessions faulted the Board for stating in *Hashmi*...
that "[c]ompliance with an Immigration Judge's case completion goals ... is not a proper factor in deciding a continuance request." 261 

Under L-A-B-R-, case completion and expeditiousness become important considerations. 262 Indeed, L-A-B-R- repeatedly suggests that continuances are being abused by immigrants as a "dilatory tactic" and "an illegitimate form of de facto relief from removal." 263 

This focus on administrative efficiency in ruling on requests for continuances increases the risk of due process violations. In Ungar v. Sarafite, the Supreme Court cautioned against "a myopic insistence upon expeditiousness in the face of a justifiable request for delay." 264 Furthermore, the Ninth Circuit has observed that "an immigrant's right to have her case heard should not be sacrificed because of the IJ's heavy caseload." 265 Yet L-A-B-R- never mentions due process as a relevant concern in ruling on continuances. 266 Nor does any part of the multifactor test for granting a continuance take into account the extent of harm suffered by the respondent as a result of a denial of a continuance, which federal courts often consider in determining whether the denial of a continuance violates due process in the criminal context. 267 Additionally, multiple circuits have expressed concerns

261. Id. (alteration in original) (quoting Hashmi, 24 I. & N. Dec. at 793-94).
262. Id. (citing Hashmi v. Att'y Gen. of U.S., 531 F.3d 256, 261 (3d Cir. 2008)).
263. Id. at 407, 411.
264. 376 U.S. 575, 589 (1964); see also Romero-Morales v. INS, 25 F.3d 125, 130-31 (2d Cir. 1994) (applying Ungar in the immigration context); Rios-Berrios v. INS, 776 F.2d 859, 862-63 (9th Cir. 1985) (same).
265. Cui v. Mukasey, 538 F.3d 1289, 1295 (9th Cir. 2008).
267. See, e.g., United States v. Flynt, 756 F.2d 1352, 1358-59 (9th Cir. 1985) (applying a four-part test for determining whether the denial of a continuance violated due process, which requires considering (1) "the extent of appellant's diligence in his efforts to ready his defense prior to the date set for hearing," (2) "how likely it is that the need for a continuance could have been met if the continuance had been granted," (3) "the extent to which granting the continuance would have inconvenienced the court and the opposing party, including its witnesses," and (4) "the extent to which the appellant might have suffered harm as a result of the district court's denial"); see also United States v. Rivera-Guerrero, 426 F.3d 1130, 1138-43 (9th Cir. 2005) (holding that the denial for a continuance deprived the defendant of due process under this four-part test); United States v. Uptain, 531 F.2d 1281, 1286 (5th Cir. 1976) (setting forth highly relevant factors in assessing the denial of continuances, including "the likelihood of prejudice from denial"). Some courts have also adopted multifactor tests for assessing whether the denial of a continuance violates a defendant's right to present witness testimony. These tests include the degree to which the testimony is favorable to the accused. See Bennett v. Scrogg, 793 F.2d 772, 774 (6th Cir. 1986); Hicks v. Wainwright, 633 F.2d 1146, 1149 (5th Cir. 1981).
about blaming a noncitizen in removal proceedings for the USCIS’s delay in processing a visa application.268

Although a due process violation based on the denial of a continuance is difficult to establish, courts have found due process violations in certain circumstances. For example, courts have found due process violations where the denial of a continuance deprived the noncitizen of the right to counsel,269 denied the noncitizen an opportunity to investigate a forensic report submitted by the government,270 limited testimony,271 prevented submitting fingerprints for background checks,272 and deprived the noncitizen of an opportunity to have a collateral application adjudicated by the USCIS.273 Sessions’s decision in L-A-B-R threatens to undermine these procedural rights.

Even before L-A-B-R-, wide variation existed among IJs in their willingness to grant continuances and the length of the continuances they granted.274 An empirical study of continuances by David

268. Ahmed v. Holder, 569 F.3d 1009, 1012-14 (9th Cir. 2009) (holding that the denial of a continuance for the Administrative Appeals Office (AAO) to adjudicate the appeal of a denial of an employment-based visa petition violated due process and noting that “[i]f anyone is to be blamed for the delay in this case, it is the AAO, not Ahmed”); Rajah v. Mukasey, 544 F.3d 449, 456 (2d Cir. 2008) (reversing denial of continuance and remanding to the Board for further guidance on what constitutes “sufficient time” in light of the “delays endemic in almost every stage of acquiring any visa”); Subhan v. Ashcroft, 383 F.3d 591, 593-95 (7th Cir. 2004) (concluding that the IJ abused his discretion in denying petitioner a third requested continuance solely because the Department of Labor had not yet acted on the petitioner’s application, and holding that the IJ must provide a reason consistent with 8 U.S.C. § 1255(i) when denying such a continuance).

269. See Biwot v. Gonzales, 403 F.3d 1094, 1098-1101 (9th Cir. 2005); Rios-Berrios v. INS, 776 F.2d 859, 862-64 (9th Cir. 1985); Castaneda-Delgado v. INS, 525 F.2d 1295, 1300 (7th Cir. 1975); see also Gandy v. Alabama, 569 F.2d 1318, 1327 (5th Cir. 1978) (finding that denial of a continuance in a criminal case that resulted in the defendant being unrepresented by the attorney familiar with his case violated due process).

270. Bondarenko v. Holder, 733 F.3d 899, 906-07 (9th Cir. 2013).

271. Cruz Rendon v. Holder, 603 F.3d 1104, 1111 (9th Cir. 2010) (finding a violation of due process where the petitioner was denied a continuance and limitations were placed on her testimony); see also Manlove v. Tansy, 981 F.2d 473, 476-79 (10th Cir. 1992) (holding that the denial of defendant’s request for a continuance to obtain witness violated due process in a rape prosecution); Hicks, 633 F.2d at 1140-50 (holding that the denial of a continuance violated due process when it prevented petitioner from presenting his only expert witness on his insanity defense, which was the sole issue at trial).

272. Cui v. Mukasey, 538 F.3d 1289, 1292-95 (9th Cir. 2008).


274. See David Hausman & Jayashri Srikantiah, Time, Due Process, and Representation: An Empirical and Legal Analysis of Continuances in Immigration Court, 84 FORDHAM L. REV. 1823, 1827-28 (2016) (arguing that courts should consider the effect of continuance length on access to counsel in deciding how much time is constitutionally adequate).
Hausman and Jayashri Srikantiah found that some judges "tend to give several continuances with six months or more between hearings; others give only one or two continuances with only a month or two between hearings." They found that moving from a one-month to a two-month continuance nearly doubled the chance of an unrepresented child finding a lawyer. Because IJs know that more time increases the chance of finding a lawyer and successfully applying for relief, "[t]he same IJs who are more likely to order immigrants deported also grant shorter and fewer continuances." Sessions likewise understood that because he heightened the standard for granting a continuance in *L-A-B-R-* and stressed the importance of expediency, IJs are now likely to grant fewer and shorter continuances, resulting in swifter deportations.

3. Summary Dismissals

The last decision by Sessions discussed here, *Matter of A-B-*, has contributed to the summary dismissal of asylum claims by some IJs without any evidentiary hearing. It has done so in conjunction with a BIA case decided in 2018 called *Matter of W-Y-C- & H-O-B-*, which *A-B-* cites approvingly.

In order to understand how this has happened, a little more background in the particular social group (PSG) ground for asylum is necessary. "[M]embership in a particular social group" is one of five protected grounds for asylum, along with race, religion, nationality, and political opinion. In fact, it is the most convoluted and controversial ground, as its definition is complicated and has changed over time.

In *Matter of A-R-C-G-*, which *A-B-* overruled, the Board had recognized a PSG defined as "married women in Guatemala who are

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275. *Id.* at 1827.
276. *See id.* at 1830.
277. *Id.* at 1834.
280. 27 I. & N. Dec. at 344.
282. In 2014, the Board clarified that the three requirements for establishing a social group are (1) an immutable characteristic, meaning something the asylum seeker cannot change or should not have to change because it is fundamental to identity; (2) particularity, meaning that the boundaries of the group are so clear that one can determine who is inside and outside of the group; and 3) social distinction, meaning that society in general in the applicant’s home country perceives the proposed group as distinct from the rest of society. *See Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 231-33 (B.I.A. 2014); *Matter of W-G-R-*, 26 I. & N. Dec. 208, 209-17 (B.I.A. 2014).
unable to leave their relationships” in granting asylum to a woman whose persecution involved extreme domestic violence by her husband.\(^{283}\) Accordingly, the respondent in A-B- defined her PSG along the same lines as “El Salvadoran women who are unable to leave their domestic relationship where they have children in common’ with their partners.”\(^{284}\) The IJ rejected that social group, but the Board found it cognizable and remanded the case with an order to grant asylum upon the completion of background checks.\(^{285}\) Instead of granting asylum, however, the IJ tried to recertify the case to the Board for further consideration in light of intervening legal developments leading the IJ to believe that the precedents the Board had relied on were no longer valid.\(^{286}\) Before the Board could respond, Attorney General Sessions stepped in and certified the case to himself.

He requested briefing on “whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable ‘particular social group’ for purposes of an application for asylum or withholding of removal,” even though the respondent in A-B- had never defined her PSG as a “victim of private criminal activity.”\(^{287}\) Both parties asked the Attorney General to clarify the question on which briefing was requested, but he declined to do so.\(^{288}\) Furthermore, while the case was pending before him, Sessions publicly stated that he thought domestic violence is an “obviously false” basis for asylum.\(^{289}\) The day he issued the decision, he told an audience of IJs that “the vast majority of the current asylum claims are not valid.”\(^{290}\)

The decision itself called into question entire categories of asylum claims, stating, “Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will


\(^{284}\) A-B-, , 27 I. & N. Dec. at 321 (quoting Decision Denying Asylum Application at *8).

\(^{285}\) Id. at 321.

\(^{286}\) Id. at 321-22.

\(^{287}\) Id. at 317.


not qualify for asylum." 291 Sessions stressed that "if an alien's asylum application is fatally flawed in one respect—for example, for failure to show membership in a proposed social group—an immigration judge or the Board need not examine the remaining elements of the asylum claim." 292 A-B cited with approval the Board's 2018 decision in W-Y-C- & H-O-B-, which requires asylum applicants to provide an "exact delineation" of their proposed PSG to the IJ and prohibits revising the social group at the administrative level. 293 In effect, these rules impose an exceedingly high standard not applied to any area of law, or even to any other type of asylum claim, also paving the way for summary dismissals.

A-B did not stop there. It also applied a heightened standard for persecution in cases involving nongovernmental actors, requiring the asylum seeker to demonstrate that "the government condoned the private actions 'or at least demonstrated a complete helplessness to protect the victims.'" 294 In contrast, the well-established standard for non-state actors simply requires showing that the government is "unable or unwilling" to control a nongovernmental persecutor. 295

Soon after A-B was decided, the USCIS issued new guidance to all of its asylum officers, advising them about the impact of A-B on credible fear interviews and asylum interviews. 296 This guidance repeats the generalization in A-B that claims based on domestic violence and gang violence are unlikely to succeed, adopts the heightened standard for persecution by non-state actors, and includes the requirement set forth in W-Y-C- & H-O-B- that asylum seekers provide an exact delineation of their proposed PSG. 297

292. Id. at 340 (citation omitted).
293. Id. at 344 (citing 27 I. & N. Dec. 189, 190-91 (B.I.A. 2018)).
294. Id. at 337 (emphasis added) (quoting Galina v. INS, 213 F.3d 955, 958 (7th Cir. 2000)).
295. Matter of Acosta, 19 I. & N. Dec. 211, 222 (B.I.A. 1985). This standard stems from the INA, which describes a refugee, in relevant part, as someone who is "unable or unwilling to avail himself or herself of the protection of [his or her home country]." 8 U.S.C. § 1101(a)(42)(A) (2012).
297. Id. at 6 ("In general, ... claims based on membership in a putative particular social group defined by the members' vulnerability to harm of domestic violence or gang violence committed by non-government actors will not establish the basis for ... a credible ... fear of persecution."); id. at 10 ("[T]he home government must either condone the behavior or
Perhaps most striking of all, the USCIS guidance went beyond A-B- and instructed asylum officers to ignore any federal appeals decisions that conflict with A-B-.\textsuperscript{298} Prior guidance never instructed asylum officers to disregard federal appellate court decisions. In fact, prior guidance encouraged asylum officers to consider the law in \textit{all circuits} at the credible fear stage, explaining that "generally the interpretation most favorable to the applicant is used when determining whether the applicant meets the credible fear standard."\textsuperscript{299}

The new USCIS guidance is also remarkable for its lack of transparency.\textsuperscript{300} The traditional practice is for USCIS’s Asylum Division to draft guidance and submit it for approval by the Chief of the Asylum Division. However, the guidance was "issued outside those channels, without approval from any of the DHS's Asylum Division experts."\textsuperscript{301} The USCIS guidance on A-B- has no "from" field, no named author, and no signature, providing no indication of who is responsible for the document and making no one accountable.\textsuperscript{302} Despite its questionable origins, the new USCIS guidance immediately resulted in more negative credible fear determinations and therefore more expedited removals.\textsuperscript{303}

In \textit{Grace v. Whitaker}, however, the United States District Court for the District of Columbia abrogated A-B- and found that provisions of the USCIS guidance implementing or even going beyond A-B- were unlawful.\textsuperscript{304} Applying the \textit{Chevron} test to Sessions’s interpretation of "particular social group," the court concluded that a near-blanket rule precluding domestic violence claims at the credible fear stage is an

\begin{footnotes}
\item[298] \textit{id.} at 8-9 (stating that asylum officers should “apply the case law of the relevant federal circuit court, to the extent that those cases are not inconsistent with \textit{Matter of A-B-}”).
\item[299] \textit{See} 2017 Lesson Plan on Credible Fear, \textit{supra} note 188, at 17.
\item[300] \textit{Cf.} Mashaw \& Berke, \textit{supra} note 114, at 612-13 ("Presidentialism that takes account of process and participatory values; is transparent and robust concerning sources, science, and data consulted or relied upon . . . is, from our perspective, good government. Failure to abide by these conventions, while sometimes justified, is generally problematic and anti-democratic." (footnote omitted)).
\item[302] \textit{Id.}
\end{footnotes}
unreasonable interpretation of the statute under step two of *Chevron*.305 The court reasoned that the general rule announced by Sessions runs contrary to the individualized analysis required by the INA, conflicts with Congress's intent to align U.S. asylum law with the Refugee Protocol, and heightens the standard at the credible fear stage.306 The court further found that the "condoned or complete helplessness" standard set forth in *A-B-* and the USCIS guidance impermissibly heightened the legal standard for persecution by nongovernmental actors.307

While *Grace* has helped prevent the denial of credible fear for entire classes of asylum claims, it does not directly affect how IJs approach domestic violence and gang-related cases in removal proceedings. Since Sessions vacated *E-F-H-L-*, which had protected the right to a full evidentiary hearing in removal proceedings,308 some IJs feel empowered to summarily dismiss cases without an evidentiary hearing based on the purported failure to establish a cognizable PSG early in the proceedings.309 Failure to demonstrate the existence of a PSG with sufficient documentation can lead to the swift denial of asylum, even without the presentation of testimony. As former Immigration Judge Jeffrey Chase has pointed out, "The judges that conclude ... [that] the best practice is to summarily deny asylum without testimony are exactly the type of judge the present administration wants on the bench."310 Yet prior decisions by the Board and circuit courts recognize how difficult it is for an asylum seeker to satisfy the burden of proof without providing testimony311 and how relevant facts often continue to develop up until the final hearing.312 The use of summary dismissals ignored this reality.

305. *Id.* at 125-26.
306. *Id.* at 126-27.
307. *Id.* at 127-30.
309. Orders issued by an IJ in Dallas, for example, gave an asylum seeker thirty days to submit written documentation establishing the PSG, citing cases and legal standards pertaining to motions for summary judgment, which do not exist in immigration court. See Order to Produce in an Asylum or Withholding Case, Immigration Judge Pre-Hearing Order (Robert W. Kimball), Dallas, Tex., May 29, 2018 (on file with author).
By curtailing the use of administrative closure and continuances, and encouraging summary dismissals, Sessions scaled back procedural rights in removal proceedings and facilitated swift deportations.

C. Policy Making Versus Prosecution

The cases discussed above not only cross the line between law-based determinations of procedural rights and policy choices, but also cross the line between policy making and prosecution. In her article, Presidential Administration, Elena Kagan set “the appropriate boundaries on presidential direction” at “prosecutorial authority,” arguing that “it is in this area, because so focused on particular individuals and firms, that the crassest forms of politics (involving, at the extreme, personal favors and vendettas) pose the greatest danger of displacing professionalism and thereby undermining confidence in legal decisionmaking.”

The Trump Administration’s interference in immigration adjudication, especially former Attorney General Sessions’s decisions discussed above, risk undermining confidence in legal decision making by pushing for expeditious immigration enforcement.

Although case management and efficiency could, in theory, be neutral concepts, Sessions deployed them in a purely one-sided manner that consistently favored DHS over noncitizens. In L-A-B-R-, for example, Sessions only collected cases where the Board had declined to hear an interlocutory appeal by DHS of an IJ’s decision granting a continuance. Although the decision purports to be concerned with efficiency and case management in general, it focuses only on continuances requested by the noncitizen. The decision provides no guidance for what DHS would need to establish to satisfy the “good cause” standard when it requests a continuance, even though the regulation explicitly applies the “good cause” standard to both parties.

A more neutral approach to reducing delay would address both parties, especially since DHS was responsible for 14% of the

313. Kagan, supra note 95, at 2357-58; see also Mashaw & Berke, supra note 114, at 606 (“Kagan expressed a hesitancy about presidentialism seeping into prosecution (as opposed to regulatory policymaking), but Obama’s white-collar enforcement ramp-up and Trump’s deportation guidance move precisely in that direction.” (footnote omitted)).


315. 8 C.F.R. § 1240.6 (2018).
continuances granted between 2006 and 2015. In addition, DHS-related continuances increased by 54% from 2006 to 2016, far more than any other category of continuance, suggesting a growing need to address this issue. By comparison, continuances requested by noncitizens increased by only 18%.

The way that Sessions framed continuances as “reflect[ing] the public interest in expeditious enforcement of the immigration laws” also presents enforcement, rather than fair adjudication, as the primary purpose of removal proceedings. The conclusion of L-A-B-R-underscores this perspective, warning that “[t]he absence of any reasoned explanation for the grant of a continuance may . . . leave the Board no choice but to vacate the order granting the continuance if evidence supporting good cause is not clear from the record.” This reasoning applies equally to the denial of a continuance, but that is not mentioned. In fact, in Ahmed v. Holder, the Ninth Circuit used almost the same language as Sessions in concluding that “[a]bsent an explanation from the [IJ], we have no choice but to conclude that the denial of the continuance was arbitrary and unreasonable.

Just as Sessions’s approach to continuances in L-A-B-R- focused on enforcement, so did his response to administrative closure. Castro-Tum overruled Avetisyan, a Board decision that recognized IJs’ authority to administratively close cases as part of their general authority to regulate their dockets. Prior to Avetisyan, an IJ could not administratively close a case if either party opposed closure. As circuit courts recognized, “[T]his had the effect of allowing the [DHS] to unilaterally control and decide administrative closure.” By overruling Avetisyan, Sessions put himself in the role of prosecutor, akin to DHS in the pre-Avetisyan world, and unilaterally decided that IJs should not be allowed to administratively close cases.

317. Id.; see also Benson & Wheeler, supra note 18, at 73 (2012) (reporting that 11% of delays were because a DHS attorney was not ready to proceed and that 14% were because DHS was missing a file).
320. Id. at 418-19.
321. 569 F.3d 1009, 1014 (9th Cir. 2009) (emphasis added).
323. Gonzalez-Caraveo v. Sessions, 882 F.3d 885, 890 (9th Cir. 2018).
Easing the path to summary dismissals by vacating the Board’s decision in E-F-H-L- and declaring entire categories of claims to be nonstarters under A-B- further reflects the use of review powers for prosecutorial purposes. This prosecutorial approach is consistent with remarks Sessions made stating that the asylum system “is currently subject to rampant abuse and fraud,” causing the system to be “overloaded with fake claims.”

Indeed, transforming adjudication into enforcement reflects the Trump Administration’s view of immigrants as criminals. Trump has repeatedly described immigrants, particularly those from Mexico and Central America, as criminals, drug dealers, rapists, murderers, gang members, fraudsters, and animals who “prey on our citizens.” One of his first executive orders on immigration created an Office for Victims of Immigrant Crimes. In June 2018, Trump tweeted about “bad” immigrants “infest[ing] our Country, like MS-13.” A month prior, Trump had claimed “[t]hese [immigrants] aren’t people—these are animals.” Characterizing immigrants as criminals eased the way for the Trump Administration to cross the line from permissible policy making to impermissible prosecution.

324. Att’y Gen. Jeff Sessions, supra note 30; see also Backlog of Pending Cases in Immigration Courts as of November 2018, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, http://trac.syr.edu/plptools/immigration/court_backlog/apprep_backlog.php (last visited Feb. 12, 2019) (showing the sharp increase in pending cases in immigration court from FY1998 to FY2019); Jeffrey S. Chase, In Response to the A.G.’s Claims Regarding Asylum Fraud, OPINIONS/ANALYSIS ON IMMIGR. L. (Oct. 26, 2017), https://www.jeffreyschase.com/blog/2017/10/26/in-response-sessions-claims-regarding-asylum-fraud (“In support of his fraud claim, Sessions stated that many who were found to have a credible fear of persecution and paroled into the U.S. did not subsequently apply for asylum. However, he neglected to mention that many of those parolees are unaccompanied children.”).


326. As journalist Peter Beinart noted, Trump’s decision to publicize reports of crimes by immigrants is similar to actions taken by Germany’s Ministry of Justice in the 1930s to publish reports of crimes by Jews. Peter Beinart, Trump Scapegoats Unauthorized Immigrants for Crime, ATLANTIC (Mar. 1, 2017), https://www.theatlantic.com/politics/archive/2017/03/trump-scapegoats-unauthorized-immigrants-for-crime/518238.


V. EXECUTIVE POLICIES THAT PREVENT ADJUDICATION

The final category of executive actions discussed in this Article pertains to policies designed to prevent IJs and asylum officers from getting cases in the first place. These policies stop or deter noncitizens from applying for asylum. While this category is the most attenuated of the three forms of executive interference addressed in the Article, it has the potential to subvert the U.S. asylum system. This Part discusses three tactics that have been used by the Trump Administration to prevent asylum adjudication: denying noncitizens the right to apply for asylum at ports of entry, criminally prosecuting asylum seekers who enter illegally, and separating parents from their children.

By preventing asylum claims from being filed, these executive policies circumvent the statutory right to apply for asylum that Congress created to codify the United States' international obligations. The INA explicitly states that "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such alien's status, may apply for asylum." This language stresses that any individual may apply for asylum. Additionally, by specifically addressing noncitizens who are "physically present" in the United States or those who "arrive," the statute sets out distinct categories of eligibility and protects both. Unlike someone who is "physically present," someone who "arrives" reaches the border but does not need to set foot inside the country.

In describing the procedures that officers must follow in dealing with asylum seekers, the statute similarly uses mandatory language and explicitly addresses both "arriving" noncitizens and those physically present in the United States. The regulations likewise use mandatory

332. See id. at 9.
333. See 8 U.S.C. § 1225(a)(1) (defining an applicant as a noncitizen "who arrives in the United States (whether or not at a designated port of arrival . . .)" (emphasis added); id. § 1225(a)(3) ("All aliens . . . who are applicants for admission or otherwise seeking admission . . . shall be inspected by immigration officers." (emphasis added)); id. § 1225(b)(1)(A)(ii) ("If an immigration officer determines that an alien . . . who is arriving in the United States . . . is inadmissible . . . and the alien indicates either an intention to apply for asylum under section
language and interpret an “arriving alien” to mean someone “coming or attempting to come into the United States,” thereby including those who have not yet crossed the border.\(^{334}\) The plain language of the INA and its implementing regulations therefore provide a strong basis for challenging the legality of policies and practices that seek to deter people from applying for asylum. Since enacting the INA, Congress has confirmed its intent to make the asylum process available to everyone by repeatedly rejecting bills that sought to limit the number of asylum applications.\(^{335}\)

Not only is access to the asylum process mandatory, but so is access to related forms of nondiscretionary relief, namely withholding of removal and protection under the Convention Against Torture, both of which reflect the international obligation of non-refoulement.\(^{336}\) The

1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by the asylum officer . . . .” (emphasis added)); see also Trump v. Hawaii, 138 S. Ct. 2392, 2411 (2018) (noting that the President may not “override particular provisions of the INA”); East Bay Sanctuary Covenant v. Trump, 909 F.3d 1219, 1250 (9th Cir. 2018) (“Where ‘Congress itself has significantly limited executive discretion by establishing a detailed scheme that the Executive must follow in [dealing with] aliens,’ the Attorney General may not abandon that scheme because he thinks it is not working well . . . .” (alteration in original) (quoting Jama v. ICE, 543 U.S. 335, 368 (2005))).

334. 8 C.F.R. § 1.2 (2018); see also id. § 235.3(b)(1)(i), (b)(4) (describing the asylum application procedure for an “arriving alien” and mandating that immigration officers “shall not proceed further with removal of the alien until the alien has been referred for an interview by an asylum officer” (emphasis added)).

335. For example, the Asylum Abuse Reduction Act would have prohibited migrants from applying for asylum at the border, requiring prospective applicants to instead travel to a U.S. embassy or consulate for an interview with an asylum officer, but the bill died in committee. S. 3372, 115th Cong. § 2 (2018). Other bills restricting the asylum procedure introduced in the House of Representatives were also unsuccessful. See, e.g., Border Security and Immigration Reform Act of 2018, H.R. 6136, 115th Cong., tit. IV, §§ 4101, 4108 (2018); Securing America’s Future Act of 2018, H.R. 4760, 115th Cong., tit. IV, §§ 4402, 4408 (2018); Asylum Reform and Border Protection Act of 2017, H.R. 391, 115th Cong. § 4 (2017).

336. 8 U.S.C. § 1231(b)(3) (prohibiting removal to a country where the individual’s life or freedom is threatened); 8 C.F.R. §§ 208.16-.18 (implementing withholding of removal protection pursuant to the Convention Against Torture). Article 33 of the 1951 Refugee Convention prohibits a state from returning “a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Refugee Convention, supra note 45; see also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, adopted Dec. 10, 1984, 1465 U.N.T.S. 85 (“No State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”); International Covenant on Civil and Political Rights art. 13, adopted Dec. 19, 1966, 999 U.N.T.S. 171 (“An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented
norm of non-refoulement is well-established and has reached the status of *jus cogens* in international law, meaning it is not subject to derogation.\(^{337}\)

Executive policies that prevent noncitizens from applying for asylum may also run afoul of constitutional due process. When Congress grants a statutory right to apply for asylum and instructs an agency to establish procedures to effectuate that right, procedural due process requires that the procedures be fair and are followed.\(^{338}\) Even noncitizens who are technically outside of the United States (for example, waiting to apply for asylum at a port of entry) have certain constitutional rights. In *Boumediene v. Bush*, the Supreme Court found that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism."\(^{339}\) While a full discussion of extraterritoriality is beyond the scope of this Article, suffice it to say that noncitizen asylum seekers who are mere steps from the border and stopped from entering by CBP have a strong claim that the right to due process reaches them.\(^{340}\)

The executive branch is bound to uphold the Constitution and implement the laws enacted by Congress, including laws pertaining to asylum. As the Supreme Court explained in *Youngstown*, "the President’s power to see that the laws are faithfully executed refutes for the purpose before, the competent authority or a person or persons especially designated by the competent authority.").\(^{338}\)


338. See Marincas v. Lewis, 92 F.3d 195, 203 (3d Cir. 1996) (“The basic procedural rights Congress intended to provide asylum applicants ... are particularly important because an applicant erroneously denied asylum could be subject to death or persecution if forced to return to his or her home country.”).

339. 553 U.S. 723, 764 (2008); see also Ibrahim v. Dep’t of Homeland Sec., 669 F.3d 983, 995 (9th Cir. 2012) (“The Supreme Court has held in a series of cases that the border of the United States is not a clear line that separate aliens who may bring constitutional challenges from those who may not.”). The Ninth Circuit has examined three factors in determining the Constitution’s extraterritorial application: (1) the citizenship and status of the claimant, (2) the nature of the location where the constitutional violation occurred, and (3) the practical obstacles inherent in enforcing the claimed right. See, e.g., Rodriguez v. Swartz, 899 F.3d 719, 729 (9th Cir. 2018) (addressing a Fourth Amendment claim).

340. For a more detailed discussion of extraterritoriality in the context of litigation challenging the alleged policy and practice of turning back asylum seekers at port of entry, see Amicus Brief of Immigration Law Professors, supra note 331, at 12-16. See also Eva L. Bitran, Note, Boumediene at the Border? The Constitution and Foreign Nationals on the U.S.-Mexico Border, 49 HARV. C.R.-C.L. REV. 229, 244-47 (2014) (“[T]he United States’ authority over a region need not be as strong as it was in *Boumediene* for rights to adhere, particularly where the degree of interdependence between two countries is so high.”).
the idea that he is to be a lawmaker." The executive does not have the "power to revise clear statutory terms," even if they "turn out not to work in practice." Nor may the executive "decline to follow a statutory mandate or prohibition simply because of policy objections." Yet the executive actions discussed below indicate a concerted effort to do just that.

These actions also undermine the United States' international obligations. In an authoritative advisory opinion, the U.N. High Commissioner for Refugees (UNHCR) ruled that denying admission to asylum seekers at the border violates the principle of non-refoulement, which encompasses the right to "fair and efficient asylum procedures." The advisory opinion stresses that a state must not only prevent asylum seekers' return to danger but must also "adopt a course that does not result in their removal, directly or indirectly, to a place where their lives or freedom would be in danger."

A. Denying the Right to Apply for Asylum

Over one hundred documented cases exist of CBP officers turning away asylum seekers at ports of entry along the U.S.-Mexico border.  

343. City & Cty. of San Francisco v. Trump, 897 F.3d 1225, 1232 (9th Cir. 2018) (quoting In re Aiken Cty., 725 F.3d 255, 259 (D.C. Cir. 2013)).
345. Id para. 8 (emphasis added); see also Jamaa v. Italy, 2012-II Eur. Ct. H.R. 97, 173 (De Albuquerque, J., concurring) ("The prohibition of refoulement is not limited to the territory of a State, but also applies to extraterritorial State action . . . .").
346. See HUMAN RIGHTS FIRST, CROSSING THE LINE: U.S. BORDER AGENTS ILLEGALLY REJECT ASYLUM SEEKERS 1 (2017), https://www.humanrightsfirst.org/sites/default/files/hrf-crossing-the-line-report.pdf ("This report is based on 125 cases of individuals and families wrongfully denied access to U.S. asylum procedures at U.S. ports of entry."); see also Moore, supra note 102 ("[T]hree migrants—a badly sunburned woman, her baby, and a 16-year-old girl . . . . were stopped by two CBP agents, asked for documents, and told they would not be allowed to go further into the United States because of capacity issues."); Robert Moore, At the U.S. Border, Asylum Seekers Fleeing Violence Are Told to Come Back Later, WASH. POST (June 13, 2018), https://www.washingtonpost.com/world/national-security/at-the-us-border-asylum-seekers-fleeing-violence-are-told-to-come-back-later/2018/06/12/779a12718-6e4d-11e8-a6f5-778aca903b83_story.html ("Serlando Pineda Hernandez and his 15-year-old son, Riquelmer, were making their ninth attempt in as many days to reach the port of entry here and apply for asylum. . . . But their path was blocked by two officers who told them that the port of entry was at capacity and couldn't handle asylum applicants."); Debbie Nathan, Desperate Asylum-Seekers Are Being Turned Away by U.S. Border Agents Claiming There's 'No Room,' INTERCEPT (June 16, 2018), https://theintercept.com/2018/06/16/immigration-border-asylum-
CBP officers have prevented people from applying for asylum through misrepresentations, threats and intimidation, verbal and physical abuse, and coercion. Among other things, CBP officers have told asylum seekers that President Trump signed a new law that ended asylum in the United States, that the United States no longer offers asylum, and that Mexicans are not eligible for asylum. In some cases, CBP officers threatened to take away the asylum seekers’ children, call Mexican immigration authorities, or let loose their dogs if the asylum seekers did not leave the port of entry. CBP officers also physically blocked asylum seekers from entering their office, held a gun to at least one individual’s back to make her leave, and physically assaulted others to force them out.

The most common allegation is that CBP officers are claiming they are “at capacity” and cannot handle any more asylum applicants. DHS Secretary Kirstjen Nielsen explained in an interview, “We’re ‘metering,’ which means that if we don’t have the resources to let them in on a particular day, they are going to have to come back.” Similarly, CBP Commissioner Kevin McAleenan stated that asylum seekers arriving at a port of entry “may need to wait in Mexico as CBP officers work to process those already within our facilities.”

348. Id. at 27.
349. Id. at 28.
350. See Moore, supra note 102.
Asylum seekers awaiting processing have had to sleep on international bridges on the Mexico side of the border, exposed to the elements and at risk of violence. While most of these asylum seekers are from Central America, some are also from Mexico, which means they are forced to wait in the same country where they fear persecution.

Between May and June 2018, the number of people admitted at ports of entry plunged by 42%. During this same period, the number of families apprehended between ports decreased only 8%, suggesting that the 42% drop was due not to fewer people trying to reach the United States but to restrictions to entry. Asylum seekers had to wait in line at ports for days or weeks before getting a chance to apply for asylum. CBP officers did not even record who was in line, leaving asylum seekers to do this themselves.

While CBP blames the processing delays on operational constraints, its own description of its capacity calls into question that claim. The largest port of entry is San Ysidro, which, according to CBP, can hold 300 to 800 people, yet CBP processes only 20 to 80 people there per day. Records produced by the government during litigation reveal that nearly half of the space CBP has available for asylum seekers remains unoccupied. Recent statements by DHS

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353. See id.; see also Nathan, supra note 346 ("Even so, the practice of turning immigrants away has suddenly become routine, creating chilling scenes of immigrants and children camped out near the bridges, exposed to sun, wind, and rain, amid make-do bedding, scattered clothing, and trash.").

354. HUMAN RIGHTS FIRST, supra note 346, at 16.


356. Id.

357. See id.

358. See id.


personnel also point clearly towards deterrence, not inadequate capacity, as the real reason for limiting asylum seekers' access to ports of entry.\footnote{361}

While some commentators describe turning back asylum seekers as “a de facto, unofficial policy,”\footnote{362} a class action filed in July 2017 by the nonprofit organization Al Otro Lado and six asylum seekers contends that it is an official policy sanctioned by the Trump Administration.\footnote{363} In addition to discussing the number of cases documented by reputable organizations, the plaintiffs stress that a member of CBP leadership, John Wagner, acknowledged CBP’s plan to “limit the number of migrants entering U.S. [ports of entry] at any given time” in testimony to Congress.\footnote{364} The complaint asserts that this policy of turning back asylum seekers violates the INA, APA, Due Process Clause, and the doctrine of non-refoulement.\footnote{365}

The government filed a motion to dismiss the lawsuit, denying the existence of any official policy but not disputing the documented cases of CBP officers denying people the right to apply for asylum.\footnote{366} Rather, the government pointed out that the “125 alleged denials out of 8,000 appropriate referrals to USCIS” represents just 1.6% of cases handled by 24,000 CBP officers managing 328 ports of entry.\footnote{367} According to the government, the reports on which plaintiffs rely at most demonstrate “uncoordinated and unauthorized actions by a handful of individual officers.”\footnote{368}

\footnote{361. See, e.g., Manny Fernandez et al., The Price of Trump’s Migrant Deterrence Strategy: New Chaos on the Border, N.Y. TIMES (Jan. 4, 2019), https://www.nytimes.com/2019/01/04/us/mexico-wall-policy-trump.html (quoting a DHS official as saying that the Trump Administration’s focus is on “how can we deter, rather than how can we handle”).
362. See B. Shaw Drake & Elizabeth Gibson, Vanishing Protection: Access to Asylum at the Border, 21 CUNY L. REV. 91, 137-39 (2017); see also HUMAN RIGHTS FIRST, supra note 346, at 1 (“The U.S. government is illegally turning away asylum seekers at official land crossings all along the southern border.”).
363. See Complaint for Declaratory & Injunctive Relief, supra note 347.
366. Id. at 12.
367. Id. at 17.}
In August 2018, the district court granted the government’s motion to dismiss in part and denied it in part. The court found that the APA provided the relevant framework for considering the alleged policy, noting that the due process claim expressly incorporated the alleged APA violations. The court found the individual plaintiffs had standing to seek relief under section 706(1) of the APA to compel the defendants to inspect and process them for admissions, as well as to request this relief for a putative class of other asylum seekers who experienced the same failures to act. However, the court found that the complaint failed to state a claim under section 706(2) of the APA regarding an alleged policy. The court found no order or regulation that constitutes or reflects a policy applicable to all CBP officials at ports of entry, nor any evidence of an unwritten policy.

The dispute over whether the Trump Administration or the CBP has any type of policy of denying asylum seekers who present themselves at ports of entry reflects a lack of transparency around the agency’s operations. If a policy exists, it is likely unwritten and based on verbal directives or requests. The Obama Administration, for example, adopted an unwritten, de facto policy of detaining migrant families during the 2014 surge in asylum seekers that was “re-emphasized” after the 2016 presidential election. Based on data showing that the release rate of asylum seekers who crossed at ports of entry plummeted from 80% in 2012 to 47% in 2015, the District Court for the District of Columbia found that an unwritten policy existed, constituting final agency action that allowed judicial review. A similar drop in asylum applications at ports of entry could help establish a policy of denying asylum seekers the right to apply.

370. Id. at 45, 49.
371. Id. at 41.
372. Id.
373. Id. at 50, 52-53; see also 5 U.S.C. § 704 (2012) (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”).
375. Aracely, R., 319 F. Supp. 3d at 123, 149.
376. Id. at 123, 138-39.
The policy of deterrence may extend even beyond asylum seekers themselves to the attorneys and organizer seeking to assist them. In March 2019, a source within DHS leaked information to the press showing that DHS is keeping files and placing passport alerts on certain immigration attorneys, organizers, and journalists involved with asylum seekers. Both the Legal Director and Litigation and Policy Director of Al Otro Lado, the organization that challenged the policy and practice of turning asylum seekers away from ports of entry, were deported from Mexico in early 2019 and told by Mexican officials that a passport alert had been placed on them by a foreign government, which they believe to be United States. This type of harassment and retaliation against individuals working to shed light on violations of asylum seekers’ rights appears intended to deter them from continuing this line of work and compounds the efforts to deter asylum seekers themselves.

B. Criminally Prosecuting Asylum Seekers

Although the government disputes an official policy of turning back asylum seekers at ports of entry, it cannot dispute that former Attorney General Sessions publicly announced a policy of criminally prosecuting all noncitizens who enter the United States illegally, including asylum seekers. While deportation proceedings are technically civil, illegal entry and illegal reentry are criminal offenses that can be prosecuted. Illegal entry is a misdemeanor punishable by up to six months for the first offense and a felony punishable by up to two years for subsequent offenses. Illegal reentry, meaning returning to the United States after being deported, is a felony that can be

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punished by up to ten or twenty years, depending on the defendant’s
criminal history. 380

The Obama Administration focused significant resources on
prosecuting these offenses, particularly felonies. By 2012,
immigration-related prosecutions were twenty-eight times higher than
twenty years earlier. 381 By 2016, over half of all federal prosecutions
were for immigration-related offenses. 382 However, the Obama
Administration generally did not prosecute asylum seekers or first-time
entrants. 383 In fact, a 2015 report by the DHS Office of the Inspector
General warned that referring “asylum seekers for criminal prosecution
may violate U.S. obligations under the Refugee Convention and its
Protocol.” 384

This quickly changed, however, after Trump took office. On
January 25, 2017, days after his inauguration, Trump issued an
executive order instructing the DOJ to make criminal prosecutions for
unlawful entry a “high priority.” 385 In 2017, Attorney General Sessions
instructed federal prosecutors to make “immigration offenses higher
priorities,” target “first-time improper entrants,” 386 and “charge and
pursue the most serious, readily provable offense.” 387 Between April
and May 2017, immigration prosecutions increased by nearly 27%. 388

While some asylum seekers were prosecuted for illegal entry in
2017, this became much more widespread in May 2018, when Sessions
announced a “zero tolerance” policy, stating, “If you cross the
Southwest border unlawfully, then we will prosecute you. It’s that

380. Id § 1326(a)-(b).
381. MICHAEL T. LIGHT ET AL., PEW RESEARCH CTR., THE RISE OF FEDERAL
pewhispanic.org/2014/03/18/the-rise-of-federal-immigration-crimes/.
382. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION NOW 52
PERCENT OF ALL FEDERAL CRIMINAL PROSECUTIONS (2016), https://trac.syr.edu/trareports/
crim/446/.
383. See HUMAN RIGHTS FIRST, THE RISE IN CRIMINAL PROSECUTIONS OF ASYLUM
SEEKERS 1 (2017), https://www.humanrightsfirst.org/sites/default/files/hrf-criminal-prosecution-
of-asylum-seekers.pdf.
384. Id.
386. Memorandum from U.S. Att’y Gen. Jeff Sessions to All Federal Prosecutors
Regarding Renewed Commitment to Criminal Immigration Enforcement 1-2 (Apr. 11, 2017),
387. Memorandum from U.S. Att’y Gen. Jeff Sessions to All Federal Prosecutors
388. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION PROSECUTIONS
simple." He also threatened to prosecute parents traveling with children for smuggling a child. Sessions dispatched thirty-five additional U.S. attorneys and eighteen more IJs to the border to handle the increased workload generated by these prosecutions. He stated that his goal was to prosecute “100 percent” of people who entered without authorization. During the first half of FY2018, 35,787 individuals were prosecuted for immigration violations.

Criminally prosecuting asylum seekers for illegal entry or illegal reentry raises serious concerns under international and U.S. law. Article 31 of the Refugee Convention prohibits imposing “penalties” on refugees “on account of their illegal entry or presence.” The UNHCR has confirmed that such penalties include “being charged with immigration or criminal offences related to the seeking of asylum.”

U.S. law also recognizes this principle of not penalizing asylum seekers for acts related to seeking asylum. For example, the federal regulations provide that asylum seekers should not be fined for document fraud related to their flight from a country, and the Ninth Circuit has held that it is inappropriate to consider manner of entry into the United States as an adverse discretionary factor in adjudicating asylum cases. In A-B-, however, Sessions suggested the opposite, urging IJs

390. Id.
391. Id.
392. Id.
393. Id.
395. Refugee Convention, supra note 45, art. 31.
398. See Gulla v. Gonzales, 498 F.3d 911, 917-19 (9th Cir. 2007) (holding that the IJ abused his discretion in denying asylum based on the asylum seeker’s use of fraudulent documents to reach the United States).
to consider illegal entry as a factor that would support a discretionary denial of asylum. 399

Although prosecuting someone for an immigration offense does not prohibit that person from submitting an asylum application, the underlying purpose of these prosecutions is clearly to deter people from seeking asylum in the United States. Criminal prosecutions discourage asylum applications by frightening already traumatized asylum seekers and placing them in jail. 400 Prosecuting asylum seekers for entering the country illegally is especially wrong if that is the only way they can enter because they are turned away from ports of entry.

Even after the administration stopped criminally prosecuting asylum seekers for illegal entry and reentry, it continued to describe asylum seekers as criminals. For example, DHS Secretary Nielsen criticized the media in November 2018 for portraying the migrant caravan as a sympathetic group composed primarily of women and children, stating that it includes "500 criminals" and "known gang members." 401 CBP Commissioner McAleenan likewise claimed to have "information of participation of over 500 individuals with criminal records as part of the caravan." 402 And President Trump described the caravan as consisting of "bad thugs and gang members" 403 and "stone cold criminals." 404 Such comments seek to build public support for the Administration’s efforts to limit the availability of asylum and for deterrence more generally by portraying asylum seekers as criminals.

399. 27 I. & N. Dec. 316, 345 n.12 (A.G. 2018) ("I remind all asylum adjudicators that a favorable exercise of discretion is a discrete requirement for the granting of asylum and should not be presumed or glossed over solely because an applicant otherwise meets the burden of proof for asylum eligibility under the INA.").
400. HUMAN RIGHTS FIRST, supra note 383, at 4.
C. Separating Parents from Children

While family separation attracted widespread public attention in the spring and summer of 2018, it began long before then. In 2016, under President Obama, staff within the Office of Refugee Resettlement (ORR), part of the U.S. Department of Health and Human Services (HHS), began informally tracking migrant children who had been separated from their parents by DHS.405 In the summer of 2017, ORR observed that the percentage of children who were separated from their parents increased over tenfold from just 0.3% of all unaccompanied minors in late 2016 to 3.6% by August 2017.406 The ORR also noted that many of the separated children were very young and therefore required placement at special facilities.407 The ORR estimates receiving thousands of separated children in this time period, although the exact number remains unknown.408

In April 2018, after the Trump Administration instituted a “zero tolerance” policy, a new, much more visible phase of family separation began. DHS began separating children from their parents when they were apprehended together at the border.409 The parents were placed in the custody of the U.S. Marshalls Service while awaiting prosecution; the children were then treated as unaccompanied minors and transferred to ORR custody.410 They were sent to over a hundred different facilities for children all across the United States.411 The vast majority of these children came from Guatemala (56%) and Honduras (33%).412

Between April and June 2018, the separation of children erupted into a nationwide scandal. President Trump and DHS Secretary Nielsen initially denied having a policy of separating children, but the Administration’s internal documents contradicted that assertion.413

406. Id.
407. Id.
408. Id.
409. Id. at 4.
410. Id.
412. Id.
Accounts emerged of CBP agents separating children as a way to coerce their desperate parents into signing deportation orders. CBP agents also lied to parents, telling them their children would be taken away temporarily for a bath or a doctor’s visit but then sent the children hundreds or thousands of miles away to shelters run by the ORR. Audio recordings and videos of young children crying out for their parents provoked a national outcry.

Once Trump realized the unpopularity of the family separation policy, he blamed Democrats for it, claiming that their “bad legislation” was the problem and that he had no choice in the matter. However, no law required children to be separated from their parents at the border. Trump finally ended the policy of separating children on June 20, 2018, by signing an order that allowed parents to stay in the custody of DHS while being prosecuted for illegal entry and directing DHS to detain families together whenever “appropriate and consistent with the law and available resources.” Shortly thereafter, the CBP announced that it was no longer referring parents for criminal prosecution.

A few days later, on June 26, 2018, a federal judge issued a nationwide injunction in a class action lawsuit filed by the ACLU in February 2018 challenging family separations by DHS as a violation of substantive due process under the Fifth Amendment. The injunction ordered the government to reunite parents with children under five within fourteen days and with all other children within thirty days. It also prohibited ICE from deporting parents without their children unless the parent “affirmatively, knowingly, and voluntarily” agreed to be deported alone.


420. Id. at 1149.

421. Id.
In July 2018, the government provided the court with data showing that it had separated 2654 children from their parents in the spring and summer of that year as a result of the zero-tolerance policy, including over one thousand children under the age of ten and 103 children under the age five.\textsuperscript{422} This data did not include the thousands of children who had been separated from their parents before the zero-tolerance policy went into effect, because the government had not properly tracked the children’s placements.\textsuperscript{423} In addition, parents who had been separated from their children were excluded as class members if the government deemed them to be unfit or to pose a danger to the child, for example because of a criminal history or a communicable disease, or if they voluntarily declined to be reunited with the child.\textsuperscript{424} The ORR also excluded children from the list provided to the court if they were separated from nonparents relatives, such as siblings or grandparents, if they had a fraudulent birth certificate, or if the case file had conflicting or unclear information.\textsuperscript{425}

On August 27, 2018, two months after the injunction was issued, the government reported that 497 children who were class members still remained separated from their parents.\textsuperscript{426} A status report submitted to the court on October 15, 2018, indicated that 120 children were still in custody waiting to be unified and that 125 children had chosen to pursue asylum in the United States even after their parents were ordered deported.\textsuperscript{427} No one knows for sure whether these figures are accurate, as DHS has been unable to provide accurate and complete data regarding family separations,\textsuperscript{428} in part because HSS lacks an integrated data system to track separated families.\textsuperscript{429}

\\textsuperscript{422} See Office of the Inspector Gen., supra note 405, at 1; Family Separation by the Numbers, supra note 411.
\textsuperscript{423} See Office of the Inspector Gen., supra note 405, at 6.
\textsuperscript{424} Id. at 4, 10.
\textsuperscript{425} Id. at 7-8.
\textsuperscript{427} Family Separation by the Numbers, supra note 411.
\textsuperscript{428} Id.
\textsuperscript{429} See Office of the Inspector Gen., supra note 405, at 2. Despite the injunction, family separations continue to occur. The Office of the Inspector General’s report released in January 2019 found that 118 children were separated from their parents between July 1, 2018, and November 7, 2018. It also reported that the proportion of separated children increased between July and November 2018 at a rate two times higher than what the ORR observed in 2016. Id. at 11.
The trauma of separation has severe short- and long-term impacts on children’s mental and physical health. It “disrupt[s] the architecture of a child’s brain” and induces severe stress. Research shows that prolonged separation from parents is associated with higher rates of anxiety and depression, and that immigrant children in shelters may have an increased risk of post-traumatic stress disorder. In fact, some studies have found that family separation is on par with beatings and torture in its impact on mental health. Placing young children in institutional settings also affects their neurobehavioral development, negatively impacting the brain’s prefrontal cortex, which plays a critical role in executive function. The harm of family separation may also result in detachment from family members, relationship difficulties, developmental delays, and diminished cognitive functioning.

Given the cruel and lifelong impact of family separation on children, its use to deter asylum seekers is particularly shocking. Yet the extreme cruelty of the policy is precisely why the administration thought it would be such an effective deterrent. Recent information suggests the scale of separation is even greater than previously thought, indicating that upwards of 5000 children have been taken from their parents since Trump became President. Trump publicly affirmed the goal of deterrence in late 2018, telling reporters at the White House, “If they feel there will be separation, they don’t come.” Such comments indicate that the Administration has not yet abandoned the idea of using...
cruel asylum policies to deter people from exercising their legal right to seek asylum in the United States.

VI. PROTECTION FROM EXECUTIVE OVERREACHING

The three types of executive actions described above—political interference with adjudicators, abuse of the Attorney General review mechanism, and preventing adjudication from taking place—extend the executive’s reach into adjudication in unconventional and deeply troubling ways. These actions not only tread on individual rights but also undermine processes and procedures that Congress established by statute. Furthermore, former Attorney General Sessions’s decisions and revised USCIS guidance conflict with judicial precedents and longstanding interpretations of asylum law. Because these actions raise separation of powers concerns, it is important to consider how the judicial and legislative branches can help cabin executive interference in immigration adjudication. In addition, career staff within the EOIR and the USCIS who are responsible for these adjudications should consider ways for the agency to insulate itself from presidential interference.

A. Judicial Review

Of all the ways to protect against executive overreaching, judicial review is one of the most important, but it is also the most limited. As explained in Part II above, judicial review is limited in the immigration context by the plenary power doctrine when it comes to the admission and exclusion of noncitizens. For noncitizens already in the country, however, courts have greater powers of review. Under a President who pushes the boundaries of executive power, courts must ensure robust protection of the constitutional rights of noncitizens, including due process in credible fear interviews, asylum interviews, and removal proceedings. While the INA also limits judicial review in many types of cases, courts always retain jurisdiction over legal and constitutional questions in appeals challenging removal orders.438

The question of how much deference courts should give to administrative agencies is particularly pressing in the immigration context. Commentators have argued that traditional Chevron deference should not apply in immigration cases for various reasons. Some stress the inconsistencies in the Board’s decisions, while others focus on the

Attorney General’s lack of immigration expertise, or the unique role of international law in asylum cases that sets them apart from most administrative adjudications.\textsuperscript{439} To the extent that \textit{Chevron U.S.A. Inc. v. Natural Resources Defense Council} applies, the first part of the test, which asks whether Congress has spoken directly to the issue, becomes especially important under an aggressive executive whose policies may conflict with rights and procedures established in the INA.\textsuperscript{440}

The USCIS guidance that instructs asylum officers to ignore federal court precedents that conflict with \textit{A-B-} also raises questions about the application of \textit{National Cable & Telecommunication Ass'n v. Brand X Internet Services}, which held that an agency’s interpretation prevails even when a court has previously adopted a contrary interpretation.\textsuperscript{441} But the judiciary, not the agency, must decide whether \textit{Brand X} applies in any given situation. The United States Court of Appeals for the Tenth Circuit specifically held that an agency’s interpretation is not “legally effective” until a court, in deference to the agency, overrules itself.\textsuperscript{442} Then-Judge Gorsuch wrote both the majority and a concurring opinion in that case, arguing against the \textit{Chevron} doctrine. His concurrence describes the “elephant in the room” as the possibility of constitutional separation of powers problems with both \textit{Chevron} and \textit{Brand X}, and it warns against “abdication of the judicial duty.”\textsuperscript{443} At a minimum, courts should be wary of an agency advising asylum officers to apply \textit{Brand X} as a blanket rule. Given that \textit{Brand X} involves complex administrative law questions far beyond the training of asylum officers who do not even need to be lawyers, it is highly problematic for the agency to instruct them to ignore federal precedents.

The executive actions discussed above also provide good reasons for the judiciary to be cautious in exercising the heightened deference traditionally given to the President and administrative agencies during national emergencies.\textsuperscript{444} The Trump Administration has attempted to

\textsuperscript{440} See 467 U.S. 837, 842 (1984).
\textsuperscript{441} See 545 U.S. 967, 974, 1002-03 (2005).
\textsuperscript{442} Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1145 (10th Cir. 2016).
\textsuperscript{443} Id. at 1149, 1152 (Gorsuch, J., concurring).
\textsuperscript{444} Adrian Vermeule, \textit{Our Schmittian Administrative Law}, 122 HARV. L. REV. 1095, 1097 (2009) (“Administrative law is built around a series of open-ended standards or adjustable parameters—for example, what counts as ‘arbitrary’ or ‘unreasonable,’ whether evidence is ‘substantial,’ whether a statute is or is not ‘clear’—that courts can and do adjust during perceived emergencies to increase deference to administrative agencies.”).
manufacture an immigration “crisis” in order to justify the extreme policies discussed above.\textsuperscript{445} But the government’s own data undercuts this claim.\textsuperscript{446} Furthermore, recidivism rates—the percentage of individuals apprehended by Border Patrol more than once within a fiscal year—have been dropping over the past five years.\textsuperscript{447}

If one drills down into Trump’s assertion of an immigration crisis, it appears that the claim depends less on the number of immigrants entering the country than the type of people coming.\textsuperscript{448} The concern is not really about a criminal threat, as less than three percent of individuals apprehended by Border Patrol are criminals or gang


\textsuperscript{446} See Anderson, supra note 445.


\textsuperscript{448} A study by the Public Religion Research Institute and the Atlantic based on surveys conducted before and after the 2016 election found that the best predictor of support for Trump was fear about immigrants and cultural displacement, even more than economic and other concerns. Daniel Cox et al., \textit{Beyond Economics: Fears of Cultural Displacement Pushed the White Working Class to Trump}, PUB. RELIGION RES. INST./ATLANTIC (May 9, 2017), https://www.prri.org/research/white-working-class-attitudes-economy-trade-immigration-election-donald-trump/. These supporters included white, working class voters who felt “like a stranger in their own land” and believed that “the American way of life needs to be protected from foreign influence.” Id. Additionally, those who favored deporting more unauthorized immigrants were over three times as likely to vote for Trump compared to those who did not share these views. Id.; see also Emma Green, \textit{It Was Cultural Anxiety That Drove White, Working-Class Voters to Trump}, ATLANTIC (May 9, 2017), https://www.theatlantic.com/politics/archive/2017/05/white-working-class-trump-cultural-anxiety/525771/ (“Besides partisan affiliation, it was cultural anxiety—feeling like a stranger in America, supporting the deportation of immigrants, and hesitating about educational investment—that best predicted support for Trump.”).
members. Rather, the real fear is a racial and cultural threat. As a candidate, Trump promised to enact a "total and complete shutdown of Muslims entering the United States." As President, he said he would prefer immigrants from Norway (a Christian, white, wealthy country) instead of individuals from "shithole" countries like Haiti, El Salvador, and African nations. When asked about immigration to Europe, Trump stated, "I think they better watch themselves because you are changing culture ...

He described cultural change as "a very negative thing for Europe," stressing that "[w]e don’t want what is happening with immigration in Europe to happen with us!" Such comments resonate with some white Americans who feel threatened by the prospect of becoming a minority race.

The plenary power’s deep roots in racial animus, beginning with the Chinese Exclusion Case, indicate a close connection between an expansive view of executive immigration powers, limited judicial review, and a perceived crisis created by a racial or cultural threat.

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449. CBP Enforcement Statistics FY2018, supra note 447. Of the 310,531 individuals that Border Patrol apprehended nationwide in FY2017, only 8531 (2.7%) had criminal convictions. In the first part of FY2018 (Oct 1, 2017-Aug. 31, 2018), only 1.7% of all apprehensions by Border Patrol were convicted criminals. The number of gang members apprehended is even smaller, just 536 people in FY2017 (.0017% of all apprehensions).


452. Collinson, supra note 36.

453. Wagner, supra note 39. Similarly, after tweeting (falsely) that "[c]rime in Germany is way up," he continued "[b]ig mistake made all over Europe in allowing millions of people in who have so strongly and violently changed their culture!" Donald J. Trump (@realDonaldTrump), TWITTER (June 18, 2018, 8:02 AM EST), https://twitter.com/realdonaldtrump/status/1008696508697513985.

454. Donald J. Trump (@realDonaldTrump), TWITTER (June 18, 2018, 8:04 AM EST), https://twitter.com/realdonaldtrump/status/1008696952559734787.


456. See Gabriel J. Chin, Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration, 46 UCLA L. REV. 1, 10 (1998) ("The plenary power doctrine cases may have been decided as they were because of the race of the aliens involved."); Kevin R. Johnson, Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness, 73 IND. L. J. 1111, 1115 (1998) ("Besides
Giving deference to executive immigration actions just because the President declares a national crisis, without looking deeper to see if there is any objective evidence of a crisis or if it is rooted in racial or religious animus, risks eroding our most deeply held constitutional values.

Courts also should not be so blinded by deference that they fail to intervene when the President’s actions conflict with statutes enacted by Congress. The Fifth Circuit found that President Obama had gone too far in adopting Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) as a policy, reasoning that this impermissibly suspended statutory requirements. An evenly divided Supreme Court did not address the issue further. If courts were willing to reject DAPA as being inconsistent with the statute, then they should also carefully consider whether Trump’s policies conflict with the statutory rights and procedures surrounding credible fear interviews and asylum applications.

B. Legislative Reform

Legislative reforms can also help protect against executive overreaching in immigration adjudication. To protect against the problem of political interference with adjudicators, discussed in Part III above, Congress can restructure the immigration court system. Proposals to do this go back decades but still have not been implemented. The American Bar Association, and the Federal Bar Association all support such restructuring. In April 2018, the Senate Judiciary Committee’s Subcommittee on Border Security and Immigration held a hearing concerning the immigration court system that considered several options for increasing the independence of

analyzing the history surrounding legal exclusions in the immigration laws, I argue that the exclusionary laws reveal majority sentiment about racial minorities in the United States.”).


IJs. These options included creating an immigration court with trial and appellate tribunals outside of the executive branch, creating a new and independent agency within the executive branch that has trial-level IJs and a review board, and designing a hybrid approach that places trial-level IJs in an independent administrative agency within the executive branch and an appellate tribunal outside the executive branch.

The Federal Bar Association’s proposal, endorsed by the National Association of Immigration Judges, is to create an Article I United States Immigration Court, with trial level and appellate judges. The appellate judges would be appointed by the President and confirmed by the Senate, while the trial judges would be appointed by the appellate judges. Final decisions of the appellate judge would be subject to circuit court review. If adopted, this proposal would dramatically increase the independence of immigration adjudicators and help ameliorate some of the forms of executive overreaching discussed above.

Another legislative reform that would curb executive overreaching is to impose more constraints on Attorney General review. Procedural constraints could include requiring the Attorney General to give notice to the parties of the issues that will be addressed, as well as an opportunity to submit briefs. In addition, Congress could constrain the Attorney General’s power to intervene in a case. For example, Congress could require the Attorney General to wait until the Board has had an opportunity to address an issue before utilizing the review mechanism. Congress could also limit the Attorney General’s review power to issues that were raised by the parties below and addressed by the Board, thereby preventing the Attorney General from raising and addressing brand new issues. Most importantly, Congress could specify that the Attorney General review mechanism should only be used in cases that require important policy choices and that it should not be used to curtail immigrants’ procedural rights or promote prosecution over fair adjudication. Although there is no bright line between law and policy, relevant statutory language could help rein in an overly aggressive Attorney General.

460. Statement of J. A. Ashley Tabaddor, supra note 8, at 12.
461. Id.
462. Id.
463. Id.
An even more specific suggestion is for Congress to amend the INA to include a private right of action that authorizes asylum seekers to enforce the right to apply for asylum. The INA currently includes a provision explicitly stating that no such private right of action exists. Creating a private right of action could help asylum seekers legally challenge executive branch policies and procedures that prevent them from applying. A private right of action would also help establish a constitutionally protected interest in asylum for noncitizens outside of the United States that could serve as the basis for a procedural due process claim. This would help ensure that the population of asylum seekers arguably most vulnerable to abuse—those denied admission to the United States—are not deprived of redress for violations of the rights Congress has given them.

Finally, Congress should address the enormous disparity in funding for ICE’s immigration enforcement operations versus the EOIR’s adjudicative operations. Statutory and due process violations are bound to result when the courts cannot keep up with the number of noncitizens being apprehended and placed in deportation proceedings. Increased funding for the EOIR would support hiring more IJs, which would relieve the pressure to meet case completion quotas and help ensure that expedience does not result in the unjust denial of cases involving life-or-death decisions.

464. 8 U.S.C. § 1158(d)(7) (2012) (“Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.”).
465. See, e.g., L.M. v. Johnson, 150 F. Supp. 3d 202, 209 (E.D.N.Y. 2015) (holding that asylum seekers could not enforce the timelines in the INA for asylum interviews through mandamus because the statute denied a private right of action); Gonzalez ex rel. Gonzalez v. Reno, 86 F. Supp. 2d 1167, 1187-88 (S.D. Fla. 2000), aff’d, 212 F.3d 1338 (11th Cir. 2000) (holding that the asylum provisions established by Congress do not create any constitutionally protected interests on which a noncitizen outside the United States may base a procedural due process claim).
466. See Charles Ellison, Extending Due Process Protections to Unadmitted Aliens Within the U.S. Through the Functional Approach of Boumediene, 3 CRIT. 1, 20-25 (2010) (discussing the problems that arise for unadmitted noncitizens due to the lack of a private right of action).
C. Agency Transparency and Self-Insulation

While the judicial and legislative branches provide checks on executive power, career staff in the agencies directly involved in immigration adjudication can also play an important role in protecting against presidential influence. One of the most important things agencies can do in this regard is to increase transparency. As noted above, the USCIS guidance on applying A-B- was shrouded in secrecy and did not go through normal channels, which undermined public confidence. Simply disclosing how such guidance comes about, including what role, if any, presidential directives played, would be a step towards greater transparency and accountability. Similarly, greater transparency about why and how training materials for asylum officers are revised, especially when those revisions heighten legal standards, would increase accountability.

Ultimately, the process that executive leadership uses to exert influence may be more relevant than whether the executive leadership exerted influence in determining whether an action is permissible. The substance of the influence is also important. For example, if the President or Attorney General communicated a desire to curtail the procedural rights of asylum seekers or adopted other policy choices inconsistent with the INA, then it would be appropriate for the agency to refuse to follow those directives.

In addition to promoting transparency, agencies can curb executive overreach into adjudication by adopting measures that help insulate the agency from presidential control. Self-insulation benefits

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While the DOJ has been hiring more IJs, it has not kept pace with the workload. See Benson & Wheeler, supra note 18, at 6, 24-30.

469. See Kate Andrias, The President’s Enforcement Power, 88 N.Y.U. L. Rev. 1031, 1124 (2013) ("[P]ublic disclosure of enforcement policy decisions is essential."); Kathryn A. Watts, Controlling Presidential Control, 114 Mich. L. Rev. 683, 734-40 (2016) (arguing that transparency-enhancing mechanisms provide one way to curb presidential control); cf. Jennifer Nou, Subdelegating Powers, 117 Colum. L. Rev. 473, 502 (2017) ("Another strategy agency heads can use to make their subdelegations more credible is to make them more transparent.").

470. Cristina M. Rodriguez, Constraint Through Delegation: The Case of Executive Control over Immigration Policy, 59 Duke L.J. 1787, 1826 (2010) ("[T]hough complete insulation from political control may be unattainable (and probably also undesirable because it would eliminate accountability), the structure of an independent agency at least enables tensions between political actors to keep politically motivated decisionmaking at bay.").

471. See Watts, supra note 469, at 731-32 (stressing the importance of a transparent process).

472. Id. at 731 ("[T]he distinguishing factor between permissible and impermissible considerations should not be the source of the influences, but rather the substance of the influences and the process used to exert the influences.").
not only the noncitizens whose cases are being adjudicated, but also the agency. One of the biggest benefits for the agency is stability.\textsuperscript{473} The EOIR and the USCIS have grappled with major fluctuations in policies and priorities from one administration to the next, including from Obama to Trump. In fact, one of the reasons for the enormous backlog of cases in immigration court is shifting immigration priorities from one administration to the next, which requires judges to repeatedly change which cases take priority.\textsuperscript{474} Internal policies that allow the EOIR to resist short-term political pressures in order to preserve long-term stability would help protect against executive overreaching and serve the public interest.

An agency such as the EOIR, whose responsibility is fair adjudication, should also carefully consider its relationship with ICE, whose responsibility is enforcement. The EOIR cannot be expected to further the enforcement goals of ICE, or DHS more generally. In fact, the main reason that the EOIR is not within DHS is to avoid competing internal goals. But the close relationship that these agencies currently share, and the expectation of cooperation communicated through executive leadership, create significant conflicts of interest.\textsuperscript{475} Adopting internal policies that help insulate the EOIR from this influence would protect against undue influence.

Finally, agencies should consider the cost of litigation in deciding whether to adopt policies that help insulate them from presidential control. When the executive becomes too aggressive and interferes in adjudication, it increases the risk of litigation. Indeed, each of the policies to prevent asylum adjudication discussed in Part V above has resulted in a class action lawsuit against executive leadership. The decisions by former Attorney General Sessions discussed in Part IV will also likely lead to numerous direct appeals of removal orders in federal appellate courts. This risk of litigation creates significant costs for agencies and the executive branch in general.\textsuperscript{476} Even if the agency

\textsuperscript{473} Rachel E. Barkow, \textit{Insulating Agencies: Avoiding Capture Through Institutional Design}, 89 Tex. L. Rev. 15, 24 (2010) (explaining that the desire for long-term stability has long motivated agencies to insulate themselves from political changes in Congress or the executive branch).

\textsuperscript{474} Statement of J. A. Ashley Tabaddor, \textit{supra} note 8, at 3-4.

\textsuperscript{475} See Barkow, \textit{supra} note 473, at 51 ("Even if a single agency does not have competing internal goals, conflict can emerge from the agency's relationship with a separate agency that is looking out for a different interest.").

ultimately prevails, an enormous amount of time and resources go into litigation. For example, although Trump prevailed in the travel ban case, it took three versions of the ban and defending multiple lawsuits in multiple circuits all the way up to the Supreme Court, draining resources from the White House, the DOJ, DHS, and the Department of State. Agencies with limited resources therefore have much to gain from adopting internal policies that protect the agency from presidential interference that leads to costly litigation.

VIII. CONCLUSION

An unconventional President like Donald Trump, with strong views on immigration courts and the asylum process, forces us to consider how much presidential interference, if any, is tolerable in this area. We can no longer assume that the executive will refrain from influencing the outcomes of individual cases. In order to explore the border between permissible and impermissible actions, this Article has explored three ways that President Trump and his appointees have influenced immigration adjudication. Of the three, politicized interference with adjudicators is the clearest transgression, as it undermines fundamental beliefs in a neutral and independent decision-maker. Using the Attorney General review process to curtail procedural rights and promote prosecution also interferes in adjudication, although the lines between law, policy, and enforcement are notoriously difficult to draw. Finally, adopting policies or practices that prevent adjudication represent the most attenuated form of interference discussed here, but it is also one of the most dangerous. Collectively, these forms of executive interference in immigration adjudication threaten to dismantle the U.S. asylum system established by Congress. Unless courts, Congress, and career agency staff check presidential power when it interferes in adjudication, asylum seekers risk being swiftly deported by biased adjudicators without due process.