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The President's Immigration Courts

Catherine Y. Kim
University of North Carolina School of Law, cykim@email.unc.edu

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ABSTRACT

Scholars have long documented the expansion of White House influence over agency decision-making; for at least the past quarter-century, presidential control has become the central feature of federal regulatory governance. Until recently, such influence was understood to target the performance of purely executive and legislative functions by agencies; commentators generally assumed that political operatives refrained from interfering in agencies' performance of adjudicative functions. The Trump Administration has cast doubt on that assumption, deploying a series of reforms designed to reshape administrative adjudication in our nation's immigration courts. This Article evaluates these emerging tools of political influence and their implications for the ongoing debate over the legitimacy of presidential administration.

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INTRODUCTION

Over eleven million noncitizens reside in the United States without authorization, either because they entered without inspection or because they overstayed their visas.[1] Additionally, an estimated 1.9 million noncitizens—the majority of whom hold lawful immigrant status—are subject to deportation based on post-entry conduct.[2] President Trump has placed the deportation of "illegals" at the center of his policy agenda, staking much of his political future on the ability to remove these individuals from the country.[3] One of his administration's core strategies has been aimed at "transforming [the] institutional culture and infrastructure" of our nation's immigration courts.[4]

These administrative courts, housed within the Department of Justice Executive Office for Immigration Review (EOIR),[5] are staffed by "immigration judges"[6] congressionally vested with authority to adjudicate whether a given noncitizen is "inadmissible" or "deportable,"[7] and if so, whether the individual nonetheless is eligible for, and warrants, discretionary relief from removal.[8]

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[1] Jeffrey S. Passel & D'Vera Cohn, *Unauthorized Immigrant Population Stable for Half a Decade*, PEW RES. CENTER (Sept. 21, 2016), http://www.pewresearch.org/fact-tank/2016/09/21/unauthorized-immigrant-population-stable-for-half-a-decade/ (estimating 11.1 million unauthorized immigrants residing in the U.S. as of 2014).

[2] Muzaffar Chishti & Michelle Mittelstadt, *Unauthorized Immigrants with Criminal Convictions: Who Might Be a Priority for Removal?* MIGRATION POL'Y INST. (Nov. 2016), https://www.migrationpolicy.org/news/unauthorized-immigrants-criminal-convictions-who-might-be-priority-removal (estimating 1.9 million noncitizens as removable criminal aliens, including approximately 820,000 unauthorized aliens).

[3] *See infra* Section II.A.

[4] Press Release, U.S. Dep't of Justice, Backgrounder on EOIR Strategic Caseload Reduction Plan, https://www.justice.gov/opa/press-release/file/1016066/download.

[5] 6 U.S.C. § 521 (2012) (recognizing the Executive Office for Immigration Review). For descriptions of adjudication within immigration courts, see U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: AN AGENCY GUIDE 2 (2017) [hereinafter EOIR: AN AGENCY GUIDE], https://www.justice.gov/eoir/page/file/eoir_an_agency_guide/download; AM. BAR ASS'N COMM'N ON IMMIGRATION, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL CASES 1–17 (2010) [hereinafter ABA, REFORMING THE IMMIGRATION SYSTEM], https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.authcheckdam.pdf; Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501, 1505 (2010); Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 ADMIN. L. REV. 647, 669 (2008) (examining creation of new legal rules through immigration adjudication).

[6] 8 U.S.C. § 1101(b)(4) (2012) (defining "immigration judge").

[7] 8 U.S.C. § 1229a(a)(1) (2012) (delegating to immigration judges the power to adjudicate inadmissibility or deportability in removal proceedings); 8 U.S.C. § 1182(a) (2012) (setting forth grounds for inadmissibility); 8 U.S.C. § 1227(a) (2012) (setting forth grounds for deportability).

[8] The Immigration and Nationality Act provides an array of discretionary forms of relief from removal. *See, e.g.*, 8 U.S.C. § 1158(b)(1)(A) (2012) (setting forth statutory prerequisites for discretionary grants of asylum); 8 U.S.C. § 1182(h) (2012) (setting forth prerequisites for discretionary waivers of crime-based inadmissibility); 8 U.S.C. § 1229b (2012) (setting forth prerequisites for discretionary cancellation of removal).

These agency officials in many cases also decide whether a detained alien may be released pending the outcome of removal proceedings.[9] In fiscal year 2016, over 300,000 new proceedings were filed in immigration courts, to be adjudicated by one of approximately 330 immigration judges sitting in 58 courts across the nation.[10] For millions of individuals facing deportation, immigration courts are the final arbiter to determine whether they will be removed from, or permitted to remain in, the United States.[11]

Immigration courts have long been the subject of criticism from both the right and the left.[12] Commentators have documented vast disparities in case

See generally Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMM. L.J. 611, 612, 624, 640 (2006) (discussing various forms of discretionary authority within immigration system).

[9] Congress has provided that certain noncitizens are subject to mandatory detention pending removal proceedings. *See* 8 U.S.C. § 1226(c) (2012) (noncitizens subject to crime-based removal); 8 U.S.C. § 1225(b) (2012) (arriving or recently-arrived noncitizens without documentation or with fraudulent documents); 8 U.S.C. § 1226a(a)(1) (2012) (suspected terrorists). For noncitizens exempt from these provisions, detention decisions are made in the first instance by the enforcement officers and prosecutors within the Department of Homeland Security. 8 C.F.R. §§ 236.1(b)(1)–(2), 287.5(a)–(c) (2018). Once charges have been filed in immigration court, a detained alien may request a bond rehearing before the immigration judge. 8 C.F.R. §§ 236.1(d)(1), 1003.19(a)–(f) (2018). For an empirical analysis of bond determinations made in immigration courts, see Emily Ryo, *Detained: A Study of Immigration Bond Review*, 50 L. & SOC'Y REV. 117, 144 (2016) [hereinafter *Detained Study*].

[10] U.S. DEP'T OF JUSTICE, EXEC. OFF. FOR IMMIGR. REV., FY 2016 STATISTICS YEARBOOK A2–A3 (2017) [hereinafter EOIR 2016 YEARBOOK], https://www.justice.gov/eoir/page/file/fysb16/download; *Office of the Chief Immigration Judge*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/office-of-the-chief-immigration-judge (last visited Aug. 20, 2018).

[11] Not all aliens subject to removal are entitled to a formal removal proceeding before an immigration judge. The Immigration and Nationality Act provides that certain arriving aliens and recent entrants without documentation or with fraudulent documents, and certain noncitizens posing national security risks, may be subject to "expedited removal," in which a summary and final order of removal is entered not by an immigration judge but rather by an enforcement officer within the Department of Homeland Security. 8 U.S.C. § 1225(b)(1)(A)(i), (c)(1) (2012); *see* Ebba Gebisa, *Constitutional Concerns with the Enforcement and Expansion of Expedited Removal*, 2007 U. CHI. LEGAL F. 565, 567, 576 (2007). Formal removal proceedings may also be denied to noncitizens without legal permanent resident status who have been convicted of an "aggravated felony." 8 U.S.C. § 1228(b) (2012) (providing that the Attorney General may develop truncated removal procedures for such noncitizens); *see also* 8 U.S.C. § 1101(a)(43) (2012) (defining "aggravated felony"); NAT'L IMMIGR. PROJECT OF THE NAT'L LAWS. GUILD, PRACTICE ADVISORY: ADMINISTRATIVE REMOVAL UNDER 238(b) 1 (Feb. 16, 2017), https://immigrantdefenseproject.org/wp-content/uploads/practice-advisory-administrative-removal-under-238b.pdf (describing administrative removal procedures for such noncitizens).

[12] The federal courts of appeals have been particularly critical. *See, e.g.*, Huang v. Gonzales, 453 F.3d 142, 148 (2d Cir. 2006) ("The hearings included several instances of questioning by the [immigration judge] that were at least inappropriate and at worst indicative of bias against Chinese witnesses."); Cham v. Att'y Gen. of the U.S., 445 F.3d 683, 686 (3d Cir. 2006) ("The case now before us exemplifies the 'severe wound . . . inflicted' when not a modicum of courtesy, of respect, or of any pretense of fairness is extended to a petitioner and the case he so valiantly attempted to present. Yet once again, under the 'bullying' nature of the immigration judge's questioning, a petitioner was ground to bits."); Benslimane v. Gonzales, 430 F.3d 828, 830 (7th Cir. 2005) (Posner, J.) (concluding that immigration court adjudication "has fallen below the minimum standards of legal justice"); Wang v. Att'y Gen. of the U.S., 423 F.3d 260, 269 (3d Cir. 2005) ("The tone, the tenor, the

outcomes,[13] staggering processing times and backlogs,[14] and an overall lack of fair and meaningful deliberation.[15] Unlike prior reform proposals,[16] however, the Trump Administration has sought to expand its political control over these courts.[17] Over the past year and a half, under the tenure of Attorney General Jeff

disparagement, and the sarcasm of the [immigration judge] seem more appropriate to a court television show than a federal court proceeding."); Recinos De Leon v. Gonzales, 400 F.3d 1185, 1193 (9th Cir. 2005) ("The [immigration judge] opinion in this case is extreme in its lack of a coherent explanation."). *See generally* Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 97 TEX. L. REV. (forthcoming 2018) (manuscript at 15, 24), https://scholarship.law.upenn.edu/faculty_scholarship/1951/ (documenting circuit court criticism of immigration courts); Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1645–46, 1648–49 (2010) (documenting widespread criticism of immigration courts).

[13] Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 16, 30, 47, 53–54 (2015) (noting disparities based on whether noncitizen was represented by counsel); Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 372 (2007) (documenting disparities in rates of granting asylum applications); Ryo, *Detained Study*, *supra* note 9 (documenting disparities in rates of granting bond and amounts of bond).

[14] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 25 (2017) [hereinafter GAO 2017 REPORT]; Lenni B. Benson & Russell R. Wheeler, *Report for the Administrative Conference of the United States: Enhancing Quality and Timeliness in Immigration Removal Adjudication* 24–25, 27–29 (2012), https://www.acus.gov/report/immigration-removal-adjudication-report; BOOZ ALLEN HAMILTON, LEGAL CASE STUDY: SUMMARY REPORT FOR THE DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW 3, 19, 21, 25 (2017), https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/immigration_judge_performance_metrics_foia_request_booz_allen_hamilton_case_study.pdf.

[15] *See, e.g.,* Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 611, 624, 627, 632 (2009) (criticizing practices diverting noncitizens from formal removal proceedings); Jennifer Lee Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C. L. REV. 475, 504 (2013) (criticizing practice of obtaining waivers of right to removal proceedings); John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 29–32, 76 (2005) (criticizing reforms to streamline decision-making of immigration courts at the administrative appeals level).

[16] For proposals to reform immigration adjudication, see Legomsky, *Restructuring Immigration Adjudication*, *supra* note 12, at 1686 (proposing creation of new Article III immigration appellate court); Ramji-Nogales et al., *supra* note 13, at 380–87 (recommending various reforms to immigration courts and Board of Immigration Appeals); ABA, REFORMING THE IMMIGRATION SYSTEM, *supra* note 5, at 6-4 (proposing systemic restructuring of immigration adjudication); BOOZ ALLEN HAMILTON, *supra* note 14, at 18–26 (setting forth various recommendations including expanded hiring and training of immigration judges).

[17] Attempts to politicize immigration court proceedings are not unprecedented. *See* U.S. DEP'T OF JUSTICE, OFFICE OF PROF'L RESPONSIBILITY AND OFFICE OF THE INSPECTOR GEN., AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 137 (2008) [hereinafter DOJ INSPECTOR GEN. REPORT], https://oig.justice.gov/special/s0807/final.pdf (finding that hiring within EOIR was made on the basis of political affiliation in violation of law and Department policy); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 372–74 (2006) [hereinafter Legomsky, *War on Independence*] (describing evisceration of decisional independence of immigration judges); Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. BULL. 129, 143–44 (2016–2017); *cf.* Alberto R. Gonzales & Patrick Glen, *Advancing Executive*

Sessions, the Trump Administration has eliminated immigration judges' authority to grant relief from removal in the form of administrative closure; altered longstanding agency precedent regarding the availability of asylum; sought to mandate the detention of virtually all noncitizens pending removal proceedings; engaged in an aggressive hiring plan to recruit new judges; and implemented supervisory mechanisms including performance metrics to expedite case processing and increase rates of removal.[18] These reforms cast doubt on the conventional narrative within administrative law scholarship maintaining that while the White House has expanded control over various aspects of the regulatory state, it refrains from interfering in administrative adjudications.[19]

Whatever one's substantive policy preferences—whether one believes that we should be deporting more or fewer noncitizens from our country—these developments raise fundamental concerns regarding the legitimacy of presidential control over administrative adjudications more generally.[20] The increased politicization of agency adjudications raises a host of thorny questions about the extent to which such proceedings should be insulated from political

Branch Immigration Policy Through the Attorney General's Review Authority, 101 IOWA L. REV. 841, 896–97 (2016) (endorsing such political control).

[18] *See infra* Section II.C.

[19] *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2306 (2001) (observing expansion of presidential control over agency decision-making but maintaining that such control does not reach administrative adjudications); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1211 (2013) [hereinafter Vermeule, *Agency Independence*] (asserting existence of a "network of tacit unwritten conventions" functioning to "protect the independence of" federal agencies engaged in adjudication). *But see* Harold J. Krent, *Presidential Control of Adjudication Within the Executive Branch*, 65 CASE WEST. L. REV. 1083, 1091–1105 (2015) (describing mechanisms through which the President may influence agency adjudications).

[20] Evidence of a growing politicization of agency adjudications is not limited to the immigration context. The Administrative Conference of the United States (ACUS) recently published a report surveying adjudicators' susceptibility to political influence across the administrative state. *See* KENT BARNETT ET AL., NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES: STATUS, SELECTION, OVERSIGHT, AND REMOVAL (2018) [hereinafter NON-ALJ ADJUDICATORS] (surveying lack of protections from political influence in agency adjudicators across the administrative state), https://www.acus.gov/sites/default/files/documents/Non-ALJ%20Draft%20Report_2.pdf. Scholars have also documented bias and political interference in adjudications within particular agencies. *See* Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 818 (2013) (noting administrative efforts to interfere in Social Security Administration adjudications); Christina L. Boyd & Amanda Driscoll, *Adjudicatory Oversight and Judicial Decision Making in Executive Branch Agencies*, 41 AM. POLS. RES. 569, 570–71 (2013) (assessing political control over adjudications within the Department of Agriculture); Krent, *supra* note 19, at 1110–14 (examining political oversight in SSA adjudications); Robert R. Kuehn, *Addressing Bias in Administrative Environmental Decisions*, 37 J. NAT'L ASS'N ADMIN. L. JUDICIARY 693, 699–700, 774, 781–82 (2017) (examining claims of political bias in EPA adjudications); Amy Elizabeth Semet, An Empirical Examination of Adjudications at the National Labor Relations Board 184 (2015) (unpublished dissertation) (on file with Columbia University) (describing political interference in NLRB adjudications), https://academiccommons.columbia.edu/catalog/ac:189982.

influence. Commentators often assert that presidential control over agency adjudications would be normatively, if not constitutionally, problematic.[21] This Article asserts that the normative calculus is somewhat more complicated, implicating a constellation of often-competing goals including individual fairness, democratic accountability, accuracy, efficiency, and fidelity to separation-of-powers principles.[22] It proceeds as follows. Part I briefly recounts the rise of presidential control over agency decision-making and the conventional assumption that such control does not extend to agency adjudications. Part II documents evidence to rebut that assumption, identifying a series of recent reforms designed to shift outcomes in immigration adjudication. Part III identifies the legal norms at stake in the politicization of agency adjudications and evaluates the recent reforms to removal proceedings on the basis of these metrics.

I. THE CONVENTIONAL ACCOUNT OF PRESIDENTIAL CONTROL

Federal agencies occupy a special place in our constitutional system.[23] Formally, they are constituent parts of the Executive Branch serving under the

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[21] *See* Barnett, *supra* note 20, at 816 (noting that limited independence of ALJs "raises impartiality, and thus due process, concerns"); Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 1263, 1300 (1962) [hereinafter Friendly, *The Federal Administrative Agencies*] ("Everyone, including the presidential activists, seems to agree that 'the outcome of any particular adjudicatory matter is . . . as much beyond . . . [the President's] concern . . . as the outcome of any cause pending in the courts . . . .'") (quoting JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 33 (1960) (alterations in original)); Kagan, *supra* note 19, at 2363 (noting that presidential control over agency adjudications "would contravene procedural norms and inject an inappropriate influence into the resolution of controversies"); Krent, *supra* note 19, at 1084 (acknowledging President's inherent authority to manage agency adjudications but asserting that "political control over adjudication seems anathema to rights of litigants asserting claims against the government itself"); *see also* Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1744 (2009) (noting that presidential control over agency actions may compromise democratic accountability); Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 71–72 (2017) [hereinafter Metzger, *The Administrative State Under Siege*] (arguing that checks on presidential control over agencies are constitutionally required). *But see* Gonzales & Glen, *supra* note 17, at 896–97 (extolling political control over immigration adjudication); James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE F. L. REV. 1191, 1200, 1234 (2006) (maintaining that administrative judges should be impartial, but not politically independent).

[22] *See* Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The* Déjà vu *of Decisional Disparities in Agency Adjudication,* 60 STAN. L. REV. 475, 481 (2007) ("There is an obvious tension between the oversight that promotes consistency and accuracy and the decisional independence of agency adjudicators. This tension has bedeviled administrative law from its inception."); Legomsky, *War on Independence*, *supra* note 17, at 390 (noting tension between decisional independence and political accountability); Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2487 (2017) (endorsing "marginalist" approach to optimize a plurality of competing values).

[23] *See generally* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 579 (1984).

President.[24] But Congress is responsible for creating agencies and delegating their authority,[25] and the federal courts play a crucial role in policing administrative exercises of that authority.[26]

Through time, theorists have developed a series of models to describe how agencies are controlled. Prior models conceptualized agencies as primarily agents of Congress, while others emphasized the extent to which they are subject to control by federal courts or even non-governmental interest groups.[27] Under the currently prevailing model, the "presidential control model," the White House and its political appointees are understood to be the primary drivers of agency action.[28] This Part proceeds in three sections: Section A offers a brief description of the presidential control model of agency action. Section B explains the conventional assumption that such control stops short of agency adjudications. Finally, section C points out weaknesses in assuming adjudicative independence from political influence.

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[24] U.S. CONST. art. II, § 2, cl. 2; Myers v. United States, 272 U.S. 52, 117 (1926) ("The vesting of the [E]xecutive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates . . . . As he is charged specifically to take care that [the laws] be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his [E]xecutive power he should select those who were to act for him under his direction . . . .").

[25] *See, e.g.*, La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.").

[26] LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965) ("The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid.").

[27] Under the "transmission belt" model, agencies were understood to be controlled primarily by Congress, which issued discrete statutory directives with little policymaking discretion. *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 470 (2003). By contrast, under the "interest group representation" model, agencies were viewed as controlled by a political process in which competing interest groups negotiate and compromise on policy outcomes. *See id.* at 475, 469–77 (describing other historical models of agency control).

[28] *See, e.g.*, Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 52–53 (2006) (examining presidential control from perspective of agency officials); Kagan, *supra* note 19, at 2331 (endorsing presidential control over agency policymaking); Metzger, *The Administrative State Under Siege*, *supra* note 21, at 14–15 (describing emergence of presidential administrative control); Richard J. Pierce, Jr., *Presidential Control is Better than the Alternatives*, 88 TEX. L. REV. SEE ALSO 113, 114, 116 (2009–2011) (recognizing dominance of presidential control model); Peter L. Strauss, *Overseer, or "the Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 702–03 (2007) [hereinafter Strauss, *The President in Administrative Law*] (arguing that President has power to oversee, but not direct, agency action); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 688 (2016) (noting that presidential control has become "an entrenched feature of the regulatory state" and proposing doctrinal rules to "control . . . but not unnecessarily constrain" such influence).

A. Emergence of Presidential Control

For the past quarter-century, administrative law scholars have observed the steady expansion of White House influence over agency action; indeed, presidential control has become the defining feature of our modern regulatory landscape.[29] Two mechanisms have been crucial in allowing the White House and its political leadership to ensure that agency decisions adhere to and promote the President's political agenda: (1) the emergence of centralized White House regulatory planning and review; and (2) the expansion of presidential appointments in agencies.

Centralized regulatory planning and review. For decades, the Oval Office has ensured that regulatory decisions are vetted through the White House. Building on earlier administrations' efforts to enhance interagency coordination, President Ronald Reagan required all Executive Branch agencies to submit "major" rulemaking proposals for pre-approval to the White House Office of Information and Regulatory Affairs (OIRA).[30] President Bill Clinton expanded that centralization, requiring both Executive Branch agencies and independent ones to submit a list of "significant regulatory actions" planned for the forthcoming year.[31] President George W. Bush extended these requirements to cover not only proposed rules and regulations but also guidance documents exempt from notice-and-comment requirements,[32] a mandate which President Obama retained.[33]

Expansion of presidential appointees. The number and percentage of presidentially appointed agency positions has nearly doubled over the past fifty years, and the vast majority of these positions serve at the pleasure of the President with no protections from removal.[34] Moreover, Congress has eliminated civil service protections for large segments of the bureaucracy, rendering a growing number of agency officials vulnerable to removal on

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[29] *Supra* note 28 and accompanying text.

[30] Exec. Order No. 12,291, § 3, 3 C.F.R. § 127 (1981–1982). While OIRA does not claim the power to reject regulatory proposals outright, it routinely returns proposals to agencies for reconsideration and can delay release indefinitely. *See* Kagan, *supra* note 19, at 2278.

[31] Exec. Order No. 12,866, § 4(c)(B), 3 C.F.R. § 638 (1993–1994).

[32] Exec. Order No. 13,422, §§ 3(g)–(h), 4(b)–(c), 3 C.F.R. § 191 (2007–2008).

[33] Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, to the Heads of Exec. Dep'ts & Agencies (Mar. 4, 2009).

[34] DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE 21–22 (2008); *see also* DAVID E. LEWIS & JENNIFER L. SELIN, ADMIN. CONFERENCE OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 70, 82–83 (2013), https://www.acus.gov/publication/sourcebook-united-states-executive-agencies.

ideological grounds rather than for cause.[35] As then-Professor David Barron observed, "agencies are now staffed in ways that make them increasingly likely to speak the White House line as if it were their own, even if they have not been ordered to do so by the President."[36] Taken together, these mechanisms enable significant political oversight over agency decision-making.

Agency decision-making, however, takes many forms, including not only purely "Executive" functions but also quasi-legislative and quasi-adjudicative ones.[37] Purely "Executive" decisions include ministerial exercises of specified statutory directives as well as decisions to enforce individual violations of generally applicable standards.[38] "Legislative" or quasi-legislative decisions involve the promulgation of those generally applicable standards of conduct; in the agency context, they are most closely associated with exercises of rulemaking authority.[39] "Adjudicative" or quasi-adjudicative decisions involve the resolution of disputes between discrete parties, typically in an adversarial, trial-like setting.[40]

Presidents have long exercised control over administrative exercises of purely Executive functions.[41] As Professor Peter Strauss recounts, President Jackson, who staunchly opposed the creation of the Bank of the United States, directed two successive Treasury Secretaries to remove all funds from the Bank and terminated them for refusing to heed his command.[42] President Nixon purportedly fired Leon Panetta (who would later serve as the Director of the CIA and Secretary of Defense) from his leadership post at the Office for Civil Rights

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[35] LEWIS & SELIN, *supra* note 34, at 72–81 (describing expansion of federal employees exempted from civil service protections).

[36] David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1121 (2008).

[37] *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1248 (1994) (characterizing concentration of these functions as "perhaps the crowning jewel of the modern administrative revolution"); M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1394 (2004) (noting breadth of policymaking tools available to agencies); *see also* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 2–4, 493–94 (2014) (criticizing agency assumption of power to engage in quasi-legislative and quasi-adjudicative acts).

[38] *See* Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1034 (2013) ("Enforcement is at the core of the President's constitutional duty to 'take Care' that laws are faithfully executed." (footnote omitted)); *see also* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 596 (1994) (characterizing decision to fine a bank for violation of banking laws as exercise of purely Executive power); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 696–97 (2014) (characterizing enforcement discretion as part of President's duty to "faithfully" execute the laws).

[39] *See* 5 U.S.C. §§ 551(4)–(5), 553 (2012).

[40] *See* 5 U.S.C. §§ 551(6)–(7), 554, 556, 557 (2012).

[41] U.S. CONST. art. II, § 2, cl. 2.

[42] *See* Strauss, *The President in Administrative Law*, *supra* note 28, at 706.

in the United States Department of Health, Education, and Welfare because the latter refused to comply with presidential policies designed to court southern white voters.[43] President Obama directed his administration to enforce sex discrimination laws to protect LGBTQ individuals.[44] More controversially, he ordered the Department of Homeland Security (DHS) to refrain from enforcing immigration laws against undocumented noncitizens who were brought to the United States as children.[45]

Past Presidents have exercised meaningful control over agencies engaged in quasi-legislative functions as well. The Carter White House exercised power in a range of rulemaking contexts, including occupational safety, air pollution, and strip mining.[46] President Clinton directed the promulgation of regulations relating to youth smoking and parental leave policies.[47] Such presidential control over rulemaking is not always apparent,[48] but it undoubtedly exists. According to one empirical study, the Clinton White House allowed fewer than 40% of proposed regulations to proceed without change; during the Bush Administration, only 17% of such proposals proceeded unaltered.[49] These examples demonstrate the extent to which Presidents have asserted control over agency decisions relating to Executive functions as well as Legislative ones.

B. Presumed Restraint Toward Adjudicative Functions

It has generally been understood, however, that presidential control stops short of one form of agency decision-making: that of administrative

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[43] LEON E. PANETTA & PETER GALL, BRING US TOGETHER: THE NIXON TEAM AND THE CIVIL RIGHTS RETREAT 1, 350 (1971); *see also* Catherine Y. Kim, *Presidential Control Across Policymaking Tools*, 43 FLA. ST. U.L. REV. 91, 111 (2015) (documenting political control over enforcement of anti-discrimination protections).

[44] President Barack H. Obama, Remarks by the President at Signing of Executive Order on LGBT Workplace Discrimination (July 21, 2014).

[45] President Barack H. Obama, Remarks by the President on Immigration (June 15, 2012); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 792, 794 (2013) (challenging constitutionality of the Obama Administration's immigration enforcement policy).

[46] Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 944–46 (1980).

[47] Kagan, *supra* note 19, at 2282–84; *see also* Peter L. Strauss, *Presidential Rulemaking*, 72 CHI. KENT L. REV. 965, 965 (1997).

[48] *See* Bressman & Vandenbergh, *supra* note 28; Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1146–47 (2010). For a discussion of the Bush Administration's covert efforts to control EPA rulemaking, see Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 799–801 (2007); Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 55 (2007); Kitrosser, *supra* note 21, at 1767.

[49] Mendelson, *supra* note 48, at 1150.

adjudication. In 1962, Judge Henry Friendly observed, "[e]veryone, including the presidential activists, seems to agree that 'the outcome of any particular adjudicatory matter is . . . as much beyond . . . [the President's] concern . . . as the outcome of any cause pending in the courts . . . .'"[50] Then-Professor Elena Kagan's account of President Clinton's expansive control over agencies similarly notes, "[t]he only mode of administrative action from which Clinton shrank was adjudication. At no time in his tenure did he attempt publicly to exercise the powers that a department head possesses over an agency's on-the-record determinations."[51] Professor Adrian Vermeule likewise asserts the existence of a "network of tacit unwritten conventions" protecting agency adjudications from presidential interference.[52]

The contention that agency adjudications remain impervious to political interference rests on two more specific assumptions. First, that the White House is legally constrained in the extent to which it can control agency adjudications. And second, that public sensibilities, or "conventions," would not tolerate exercises of raw political power in the adjudicative context.

1. Legal Constraints

The claim that the President, whether through the White House or his political appointees, refrains from interfering in administrative adjudications rests in part on the assumption that agency adjudicators are protected from such influence by legal barriers.[53] Congress has legislated a series of measures to protect the independence of agency adjudicators. Most formal adjudications under the Administrative Procedure Act (APA), which governs all agency actions unless a more specific statute controls, are decided in the first instance by Administrative Law Judges (ALJs),[54] who are not recruited by the agency's political leadership and cannot be fired except for good cause.[55]

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[50] Friendly, *The Federal Administrative Agencies*, *supra* note 21.

[51] *See* Kagan, *supra* note 19.

[52] *See* Vermeule, *Agency Independence*, *supra* note 19.

[53] For a discussion of the constitutional and statutory contours of the President's power to control agency adjudications, see Krent, *supra* note 19 (arguing that Congress should be able to delimit presidential authority over agency adjudicators); *see also* Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 246, 255 (1987) (analyzing role of agency institutional design in defining extent to which agency decisions are influenced by political actors).

[54] *See* 5 U.S.C. §§ 3105, 5372(a) (2012); *see also* MICHAEL ASIMOW, EVIDENTIARY HEARINGS OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 2 (2016) (noting that "[w]ith few exceptions," formal adjudicative hearings under the APA are presided over by an ALJ).

[55] For a discussion of the parameters for hiring and firing ALJs, see Barnett, *supra* note 20, at 799, 806–07; James G. Gilbert & Robert S. Cohen, *Administrative Adjudication in the United States*, 37 J. NAT'L ASS'N ADMIN. L. JUDICIARY, 222, 225–26 (2017). The Supreme Court's recent jurisprudence signals renewed attention

The APA further protects the *process* of administrative adjudication from political influence. Section 556(e) explicitly limits the information on which the agency adjudicator may rely in reaching a decision: "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision . . . ."[56] It further requires disclosure of any material outside of the record that is considered in reaching the decision.[57]

Even agency adjudications that are not subject to the APA typically enjoy a degree of statutory protection from political interference.[58] Removal proceedings in immigration courts, for example, are not governed by the APA,[59] but rather by the Immigration and Nationality Act (INA).[60] Like the APA, however, the INA provides private parties with a relatively formal evidentiary proceeding and a complete record of all the testimony and evidence produced at that proceeding.[61] It also mandates that a decision to deport "shall be based only on the evidence produced at the hearing,"[62] providing assurance that removal decisions be based on the agency adjudicator's independent assessment of the record rather than at the direction of political leadership.[63]

2. Cultural Constraints

Professor Adrian Vermeule posits an alternative reason for the assumption that "presidential direction of the adjudicative activities of executive agencies" has been limited.[64] The reason for this phenomenon, he claims, is the power of

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to the constitutional status of ALJs. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 542–43 (2010) (Breyer, J., dissenting) (noting majority opinion casts doubt on constitutionality of for-cause removal protections for ALJs); Lucia v. SEC, No. 17–130, slip op. at 5, 10 (U.S. June 21, 2018) (holding that ALJs within the independent SEC are "Officers of the United States" and must be appointed consistent with U.S. CONST. art. II, § 2, cl. 2).

[56] 5 U.S.C. § 556(e) (2012).

[57] *Id*. ("When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.").

[58] The vast majority of formal agency adjudications, i.e., those requiring an evidentiary hearing, occur outside the parameters of the APA. Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. (forthcoming 2019) (manuscript at 2, 7), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3129560; *see also* ASIMOW, *supra* note 56 (noting diversity of formal agency adjudications exempted from APA requirements).

[59] Marcello v. Bonds, 349 U.S. 302, 310 (1955) (noting legislative enactment clarifying congressional intent to exempt removal proceedings from APA requirements).

[60] 8 U.S.C. § 1229a (2012).

[61] 8 U.S.C. § 1229a(b)(2)(A), (b)(4)(A)–(C).

[62] 8 U.S.C. §1229a(c)(1)(A).

[63] Implementing regulations further provide, "[i]n deciding individual cases before them, and subject to the applicable governing standards, immigration judges shall exercise their independent judgment and discretion." 8 C.F.R. § 1003.10(d)(ii) (2018).

[64] Vermeule, *Agency Independence*, *supra* note 19.

"conventions."[65] He asserts, "[t]he real source of the limitation is a network of tacit unwritten conventions that protect independence of even executive agencies when engaged in adjudication."[66] He explains: "[a]mong the communities that shape administrative law—including civil servants, the organized bar, legislative committees, and regulated parties—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."[67]

From this perspective, the White House and its political appointees refrain from interfering in agency adjudications not because of formal legal constraints, but rather because of informal cultural ones. We live in a political culture which disdains the exercise of overt political influence in individual cases.

3. Historical Attempts to Politicize Agency Adjudications

Historical attempts to politicize agency adjudications suggest that legal and cultural constraints, at least in the past, have succeeded in protecting these types of administrative proceedings from significant political influence. In 1980, in response to political concerns that agency adjudicators within the Social Security Administration were too generous in awarding disabilities benefits, Congress enacted a new provision requiring review over decisions of ALJs who granted more than 70% of claims.[68] The Association of Administrative Law Judges filed suit, and a district court concluded that the provision violated the spirit, if not the letter, of the APA.[69]

A second example involved immigration court adjudications during the Bush Administration. From 2004 to 2007, the White House directed the hiring of new immigration judges (IJs) and members of the Board of Immigration Appeals (BIA), screening candidates for partisan affiliation.[70] In 2008, however, the Department of Justice Offices of the Inspector General and of Professional

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[65] *Id.* at 1181, 1194.

[66] *Id.* at 1211.

[67] *Id.* at 1213.

[68] Ass'n of Admin. Law Judges v. Heckler, 594 F. Supp. 1132, 1134–35 (D.D.C. 1984); JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 171, 174–76 (1983); Jeffrey S. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs*, 7 ADMIN. L.J. AM. U. 589, 595–97 (1993–1994).

[69] 594 F. Supp. at 1136–37, 1142–43.

[70] DOJ INSPECTOR GEN. REPORT, *supra* note 17, at 1, 135.

Responsibility issued a joint report finding that these hiring practices violated Department policy as well as federal law.[71]

The public outcry over these incidents,[72] as well as the findings of illegality, suggest that both legal barriers and conventions about adjudicative independence imposed meaningful constraints on political interference in agency adjudications.

C. Reevaluating the Presumption of Adjudicative Independence from Presidential Control

Yet, the political insulation of agency adjudications cannot be taken for granted. After all, the White House retains powerful reasons for wanting to control them. Federal agencies adjudicate everything from disability claims to unfair labor practices, from the granting of broadcast licenses to approval for corporate mergers.[73] As such, these decisions have a substantial impact on the President's ability to achieve his policy goals.[74] In *Securities Exchange Commission v. Chenery Corp.* (*Chenery II*), the Supreme Court endorsed the use of agency adjudication as a means for announcing broadly applicable policy changes. In that case, the Commission announced a new standard of conduct—precluding fiduciaries from trading in a company's shares pending reorganization—in the course of an individual adjudication.[75] Rejecting the managers' and officers' claim that the new standard could only be established through rulemaking procedures, the Court held, "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."[76] Consequently, agency adjudications—no less than enforcement decisions or rulemaking—can play a powerful role in promoting or frustrating the President's policy agenda. As Professor William Araiza notes, "courts normally purport

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[71] *Id.*

[72] *See generally* Eric Lichtblau, *Report Faults Aides in Hiring at Justice Dept.*, N.Y. TIMES (July 29, 2008), https://www.nytimes.com/2008/07/29/washington/29justice.html.

[73] *See* Gilbert & Cohen, *supra* note 55, at 254 (surveying breadth of agency adjudications). *See generally* ADMIN. CONF. OF THE U.S. AND STANFORD LAW SCH., REPRESENTATION OF PRIVATE PARTIES, https://acus.law.stanford.edu/content/federal-administrative-adjudication (mapping contours of federal agency adjudication).

[74] Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693, 718 (2005) (exploring development of policy through agency adjudications).

[75] SEC v. Chenery Corp. (Chenery II), 332 U.S. 194, 197–99 (1947).

[76] *Id.* at 203 (italics removed); *see also* NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) (affirming that the agency "is not precluded from announcing new principles in an adjudicative proceeding, and that the choice between rulemaking and adjudication lies in the first instance within" the agency's discretion); *see also* Magill, *supra* note 37 (addressing absence of direct judicial constraints on agency choice to implement new policies through one particular policymaking tool rather than another).

only to apply existing law, while federal agencies are explicitly understood to have the power to make law in the course of deciding cases."[77] These factors provide the White House with strong incentives to influence the course of agency adjudications.[78]

Even agency adjudications that do not announce binding national policy, such as those made at the trial level in disabilities adjudications or removal proceedings, impact the lives of millions of Americans and thus, potentially, a President's political fortunes. For example, it is often observed that the annual number of adjudications within the Social Security Administration far exceeds that of all federal courts put together.[79] There are over half a million deportation cases currently pending in immigration courts,[80] decisions that will inevitably impact not only the noncitizen at issue, but also his or her family members, employers, and others. At the same time, the legal and cultural barriers to presidential control over agency adjudications are far from impenetrable.

1. Limits of Legal Barriers to Political Control

While Congress has imposed legal restrictions on the extent to which politics may influence agency adjudications, those restrictions are incomplete. Although most formal adjudications under the APA are heard in the first instance by an impartial adjudicator separated from prosecutorial or investigate functions,[81] the statute expressly allows that the initial hearing may be conducted instead by the politically appointed leadership of an agency.[82] And, even when a politically insulated civil servant presides over the hearing in the first instance, the APA grants agency leadership virtually unfettered discretion to reverse that initial decision.[83]

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[77] William D. Araiza, *Agency Adjudication, the Importance of Facts, and the Limitations of Labels*, 57 WASH. & LEE L. REV. 351, 353 (2000).

[78] Professor Peter Strauss suggests that career officials within the administrative bureaucracy employ adjudication to promulgate policies in part to avoid obstacles posed by their politically appointed superiors. Peter L. Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1253 (1974).

[79] *See, e.g.*, PETER L. STRAUSS ET AL., GELLHORN & BYSE'S ADMINISTRATIVE LAW CASES AND COMMENTS 26 (12th ed. 2018).

[80] *Overview of the Executive Office for Immigration Review: Hearing Before the Subcomm. on Immigration & Border Sec. Comm. on the Judiciary*, 115th Cong. 2 (2017) (statement of James McHenry, Acting Dir., Exec. Office for Immigration Review) [hereinafter McHenry Testimony], https://judiciary.house.gov/wp-content/uploads/2017/10/Witness-Testimony-James-McHenry-EIOR-11-01-2017.pdf.

[81] 5 U.S.C. §§ 554(d), 556(b), 557(b) (2012).

[82] 5 U.S.C. § 556(b). The Supreme Court has sustained such decision-making against due process challenges. FTC v. Cement Inst., 333 U.S. 683, 702–03 (1948).

[83] 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision . . . .").

Moreover, the majority of formal agency adjudications (i.e., those involving an evidentiary hearing) are not governed by the APA.[84] For immigration removal proceedings, the INA vests adjudicative power in immigration judges (IJs) personally, precluding the agency's politically appointed leadership from presiding over these hearings.[85] Nonetheless, it defines an IJ as an attorney appointed by the Attorney General who remains "subject to such supervision and shall perform such duties as the Attorney General shall prescribe."[86] Moreover, although the Department of Justice Inspector General has concluded that civil service laws protect IJs from politically- or ideologically-motivated employment decisions,[87] the Attorney General in 2002 issued regulations asserting that such officials are subject to removal or reassignment effectively at the Attorney General's discretion.[88]

Indeed, although the INA, unlike the APA, provides that federal courts possess exclusive authority to review the decisions of IJs,[89] the Attorney General has, through regulation, created an interim review body—the Board of Immigration Appeals[90]—and a "refer-and-review" procedure by which the Attorney General can unilaterally reverse any decision of the BIA.[91] The Attorney General has exercised this refer-and-review power repeatedly to reverse BIA decisions perceived to depart from the President's political agenda.[92] Indeed, former Attorney General Alberto Gonzales recently co-authored a law review article championing the exercise of this authority, characterizing it "as a powerful tool through which the Executive Branch can assert its prerogatives in the immigration field."[93]

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[84] *See supra* note 58 and accompanying text.

[85] *Compare* 8 U.S.C. § 1229a(a)(1) (2012) ("An immigration judge shall conduct proceedings for deciding the admissibility or deportability of an alien."), *with* 5 U.S.C. § 556(b) (2012) (providing that the agency itself may preside over the taking of evidence in an adjudicative hearing).

[86] 8 U.S.C. § 1101(b)(4) (2012).

[87] *See* DOJ INSPECTOR GEN. REPORT, *supra* note 17; 5 U.S.C. §§ 2301(a)(1), (b)(8)(A)–(B), 2302(B)–(C) (2012); 5 C.F.R. § 213.3102(c)–(d) (2018).

[88] Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,893 (Aug. 26, 2002).

[89] 8 U.S.C. § 1252(a)(5) (2012).

[90] 8 C.F.R. § 1003.1 (2018).

[91] 8 C.F.R. § 1003.1(h)(1). For a discussion on this refer-and-review authority, see Gonzales & Glen, *supra* note 17, at 850; Shah, *The Attorney General's Disruptive Immigration Power*, *supra* note 17, at 130.

[92] See Margaret H. Taylor, *Midnight Agency Administration: Attorney General Review of Board of Immigration Appeals Decisions*, 102 IOWA L. REV. BULL. 18, 21, 23 (2016–2017) (describing political exercises of refer-and-review power).

[93] Gonzales & Glen, *supra* note 17, at 841.

2. Limits of Conventions as a Barrier to Political Control

The permeability of legal barriers to political influence suggests that the only real protection against presidential interference in agency adjudications may rest on soft "conventions."[94] But it is not at all clear that these soft norms will be sufficient to counterbalance the President's incentives to control agency adjudications. The recent article co-authored by former Attorney General Gonzales demonstrates that the convention of independence does not prevent agency leadership from celebrating, much less exercising, its power to reverse the decisions of lower-level adjudicators.[95] Political scientists have documented a similar willingness to exercise such review authority in other agencies.[96] Perhaps more disturbing, political actors may circumvent formal review altogether by pressuring agency adjudicators directly,[97] thereby obscuring the exercise of political influence.

Finally, even if conventions were effective in restraining prior administrations, the current President is perhaps singular in his willingness to defy such soft norms. If conventional norms were the primary reason why prior Presidents refrained from exercising control over agency adjudications, we should not be surprised if such restraint dissipates in the current Administration.

II. EMERGENCE OF PRESIDENTIAL CONTROL OVER AGENCY ADJUDICATION

The current Administration casts doubt on the conventional wisdom that agency adjudications remain impervious to presidential control. Over the past year and a half, the Trump Administration has implemented a series of reforms promising to fundamentally reshape the adjudication of removal claims in immigration courts. This Part begins with section A, analyzing the central role that immigration played in the election of President Trump, and the political capital he has since invested in achieving his immigration objectives. It then describes, in section B, the structure of immigration adjudication in the Executive Branch, outlining the role of immigration courts in developing

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[94] Vermeule, *Agency Independence*, *supra* note 19 (arguing that conventions, not legal barriers, present the only meaningful protection against politicized agency adjudications)

[95] Gonzales & Glen, *supra* note 17, at 859, 899.

[96] *See* Boyd & Driscoll, *supra* note 20 (examining exercise of reversal power by politically appointed Secretary of Agriculture over ALJ decisions); Krent, *supra* note 19, at 1084–86; Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Value of Procedural Due Process*, 95 YALE L.J. 455, 477, 499 (1986).

[97] Barnett, *supra* note 20, at 818–19 (noting that 26% of ALJs within the Social Security Administration and 9% of non-Social Security Administration administrative judges report feeling pressure from agency leadership to rule differently).

national policy. Finally, it identifies in section C a series of emerging tools the Trump Administration has employed to exercise political control over these courts to ensure their decisions conform to the President's policy agenda.

A. The President's Immigration Agenda

President Trump has placed immigration reform at the center of his policy agenda. On the campaign trail, he pledged to rid the country of "illegal immigrants."[98] Seeking the Republican primary nomination, he promised to effectuate "mass deportations,"[99] describing at one point a plan to deport all undocumented aliens in the United States within two years.[100] Even after securing the party nomination, Trump returned to these themes again and again. At an August 2016 campaign rally in Austin, he attacked his Democratic opponent for allegedly endorsing a "catch-and-release" policy to allow aliens to remain free while removal proceedings are pending, "massive amnesty in her first 100 days," and "let[ting] people overstay their visas without removal."[101] He warned: "We must not let it happen . . . . This election will decide whether or not we have a border. This election will decide whether or not we have a country."[102] The same month, in a speech in Phoenix, he promised: "In a Trump Administration all immigration laws will be enforced . . . . [N]o one will be immune or exempt from enforcement . . . . Anyone who has entered the United States illegally is subject to deportation. That is what it means to have laws and to have a country."[103]

Since assuming office, the President has continued to invest significant political capital in the achievement of his immigration goals, reiterating his commitment to deporting noncitizens repeatedly through Executive orders, speeches, and press releases. Within a week of his inauguration, he issued Executive Order 13,768, which states: "We cannot faithfully execute the immigration laws of the United States if we exempt classes or categories of

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[98] *See* Nick Gass, *Trump's Immigration Plan: Mass Deportation*, POLITICO (Aug. 17, 2015, 6:25 AM), https://www.politico.com/story/2015/08/donald-trump-immigration-plan-121420; Donald J. Trump, *Immigration Reform That Will Make America Great Again*, https://assets.donaldjtrump.com/Immigration-Reform-Trump.pdf.

[99] Kelley Beaucar Vlahos, *Messy Legal Process Could Challenge Trump's Mass Deportation Plan*, FOX NEWS (Nov. 27, 2015), http://www.foxnews.com/politics/2015/11/27/messy-legal-process-could-challenge-trumps-mass-deportation-plan.html.

[100] Julia Preston et al., *What Would It Take for Donald Trump to Deport 11 Million and Build a Wall?* N.Y. TIMES (May 19, 2016), https://www.nytimes.com/2016/05/20/us/politics/donald-trump-immigration.html.

[101] Donald J. Trump, Remarks at Luedecke Arena in Austin, Texas (Aug. 23, 2016).

[102] *Id.*

[103] Donald J. Trump, Remarks on Immigration at the Phoenix Convention Center in Phoenix, Arizona (Aug. 31, 2016).

removable aliens from potential enforcement."[104] The Order continues: "It is the policy of the [E]xecutive [B]ranch to . . . [e]nsure the faithful execution of immigration laws . . . against *all* removable aliens."[105]

His cabinet appointees have been equally clear in the Administration's policy commitments, particularly Attorney General Jeff Sessions, who played a central role in the development of Trump's immigration policy agenda during the campaign.[106] In remarks at the Mexican border in April 2017, Sessions stated, "[u]nder the President's leadership and through his Executive Orders, we will secure this border and bring the full weight of both the immigration courts and federal criminal enforcement to combat this attack on our national security and sovereignty."[107] He continued: "For those that continue to seek improper and illegal entry into this country, be forewarned: This is a new era. This is the Trump era. The lawlessness, the abdication of the duty to enforce our immigration laws and the catch and release practices of old are over."[108] In these ways, the President and his political appointees have staked much of the Administration's political future on its success in removing noncitizens from the United States.

B. Immigration Courts

Immigration courts play a key role in the Trump Administration's ability to achieve its immigration goals. There are an estimated eleven million aliens currently residing in the United States without authorization, either because they entered without inspection or remained after their visas expired.[109] Moreover, an estimated 1.9 million aliens (the Administration suggests two or three million)—most of whom are present lawfully and many of whom are longtime legal permanent residents—are subject to deportation based on non-immigration related conduct such as the commission of crimes.[110] For the vast majority of

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104 Exec. Order 13,768, § 1 (2017).

105 *Id*. § 2(a) (emphasis added).

106 Amber Phillips, *10 Things to Know About Sen. Jeff Sessions, Donald Trump's Pick for Attorney General*, WASH. POST (Jan. 10, 2017), https://www.washingtonpost.com/news/the-fix/wp/2016/11/18/10-things-to-know-about-sen-jeff-sessions-donald-trumps-pick-for-attorney-general/ (explaining the role that Sessions played in creating the Trump campaign's immigration policy positions).

107 Jeff Sessions, U.S. Att'y Gen., Remarks Announcing the Department of Justice's Renewed Commitment to Criminal Immigration Enforcement (Apr. 11, 2017) [hereinafter Sessions Remarks at Nogales]..

108 *Id.*

109 Passel & Cohn, *supra* note 1.

110 Chishti & Mittelstadt, *supra* note 2.

these individuals, the immigration courts will be the final arbiter regarding whether they will be deported from the country or permitted to remain.[111]

The Immigration and Nationality Act (INA) vests power in immigration judges (IJs) to conduct removal proceedings.[112] Lacking the robust tenure protections of Article III judges[113] or even ALJs,[114] an immigration judge is defined as "an attorney whom the Attorney General appoints" and who is "subject to such supervision and shall perform such duties as the Attorney General shall prescribe".[115] According to EOIR, the agency within the Department of Justice in which immigration judges serve, there are approximately 330 such judges in 58 immigration courts across the nation.[116]

These trial-level officials determine in the first instance whether a given noncitizen falls within one of the expansive statutory grounds for being "inadmissible"[117] or "deportable,"[118] as charged by Department of Homeland Security (DHS) prosecutors.[119] If so, they determine whether the individual is eligible for, and warrants, a discretionary grant of relief from removal.[120] In some cases, they also are charged with determining whether a detained alien should be released on bond or parole pending the outcome of removal proceedings.[121] Noncitizen-respondents as well as government prosecutors may appeal an adverse determination by the IJ to the Board of Immigration Appeals (BIA), an appellate body currently consisting of twenty-one members appointed

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111 *See supra* note 11 (describing denial of immigration court hearings for certain classes of removable noncitizens).

112 8 U.S.C. § 1229a(a)(1) (2012).

113 *See* U.S. CONST. art. III, § 1.

114 *See* Barnett et al., *supra* note 20, at 7–8 (describing independence of ALJs as compared to other agency adjudicators such as immigration judges).

115 8 U.S.C. § 1101(b)(4) (2012).

116 U.S. Dep't of Justice, Office of the Chief Immigration Judge, https://www.justice.gov/eoir/office-of-the-chief-immigration-judge (last visited Aug. 20, 2018).

117 8 U.S.C. § 1182(a) (2012).

118 8 U.S.C. § 1227(a) (2012).

119 *See* 8 U.S.C. § 1229a(a)(1) (2012) ("An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien."); 8 U.S.C. § 1229a(a)(3) ("Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States."); *see also* EOIR: AN AGENCY GUIDE, *supra* note 5 (describing role of DHS attorneys in prosecuting removal proceedings); ABA, REFORMING THE IMMIGRATION SYSTEM, *supra* note 5, at 1–9 (same).

120 8 U.S.C. § 1229a(c)(4)(A) (addressing immigration judge authority to review applications for relief from removal); *see also, e.g.*, 8 U.S.C. § 1158(b)(1)(A) (2012) (setting forth statutory prerequisites for discretionary grants of relief from removal in the form of asylum); 8 U.S.C. § 1182(h) (2012) (same for discretionary grants of relief from removal based on crimes); 8 U.S.C. § 1229b(a)–(b) (2012) (same for discretionary grants of relief in the form of cancellation of removal).

121 *See supra* note 9.

by the Attorney General.[122] In a limited set of cases, a noncitizen may appeal an adverse ruling by the BIA to the federal courts of appeals.[123] In 2016 alone, nearly 330,000 new matters were filed in immigration courts, including over 237,000 new removal proceedings and over 63,000 bond determinations.[124] The political, demographic, and humanitarian interests at stake in removal proceedings are massive.

C. Emerging Tools to Influence Immigration Adjudication

The central importance of immigration courts to national immigration policy has led the current Administration to expand political control over removal proceedings. Attorney General Jeff Sessions has addressed these courts repeatedly to emphasize the President's policy priorities. In remarks during the EOIR's Legal Training Program, he asserted, "[a]ll of us should agree that, by definition, we ought to have zero illegal immigration in this country," and reminded IJs in attendance that they are required to "conduct designated proceedings 'subject to such supervision and shall perform such duties as the Attorney General shall prescribe.'"[125] To that end, the Administration has instituted wide-ranging reforms, eliminating the power of IJs to grant "administrative closure" in cases; altering the procedures and standards for considering asylum claims; purporting to prohibit the release of detained aliens; and implementing a series of managerial reforms including an ambitious hiring initiative, the introduction of performance metrics, and additional supervisory measures to ensure that the decisions of immigration judges conform to the President's immigration agenda. Consistent with Trump's campaign promise to deport all "illegals," these reforms appear designed to maximize the number of noncitizens ordered deported and minimize the number who are allowed to remain in the United States.

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[122] 8 C.F.R. § 1003.1(a)(1) (2018) (establishing seventeen-member Board of Immigration Appeals); 8 C.F.R. § 1003.3(a)(1) (2018) (allowing for either party to appeal IJ decisions to the BIA); Executive Office for Immigration Review: Expanding the Size of the Board of Immigration Appeals, 83 Fed. Reg. 8321, 8321 (Feb. 27, 2018) (expanding BIA membership to 21).

[123] 8 U.S.C. § 1252(a)(2) (2012) (denying judicial review over, *inter alia*, denials of discretionary relief from removal and decisions involving criminal aliens); *see generally* Gerald L. Neuman, *Federal Courts Issues in Immigration Law*, 78 TEX. L. REV. 1661, 1664 (2000) (identifying limitations on judicial review over removal orders).

[124] EOIR 2016 YEARBOOK, *supra* note 10, at A7.

[125] Jeff Sessions, U.S. Att'y Gen., Remarks to the Executive Office for Immigration Review Legal Training Program in Washington, D.C. (June 11, 2018) [hereinafter Sessions Remarks at Legal Training].

1. Administrative Closure

Attorney General Sessions has acted to eliminate IJs' power to grant temporary relief from removal in the form of "administrative closure" in removal proceedings.[126] IJs had used this device since at least the late 1980s to remove a case from the court's active docket, meaning that removal proceedings would be halted unless and until a DHS prosecutor acted to reinstate proceedings.[127] As the Fifth Circuit noted, "administrative closure may be appropriate to await an action or event that is relevant to immigration proceedings but is outside the control of the parties or the court and may not occur for a significant or undetermined period of time."[128] The prototypical case in which such relief might be awarded would be for an undocumented alien with a legal permanent resident spouse whose application for naturalization is pending.[129] An immigration judge might administratively close removal proceedings against such an individual given that the alien will become eligible for permanent resident status as soon as the spouse's naturalization application is approved.[130] Immigration courts thus used this tool as a matter of docket control,[131] ensuring that only high-priority cases, i.e., those in which the alien had little likelihood of obtaining legal status, remained on the active docket.[132] In fiscal year 2016, 35% of all initial case completions in removal proceedings resulted in an administrative closure.[133] According to the Attorney General, IJs and the BIA granted administrative closure in more than 215,000 cases over the six years preceding October 2017.[134]

In May of 2018, however, the Attorney General exercised refer-and-review authority in *Castro-Tum,* involving a grant of administrative closure to an

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126 Castro-Tum, 27 I. & N. Dec. 271, 281 (A.G. 2018).

127 Avetisyan, 25 I. & N. Dec. 688, 695 (BIA 2012); *In re* W-Y-U, 27 I. & N. Dec. 17, 17–18 (BIA 2017).

128 Hernandez-Castillo v. Sessions, 875 F.3d 199, 207 (5th Cir. 2017).

129 *Avetisyan*, 25 I. & N. Dec. at 696.

130 *Id.*

131 *Id.* at 694 (characterizing administrative closure as "a tool to regulate proceedings, that is, to manage an Immigration Judge's calendar (or the Board's docket)").

132 *Id.* at 696 (listing considerations for granting administrative closure as "including but not limited to: (1) the reason administrative closure is sought; (2) the basis for any opposition to administrative closure; (3) the likelihood the respondent will succeed on any petition, application, or other action he or she is pursuing outside of removal proceedings; (4) the anticipated duration of the closure; (5) the responsibility of either party, if any, in contributing to any current or anticipated delay; and (6) the ultimate outcome of removal proceedings (for example, termination of the proceedings or entry of a removal order) when the case is re[-]calendared before the Immigration Judge or the appeal is reinstated before the Board").

133 The total number of initial case completions in removal proceedings was 137,875, of which 48,285 resulted in administrative closure. EOIR 2016 YEARBOOK, *supra* note 10, at C2, C5.

134 Castro-Tum, 27 I. & N. Dec. 271, 272 (A.G. 2018).

unaccompanied minor.[135] In that case, the IJ at the trial level granted administrative closure, but the BIA vacated on appeal by the government.[136] Rather than letting the BIA opinion stand, Attorney General Sessions requested briefing from the parties and interested amici on the legality of administrative closure generally.[137] In his final decision, Sessions concluded that neither IJs nor the BIA possess authority to grant this form of relief.[138]

2. Asylum Claims

The Attorney General has also reshaped the adjudication of asylum claims after repeatedly expressing skepticism over the credibility of such claimants. In remarks to the EOIR, Sessions asserted, "We . . . have dirty immigration lawyers who are encouraging their otherwise unlawfully present clients to make false claims of asylum . . . ."[139] According to him, "[s]aying a few simple words [establishing a credible fear of persecution] is now transforming a straightforward arrest and immediate return into a probable release and a hearing . . . ."[140] He was especially critical of the high rates at which aliens succeed in establishing a credible fear of persecution, stating that "any adjudicatory system with a grant rate of nearly [90%] is inherently flawed."[141] He repeated these sentiments in a more recent speech before the EOIR, asserting that "the vast majority of the current asylum claims are not valid," and characterizing "abuse" of the asylum system as "one of our major difficulties today."[142]

To that end, he has twice exercised the refer-and-review power to influence asylum adjudications. In *In re E-F-H-L-*, he vacated a BIA decision holding that asylum claimants are entitled to an evidentiary hearing to establish their claims.[143] At the trial level, the IJ concluded that respondent's written application for relief failed to establish a prima facie claim for asylum and thus denied an evidentiary hearing.[144] On review, the BIA in 2014 vacated and remanded, emphasizing regulations making clear that asylum applications shall

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135 *Id.* at 273.

136 *Id.* at 277–80.

137 Castro-Tum, 27 I. & N. Dec. 187, 187 (A.G. 2018).

138 Castro-Tum, 27 I. & N. Dec. 271, 281, 292–93 (A.G. 2018).

139 Jeff Sessions, U.S. Att'y Gen., Remarks to the Executive Office for Immigration Review in Falls Church, Va. (Oct. 12, 2017) [hereinafter Sessions Remarks at Falls Church].

140 *Id.*

141 *Id.*

142 Sessions Remarks at Legal Training, *supra* note 125.

143 *In re* E-F-H-L-, 27 I.& N. Dec. 226, 226 (A.G. 2018).

144 *Id.*

be determined "after an evidentiary hearing."[145] In a precedent-setting published opinion, it concluded, "in the ordinary course of removal proceedings, an applicant for asylum . . . is entitled to a hearing on the merits of the applications, including an opportunity to provide oral testimony and other evidence, without first having to establish prima facie eligibility for the requested relief."[146] Four years later, on March 5, 2018, the Attorney General—with no apparent notice to respondent or other interested parties—vacated the BIA's decision on the ground that the applicant had since withdrawn his asylum application (to pursue lawful status on the basis of a family relationship), which in his opinion rendered the BIA's decision "moot."[147] In doing so, Sessions summarily eliminated the precedential decision entitling asylum seekers to an evidentiary hearing before an IJ.

The Attorney General also utilized the refer-and-review mechanism to reject the BIA's longstanding precedent in *In re A-B-*.[148] For years, the BIA had held that victims of domestic violence could in certain circumstances qualify as being persecuted on the basis of membership in a "particular social group" for purposes of obtaining asylum.[149] In June of this year, however, the Attorney General overruled that precedent, promulgating a new interpretation of the asylum statute to exclude victims of private crimes.[150] His opinion states:

> Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum. While I do not decide that violence inflicted by non-governmental actors may never serve as a basis for an asylum or withholding [from removal] application based on membership in a particular social group, in practice such claims are unlikely to satisfy the statutory grounds for proving group persecution that the government is unable or unwilling to address. The mere fact that a country may have problems effectively policing certain crimes—such as domestic violence or gang violence—or that certain populations are more likely to be victims or crime, cannot itself establish an asylum claim.[151]

In these ways, the Administration has exerted control over the adjudication of asylum claims in immigration courts.

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145 *In re* E-F-H-L-, 26 I. & N. Dec. 319, 323–24 (BIA 2014).
146 *Id.* at 324.
147 In re *E-F-H-L-*, 27 I. & N. Dec. at 226.
148 *In re* A-B-, 27 I. & N. Dec. 316, 320 (A.G. 2018).
149 *See In re* A-R-C-G-, 26 I. & N. Dec. 388, 391–92 (BIA 2014).
150 In re *A-B-*, 27 I. & N. Dec. at 320.
151 *Id.*

3. Detention

The current Administration has also purported to prohibit the release of noncitizens pending the outcome of removal proceedings. Pursuant to statute, large segments of the removable population are subject to mandatory detention.[152] For those who are not subject to mandatory detention, enforcement officials within the Department of Homeland Security Immigration and Customs Enforcement (ICE) determine in the first instance whether the individual will be detained or released on bond or parole pending removal proceedings.[153] Once charges are filed in immigration court, the noncitizen is entitled to seek a bond rehearing before the immigration judge,[154] in which the judge engages in an individualized determination as to whether the alien poses a flight risk or danger to the community.[155]

Almost immediately upon assuming office however, President Trump announced through Executive Order 13,767, "[i]t is the policy of the [E]xecutive [B]ranch to . . . detain individuals apprehended on suspicion of violating Federal or State law, including Federal immigration law, pending further proceedings regarding those violations."[156] Subsequently, Attorney General Sessions specified, "we will now be detaining all adults who are apprehended at the border."[157]

The extent to which IJs—or indeed enforcement officers within ICE—are complying with this directive remains unclear. Certainly, not *all* aliens in removal proceedings are being detained; and among those who were detained at one point, a nontrivial number have subsequently been released.[158] Nonetheless, immigration court records compiled by the Transactional Records Access Clearinghouse (TRAC) show a dramatic increase in the percentage of noncitizens in removal proceedings who are detained. In April 2018, the most

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[152] *See supra* note 9 and accompanying text; *see also* Demore v. Kim, 538 U.S. 510, 531 (2003) (sustaining mandatory detention provisions against statutory and constitutional challenge).

[153] 8 C.F.R. § 236.1(b)(1) (2018).

[154] 8 C.F.R. §§ 1003.19, 1236.1(d) (2018). For an empirical study examining the decision-making of IJs in bond proceedings, see Ryo, *Detained Study*, *supra* note 9.

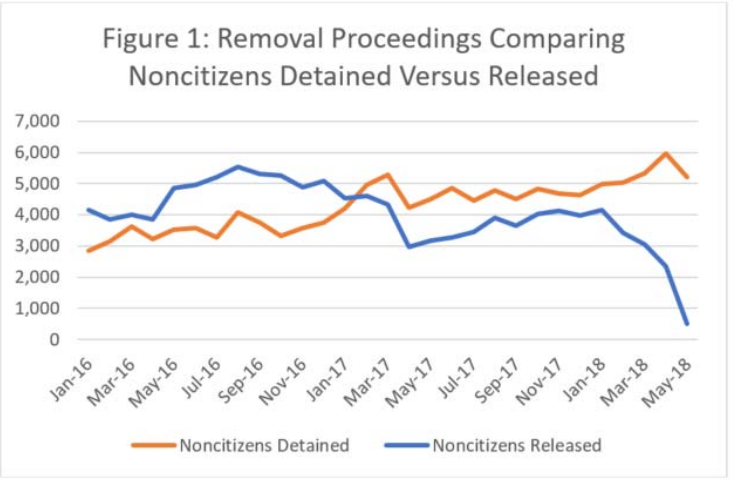
[155] U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRIGATION REVIEW, OFFICE OF THE CHIEF IMMIGRATION JUDGE, IMMIGRATION COURT PRACTICE MANUAL 141 ("If the alien is eligible for bond, the Immigration Judge considers whether the alien's release would pose a danger to property or persons, whether the alien is likely to appear for further immigration proceedings, and whether the alien is a threat to national security."), https://www.justice.gov/sites/default/files/pages/attachments/2017/11/02/practicemanual.pdf#page=146.

[156] Exec. Order 13,767, § 2(b)–(c) (Jan. 25, 2017).

[157] Sessions Remarks at Nogales, *supra* note 107.

[158] *See infra* Figure 1.

recent month for which full data are available, 41% of all removal cases involved a detained alien, as compared to only 18% in April 2016 during the prior administration.[159] At the same time, the number of aliens who previously were detained but had since been released, as a percentage of all aliens in removal proceedings, dropped to 16% in April 2018 from 21% two years prior.[160] Figure 1 below shows the total number of aliens detained in cases initiated in each month of the Trump Administration and the last year of the preceding Administration; it also shows the total number of aliens released after detention in such cases.[161]



The divergence between the number of noncitizens detained versus the number released after prior detention is particularly surprising given that the current Administration purports to no longer prioritize categories of aliens for removal.[162] One would expect that the current Administration's decision to cast a wider net—initiating removal proceedings against aliens regardless of criminal history or length of residence in the United States—would lead to a higher number of aliens released pending removal proceedings than in prior years, when removals targeted criminal aliens who arguably pose a higher risk to

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159 Transactional Records Access Clearinghouse, http://trac.syr.edu/phptools/immigration/nta/ (last visited Aug. 20, 2018) (on file with author).

160 *Id.*

161 *Id.*

162 U.S. DEP'T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 1 (2018), https://www.ice.gov/removal-statistics/2017 (stating that the DHS has "directed that classes or categories of removable aliens are no longer exempted from potential enforcement").

community safety or recent arrivals who arguably pose a higher flight risk. Yet the evidence suggests precisely the opposite. Today, even though a longtime lawful resident with a minor drug conviction arguably is as likely to be subject to removal proceedings as a violent criminal, aliens as a whole are far less likely to be released after detention than in prior years.

Importantly, the data do not identify whether a decision to release was made by enforcement officers within DHS or in bond rehearings before IJs. Thus, much of the shift may be attributable to DHS employing a more aggressive detention policy.[163] IJs retain, however, formal authority to release any alien who is not subject to statutory mandatory detention provisions,[164] and the low rates of releases are not likely to be due to enforcement officers alone. Indeed, a lawsuit filed in January 2018 alleges that some IJs have begun to refuse to conduct bond rehearings altogether.[165]

4. Managerial Reforms to Reduce Backlog of Pending Cases

The Trump Administration has also instituted a series of reforms to address a mounting backlog of cases pending in the immigration courts. As of June 2018, there was a backlog of 700,000 cases, triple the figure from nine years prior.[166] In response, the Attorney General has launched an ambitious hiring initiative and acted to significantly limit case processing times. While ostensibly managerial, these reforms are likely to alter outcomes in individual immigration proceedings.

Hiring Initiative. In April 2017, the Attorney General announced a "new, streamlined hiring plan" to dramatically expand the number of immigration judges.[167] As of November 2017, the Administration had hired more than 61 new IJs—1/5 of the current IJ corps[168]—and plans to hire 100 more in 2018.[169] At the administrative appeals level, the Administration has expanded the Board of Immigration Appeals, which determines which decisions to publish as

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163 *See* Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs & Border Prot. et al. (Feb. 20, 2017).

164 *See* 8 C.F.R. § 1240.41(a) (2018).

165 Class Action Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus at 2, Palacios v. Sessions, No. 18-cv-00026 (W.D.N.C. 2018).

166 Sessions Remarks at Legal Training, *supra* note 125.

167 Sessions Remarks at Nogales, *supra* note 107.

168 McHenry Testimony, *supra* note 80, at 3.

169 Sessions Remarks at Legal Training, *supra* note 125.

precedents by majority vote,[170] from seventeen members to twenty-one members.[171]

Details have not yet emerged on how current hiring practices depart from past procedures, and whether they avoid the legal pitfalls associated with the politicized hiring practices documented in the Inspector General 2008 report.[172] In April 2018, however, congressional Democrats sent a letter to the Department of Justice expressing concern that the Department may be screening candidates on political or ideological grounds.[173] The letter cites reports of individuals who were appointed to the immigration bench during the Obama Administration pending background checks, but whose applications subsequently were subject to extended delays and in at least one case ultimately rejected with little explanation.[174] While the Department of Justice has denied the allegations, members of Congress continue to press for an independent investigation.[175]

Even assuming current practices avoid the use of ideology or political affiliation in hiring, these new IJ hires do not enjoy the same level of independence as longtime members of this administrative bench. All new IJs serve a two-year probationary period before enjoying civil service protections, unlike most types of non-ALJ adjudicators, who have no probationary period at all.[176] Moreover, Attorney General Sessions has taken pains to point out to IJs that they serve at his pleasure, reminding them during their Legal Training Program that they are "subject to such supervision and shall perform such duties as the Attorney General shall prescribe."[177] In addition, the Administration has instituted structural changes to expand oversight over IJs serving in the field, increasing the number of supervisors while also creating a new Office of Policy within EOIR to "better coordinate initiatives to address the case load, to

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170 8 C.F.R. § 1003.1(g) (2018).

171 Executive Office for Immigration Review: Expanding the Size of the Board of Immigration Appeals, 83 Fed. Reg. 8321, 8321 (Feb. 27, 2018).

172 *See* DOJ INSPECTOR GEN. REPORT, *supra* note 17 and accompanying text.

173 Letter from Elijah E. Cummings, Lloyd Doggett, Joaquin Castro, & Donald S. Beyer, Jr., Members of Cong., to Jeff Sessions, U.S. Att'y Gen., U.S. Dep't of Justice (Apr. 17, 2018).

174 *Id.*

175 Tal Kopan, *Immigration Judge Applicant Says Trump Administration Blocked Her over Politics* CNN: POLITICS (June 21, 2018, 10:40 AM), https://www.cnn.com/2018/06/21/politics/immigration-judge-applicant-says-trump-administration-blocked-her-over-politics/index.html.

176 *Compare Oversight of the Executive Office of Immigration Review: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., & Int'l Law Comm. on the Judiciary*, 110th Cong. 2 (2008) (statement of Kevin A. Ohlson, Dir., Exec. Office for Immigration Review), https://judiciary.house.gov/_files/hearings/pdf/JointDOJ080923.pdf (noting two-year probationary period for newly hired IJs), *with* BARNETT ET AL., *supra* note 20, at 40 (noting that of the thirty-seven types of non-ALJ adjudicators identified across federal agencies, only seventeen are placed on probation upon hiring).

177 Sessions Remarks at Legal Training, *supra* note 125.

eliminate existing process redundancies across multiple components, and to more effectively oversee strategic planning, analytics, and internal communications."[178]

Expediting Case Processing. Consistent with President Trump's stated policy of "expedit[ing] determinations of apprehended individuals' claims of eligibility to remain in the United States,"[179] the Administration has initiated reforms to significantly limit case processing times. After renegotiating the collective bargaining agreement with the IJs' union to eliminate prohibitions on measuring and evaluating individual performance,[180] the Attorney General imposed new performance metrics for these judges.[181] Pursuant to these metrics, an IJ will be evaluated as having "satisfactory performance" only if he or she satisfies three measures.[182] First, he or she must complete at least 700 cases each year.[183] Second, remand rates by the BIA or the circuit courts must be less than 15%.[184] Third, he or she must meet at least half of a list of performance benchmarks such as completing 85% of detained removal cases within three days of the merits hearing; holding merits hearings on the initial scheduled hearing date in 95% of all cases; and completing all reviews of preliminary credible fear and reasonable fear assessments on the initial hearing date.[185]

These performance metrics build on separate efforts to limit immigration judges' ability to enter continuances in cases. In July 2017, the Administration amended the Operating Policies and Procedures Memorandum governing immigration courts to require judges to submit written documentation showing "good cause" warranting the grant of any continuance.[186] Although a recent United States Government Accountability Office (GAO) report found that the vast majority of continuances were due to resource constraints on the part of

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178 McHenry Testimony, *supra* note 80, at 5.

179 Exec. Order 13,767, § 2(c) (Jan. 25, 2017).

180 Maria Sacchetti, *Immigration Judges Say Proposed Quotas from Justice Dept. Threaten Independence*, WASH. POST (Oct. 12, 2017), https://www.washingtonpost.com/local/immigration/immigration-judges-say-proposed-quotas-from-justice-dept-threaten-independence/2017/10/12/3ed86992-aee1-11e7-be94-fabb0f1e9ffb_story.html.

181 Memorandum from Jeff Sessions, U.S. Att'y Gen., U.S Dep't of Justice, to the Exec. Office for Immigration Review (Dec. 5, 2017).

182 Memorandum from James R. McHenry, Dir., Exec. Office for Immigration Review, to All Immigration Judges, Exec. Office for Immigration Review (Mar. 30, 2018).

183 *Id.*

184 *Id.*

185 *Id.*

186 Memorandum from MaryBeth Keller, Chief Immigration Judge, Exec. Office for Immigration Review, to All Immigration Judges et al., Exec. Office for Immigration Review (Jul. 31, 2017) [hereinafter Keller Memorandum] (detailing new policies and procedures regarding continuances); 8 C.F.R. § 1003.29 (2018) (providing that immigration judges may grant continuances where "good cause shown").

immigration courts themselves,[187] the memorandum targets those requested by noncitizen respondents as warranting particular scrutiny, including those requested to obtain counsel or for attorney preparation.[188]

Then, in March 2018, the Attorney General indicated his intent to review the BIA's decision in *In re L-A-B-R-*, requesting parties to brief the issue of whether "good cause" exists for an IJ to grant a continuance in a removal proceeding to allow a collateral matter—such as a pending petition for legal permanent resident status—to be adjudicated.[189] In August, the Attorney General issued a final opinion, emphasizing that "the good-cause requirement is an important check on immigration judges' authority that reflects the public interest in expeditious enforcement of the immigration laws . . . ."[190] While he concluded that the decision on a motion for a continuance should turn primarily on "the likelihood that the alien will receive the pursued collateral relief" and that such "relief will materially affect the outcome of the removal proceedings," he also directed courts to consider other factors, including "DHS's position on the motion for continuance [and] concerns of administrative efficiency."[191] In doing so, he rejected the BIA's interpretation of the Third Circuit's opinion in *Hashmi v. Attorney General*, which held that denying a continuance solely to achieve case-completion goals was "impermissibly arbitrary."[192] The Attorney General concluded that while case-completion goals should not constitute the *sole* reason for a denial, they should be considered as one of several factors in the decision.[193] Additionally, he specified that continuances should be denied where the collateral relief sought constitutes a challenge to a criminal conviction or where the noncitizen respondent has a pending application for a family- or employment-based visa that is currently unavailable due to backlogs.[194] In these ways, the Attorney General ensured that the good-cause standard imposes a robust "substantive requirement" to "limit[] the discretion of immigration judges."[195]

Whether this set of reforms can appropriately be characterized as *politically* influenced may be contested. No one disputes that immigration courts suffer from extraordinary backlogs and have long been in desperate need for reform.

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187 GAO 2017 REPORT, *supra* note 14.
188 Keller Memorandum, *supra* note 186, at 4–5.
189 *In re* L-A-B-R-, 27 I. & N. Dec. 245, 245 (A.G. 2018).
190 *In re* L-A-B-R-, 27 I. & N. 405, 406 (A.G. 2018).
191 *Id.* at 415.
192 531 F.3d 256, 261 (3d Cir. 2008).
193 27 I. & N. at 416–17.
194 *Id.* at 417–18.
195 *Id.* at 405.

Currently, over 700,000 cases are pending in the immigration courts.[196] In 2015, the median case completion time stood at 286 days.[197] From this perspective, reforms focused on the timely and efficient resolution of cases may constitute precisely the sort of managerial oversight we would demand from the leadership in any hierarchical organization.

Yet in the context of immigration cases, limits on the length of removal proceedings are inextricably linked to case outcomes, heavily favoring deportation rather than relief from removal.[198] In the adversarial system between the government and a noncitizen-respondent, time limits on proceedings almost always work in favor of the government because in the vast majority of cases, the noncitizen's inadmissibility or deportability is not at issue. Grounds for removal, such as a lack of a valid visa or the existence of a criminal conviction, are relatively easy to establish. Consequently, the bulk of proceedings focus on whether the alien is eligible for, and warrants, a grant of discretionary relief from removal.[199] The alien bears the burden on this issue and must develop evidence to show, for example, a reasonable fear of persecution if removed, strong ties to the community, work history, or hardship to U.S. family members if removal were effectuated.[200]

The Administration itself has acknowledged the connection between the length of removal proceedings and case outcomes. In a document entitled "Backgrounder on EOIR Strategies for Caseload Reduction Plan," the Administration attributes the backlog in immigration proceedings to

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196 *See* Sessions Remarks at Legal Training, *supra* note 125; *see also* McHenry Testimony, *supra* note 80 (noting that in October 2017, approximately 640,000 cases remained pending in the immigration courts).

197 GAO 2017 REPORT, *supra* note 14. The GAO Report notes that the median time to completion for cases involving detained individuals, which are prioritized for case processing, was only 28 days, but the median time for non-detained cases was 535 days. *Id.* at 26.

198 By contrast, limits on case processing times have the opposite effect in disability adjudications in the Social Security Administration, where the burden of proof rests on the government. *See* HAROLD J. KRENT & SCOTT MORRIS, ACHIEVING GREATER CONSISTENCY IN SOCIAL SECURITY DISABILITY ADJUDICATION: AN EMPIRICAL STUDY AND SUGGESTED REFORMS 50–51, 54 (2013), https://www.acus.gov/sites/default/files/documents/Achieving_Greater_Consistency_Final_Report_4-3-2013_clean.pdf.

199 *See* ABA, REFORMING THE IMMIGRATION SYSTEM, *supra* note 5, at 2–9 ("In practice, many cases are resolved at the master calendar hearing, if the respondent admits to removability and only seeks voluntary departure. However, if removability is disputed or if relief other than voluntary departure is sought, the proceeding enters the second stage—an individual hearing on the merits, which is usually set for a separate date. At this hearing, the immigration judge makes a decision based on evidence and facts disputed by the respondent and on any other matters deemed relevant.") (footnote omitted).

200 8 U.S.C. § 1229a(c)(4)(A)–(B) (2012); *see also, e.g.*, Recinas, 23 I. & N. Dec. 467, 467, 468, 472–73 (BIA 2002) (holding that a single mother was eligible for cancelation of removal "because she demonstrated that her United States citizen children . . . will suffer exceptional and extremely unusual hardship upon her removal to her native country"); Marin, 16 I. & N. Dec. 581, 584–85 (BIA 1978) (outlining factors favorable to an alien in removal proceedings).

discretionary grants of relief from removal, which "have slowed down the adjudication . . . and incentivized further illegal immigration."[201] Moreover, the pressure to resolve cases quickly cannot be extricated from the Administration's repeated assertions that removal proceedings are plagued by meritless claims filed by noncitizens. The Attorney General has been particularly vocal in his conviction that baseless asylum claims are a major cause of the backlog in removal proceedings.[202] The Administration has also expressed skepticism toward claims brought by unaccompanied alien children (UACs) entitled to special protections. Recent amendments to the Operating Policies and Procedure Manual emphasize, "there is an incentive to misrepresent accompaniment status or age in order to attempt to qualify for the benefits associated with UAC status" and direct IJs to "be vigilant in adjudicating cases of a purported UAC."[203] These statements suggest that managerial and structural reforms targeting timely case completions are not expected to be outcome-neutral. IJs plausibly will feel pressure to expedite deportation orders, rather than to expedite relief from removal.

It is still too early to assess the extent to which these reforms have influenced particular case outcomes, but the initial data suggest a correlation. According to statistics released by the Department of Justice, immigration courts issued 127,570 final decisions between February 1, 2017 and November 30, 2017, a 16.6% increase from the same period the prior year.[204] The total number of removal orders issued in that time period (87,063), by contrast, grew by 30% as compared to the prior year.[205] These figures suggest that the percentage of completed cases resulting in a removal order was far higher in 2017 than in 2016.[206]

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[201] Backgrounder on EOIR Strategic Caseload Reduction Plan, *supra* note 4.

[202] Sessions Remarks at Falls Church, *supra* note 139.

[203] Memorandum from MaryBeth Keller, Chief Immigration Judge, Exec. Office for Immigration Review, to All Immigration Judges et al., Exec. Office for Immigration Review (Dec. 20, 2017) (detailing new policies and procedures regarding juveniles and UACs). The memorandum also instructs IJs not to grant relief from removal solely on the basis of "the best interest of the child." *Id.* It further states that "[a]lthough juvenile cases may present sympathetic allegations, Immigration Judges must be mindful that they are unbiased arbitrators of the law and not advocates for either party . . . ." *Id.* It asserts, "although vague, speculative, or generalized testimony by a child witness is not necessarily an indicator of dishonesty," "legal requirements, including credibility standards and burdens of proof, are not relaxed or obviated for juvenile respondents" and such vagueness and generality in a child's testimony may "be insufficient by itself to be found credible or to meet an applicable burden of proof." *Id.*

[204] Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Attorney General Sessions Issues Memo Outlining Principles to Ensure that the Adjudication of Immigration Cases Serves the National Interest (Dec. 6, 2017).

[205] *Id.*

[206] *Id.*

Contrary to conventional assumptions, the Trump Administration has sought to ensure that the removal of noncitizens are controlled not by independent adjudicators, but rather by the Administration's political leadership. Presidential administration has finally penetrated agency adjudications.

III. ASSESSING PRESIDENTIAL ADJUDICATION

Setting aside one's policy view on whether we should be deporting more, or fewer, noncitizens from the United States, the Trump Administration's reforms to immigration proceedings raise thorny normative questions about the extent to which agency adjudications should be insulated from political influence.[207] While commentators often assert that agency adjudicators must be independent from presidential control,[208] this Article argues that the normative assessment is more complex. This Part begins by setting forth the normative factors at stake when administrative adjudications become politicized. It then evaluates the recent immigration court reforms against these metrics.

A. The Normative Stakes

Our legal culture imposes a heavy presumption of adjudicative independence from politics.[209] The demand for such independence is less absolute in the administrative context than in the Article III context, however.[210] The extent to which agency adjudications are insulated from political interference should accommodate both the need to protect the interests of the individual as well as the need for democratic accountability.[211] It should also adhere to the separation-of-powers principles necessary to protect against arbitrary unilateral action.[212]

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[207] For an empirical inquiry into public norms about the legitimacy of Executive actions, see Cary Coglianese & Kristin Firth, *Separation of Powers Legitimacy: An Empirical Inquiry into Norms About Executive Power*, 164 U. PA. L. REV. 1869, 1872 (2016).

[208] *Supra* note 21 (listing sources).

[209] *See, e.g.*, U.S. CONST. art. III, § 1 (establishing life tenure and salary protections for federal judges); THE FEDERALIST NOS. 78, 81 (Alexander Hamilton) (explaining need to protect judiciary from political influence).

[210] *See generally* PETER L. STRAUSS ET AL., *supra* note 79, at 1004–06 (describing differences between Article III adjudication and federal agency adjudication). *See also* F. Andrew Hessick, *Consenting to Adjudication Outside the Article III Courts*, 71 VAND. L. REV. 715, 725–29 (2018) (same); Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. L. REV. 1569, 1581–84 (2013) (same).

[211] Legomsky, *War on Independence*, *supra* note 17, at 390 (acknowledging cost of decisional independence on norms of political accountability); Taylor, *supra* note 22, at 485 (noting trade-off between decisional independence and policy consistency and uniformity).

[212] Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1036–39 (2011) (examining importance of allocation of power between actors within a given agency); Gillian E.

1. Democratic Responsiveness and Protecting Individual Interests

The degree to which agency adjudications are insulated from presidential influence should reflect, in part, a context-specific balancing between the need to protect individual interests on the one hand and norms of electoral responsiveness on the other.[213]

Advocates of presidential control over agency decision-making generally argue that such control helps ensure that the decisions of unelected bureaucrats are held to democratic account. As Kagan described, "presidential leadership establishes an electoral link between the public and the bureaucracy, increasing the latter's responsiveness to the former."[214] The Supreme Court itself relied on this premise to justify judicial deference to agencies' interpretations of statutory ambiguities in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*: "While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . ."[215] From this view, presidential control legitimates agency decision-making by ensuring that such decisions are responsive to the electorate.

This democratic-accountability claim surfaces most frequently in defenses of presidential control over agency rulemaking, but it arguably applies to agency adjudications as well. Agency adjudicators are not limited to resolving disputes between discrete parties; as described in section I.C., they may also establish binding national policy.[216] To the extent the policy's legitimacy rests on being traceable to the democratically accountable President, such legitimacy would not appear to depend on whether the policy was promulgated through adjudication rather than rulemaking.[217]

Yet even if one accepts the primacy of democratic accountability as the touchstone of legitimacy, the extent to which presidential control actually

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Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 429–30 (2009) [hereinafter Metzger, *The Interdependent Relationship*] (examining importance of internal separation of powers to empower external actors to keep Executive power in check).

213 *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17 (1962) (coining term "countermajoritarian difficulty" to describe inherent tension between adjudicative system and norms of electoral governance).

214 Kagan, *supra* note 19, at 2332; *see also* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 75–76 (2010); Pierce, Jr., *supra* note 28, at 114–15; Watts, *supra* note 28, at 688–89, 692.

215 467 U.S. 837, 865 (1984).

216 *See supra* notes 77–80 and accompanying text.

217 Vermeule, *Agency Independence*, *supra* note 19, at 1212.

renders agency decisions more responsive to the electorate is contested.[218] In the rulemaking context, political scientists have noted the weak connection between a presidential victory and electoral preferences for a specific policy choice, e.g., ramped-up removal of noncitizens.[219] The adjudicative context exacerbates this disconnect, as adjudications simply are less publicly salient than rulemaking.[220]

More fundamentally, agency adjudications differ from rulemaking actions because the legitimacy of the former does not rest entirely—or even primarily—on notions of democratic accountability. Even Kagan, who famously championed the presidential control model, conceded that in the context of adjudications, "which apply to and affect discrete individuals and firms," "presidential participation in . . . whatever form, would contravene procedural norms and inject an inappropriate influence into the resolution of controversies."[221] A recent report published by the National Association of the Administrative Law Judiciary describes the importance of individual protections in agency adjudications:

> Ultimately, administrative adjudication . . . is about the delivery of due process to the individuals and businesses that are subject to government regulation . . . . A strong commitment to ensuring the independence of the administrative adjudicator . . . is the greatest protection for our citizens, and the most important assurance of due process for taxpayers and businesses that rely upon independent administrative judges to resolve fairly and impartially their disputes with the government.[222]

From this perspective, the legitimacy of agency adjudications rests in large part on the adjudicative process's ability to protect individual interests *against* majoritarian preferences.

A pair of early cases familiar to students of administrative law illustrates this principle. In *Londoner v. City of Denver*, the Supreme Court held that due process required an oral hearing for property owners before a tax assessment could be imposed on them.[223] In *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado*, by contrast, the Court held that property owners

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[218] *See* Kitrosser, *supra* note 21.

[219] *See* Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 450 (2010).

[220] Alan B. Morrison, *The Administrative Procedure Act: A Living, Responsive Law*, 72 VA. L. REV. 253, 255–56 (1986) (noting that adjudication is less publicly salient than rulemaking).

[221] Kagan, *supra* note 19, at 2362–63.

[222] Gilbert & Cohen, *supra* note 55, at 254.

[223] 210 U.S. 373, 386 (1908).

opposing a city-wide increase in the valuation of taxable property were not entitled to such due process protections.[224] The Court in *Bi-Metallic* justified its departure from *Londoner* as follows: "In [*Londoner*, a] relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds . . . . But that decision is far from reaching a general determination dealing only with the principle upon which all the assessments in a county had been laid."[225]

Together, these cases show that the Constitution mandates procedural due process protections where a government agency engages in "adjudicative" decision-making, impacting specific individuals, but not where the agency engages in "legislative" decision-making, which is broadly applicable to the public at large. As others have explained, this distinction rests on a particular view of the political process as incapable of protecting the interests of discrete individuals against majoritarian politics; an individual targeted by a government action is unlikely to be able to mobilize the broad support sufficient to protect her interests through the ballot box.[226] In these circumstances, the only way to protect the individual's interest is to provide due process, which at its most fundamental, requires an independent, impartial decision maker.[227] The lesson from *Londoner* and *Bi-Metallic* is that majoritarian preferences simply do not play the same dominating role in adjudicative decisions; on the contrary, they may need to give way to protect the interests of individual parties in a proceeding.

Justice Powell's concurrence in *INS v. Chadha* similarly articulates a theory of adjudication rooted in the need to protect individual interests from majoritarian preferences.[228] *Chadha* involved the constitutionality of a statute which delegated authority to grant discretionary relief from deportation while at the same time reserving Congress's power to override the grant of relief by majority vote in either the House or Senate.[229] The majority opinion authored by Chief Justice Burger invalidated the one-house legislative veto as an impermissible exercise of "legislative" power departing from constitutional lawmaking requirements of bicameralism and presentment.[230] Justice Powell, by

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224 239 U.S. 441, 444–45 (1915).

225 *Id.* at 445–46.

226 *See* 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.2, at 743 (5th ed. 2010).

227 *See* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279 n.71 (1975) (ranking an "unbiased tribunal" as the most important of due process protections).

228 462 U.S. 919, 959–60 (1983) (Powell, J., concurring).

229 *Id.* at 923–25.

230 *Id.* at 944, 947, 951–52, 958.

contrast, concluded that the statute did not constitute an exercise of "legislative" power at all, but rather an impermissible exercise by Congress of the "adjudicative" power:

> On its face, the House's action appears clearly adjudicatory. The House did not enact a general rule; rather it made its own determination that six specific persons did not comply with certain statutory criteria . . . . [T]he House's assumption of this function . . . raises the very danger the Framers sought to avoid—the exercise of unchecked power. In deciding whether Chadha deserves to be deported, Congress is not subject to any internal constraints that prevent it from arbitrarily depriving him of the right to remain in the country . . . . The only effective constraint on Congress' power is political, but Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to "the tyranny of a shifting majority."[231]

Chadha involved congressional action, but Justice Powell's concern about the fair adjudication of individual interests would seem to apply to decisions directed by a politically-motivated President as well.

In the context of agency adjudications, the balance between democratic responsiveness and protections for individual interests simply is not the same as in the rulemaking context. It does not follow that an individual's interest in an adjudicative proceeding must always prevail over the will of the majority. Rather, the proper balance to strike will be context specific, depending on factors such as the significance of the individual interests at stake; the extent to which a politicized decision compromises those interests; and the degree to which a politicized decision actually reflects the popular will.

2. Separation of Powers

The independence of agency adjudications implicates a related set of values: those reflected in the structure of separated powers in our Constitution. At the level of constitutional actors (President, Congress, and federal courts), agency adjudications must remain faithful to the Congress that created the agency and vested it with adjudicative authority. At the sub-constitutional level of the agency itself, agency adjudicators should enjoy the degree of independence necessary to ensure adequate checks and balances against arbitrary unilateral action.

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[231] *Id.* at 964–66.

Constitutional Actors. Agencies are firmly placed within the Executive Branch serving under the President.[232] But they are created by, and derive all powers from, Congress.[233] As such, the legitimacy of any form of agency action depends on its fidelity to the goals of the enacting Congress.[234] Congress sets forth the procedures by which decisions, including adjudications, are to be reached. Congress may delegate decision-making to politically insulated ALJs, or vest decision-making authority exclusively in a presidential appointee, for example.[235] It might limit the extent to which presidential appointees can overturn the decisions of trial-level adjudicators, or it might grant de novo review authority.[236]

Congress also establishes particular policy goals in creating the agency. As a general matter, independent career bureaucrats, steeped in a professional culture defined by the mission of the agencies in which they serve, can protect legislative interests when a current President's goals diverge from those of the Congress that enacted an agency's organic statute.[237] Indeed, political scientists have characterized the career bureaucracy as central to mediating between conflicting goals of Congress and the President.[238] While the value of bureaucratic independence often is associated with agency expertise in scientific and technical fields,[239] agency adjudicators also develop expertise given their focus on limited categories of cases. Moreover, agency adjudicators who preside over the taking of evidence are more likely to develop an accurate assessment of the adjudicative facts at issue in a given case.[240] For these reasons, preserving the independence of agency adjudicators may enhance the legitimacy and accuracy of their decisions, particularly where the political goals of the current President conflict with Congress's original intent.[241]

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232 PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES 171–73, 175–76, 179 (3d ed. 2016).

233 *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000) ("[N]o matter how important, conspicuous, and controversial the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.").

234 *Id.*

235 *See* Yakus v. United States, 321 U.S. 414, 425–26 (1944)

236 *See* ASIMOW, *supra* note 54, at 33–34.

237 Strauss, *The President in Administrative Law*, *supra* note 28, at 703–04.

238 *See* McCubbins et al., *supra* note 53, at 244.

239 Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019, 2055 (2015).

240 Universal Camera Corp. v. NLRB, 340 U.S. 474, 494 (1951).

241 *See* Kevin M. Stack, *An Administrative Jurisprudence*: *The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 2018 (2015) (discussing norm of legal coherence to mediate between enacting Congress's goals and the current Administration's goals).

Within the Agency Itself. Even within agencies, which are wholly within the Executive Branch, separation-of-powers norms have come to play a crucial role. Since at least the New Deal, the Executive Branch has accreted more and more power so that it is undeniably the most powerful branch of federal government.[242] One of the central projects of administrative law has been to replicate, within the increasingly powerful Executive Branch, the types of checks and balances our constitutional framers mandated *between* branches.[243] Indeed, Professor Gillian Metzger argues that such internal checks and balances are constitutionally *required,* given the increasing threat of presidential unilateralism:

> The administrative state—with its bureaucracy, expert and professional personnel, and internal institutional complexity—performs critical constitutional functions and is the key to an accountable, constrained, and effective [E]xecutive [B]ranch . . . [T]he administrative state today is constitutionally obligatory, rendered necessary by the broad statutory delegations of authority to the [E]xecutive [B]ranch that are the defining feature of modern government.[244]

Pursuant to this view, the independence of career bureaucrats within Executive Branch agencies assumes a constitutional dimension.

Importantly, preserving the independence of agency adjudicators does not eliminate the role of political leadership over agencies altogether. On the contrary, political appointees may retain meaningful oversight over broad policy choices without interfering in the decision-making processes of career

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[242] *See* Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 L. & CONTEMP. PROBS. 1, 1 (1994) ("[T]he institutional system has itself been transformed . . . from a nineteenth century system of 'congressional government' into a modern, presidentially led bureaucratic state . . . . The hallmark of modern U.S. government is presidential leadership.").

[243] *See* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2317 (2006) ("A critical mechanism to promote internal separation of powers is bureaucracy."); Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 235 (2016) (examining relationship between vertical separation of powers—involving competition between constitutional branches—and horizontal separation of powers—interactions between politically appointed agency leadership, civil service bureaucrats, and civil society organizations). For discussion of the relationship between individual rights and separation-of-powers norms, see Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1727 (2012) (setting forth originalist account of due process rights as designed to enforce separation-of-powers norms); Jonathan R. Macey, *How Separation of Powers Protects Individual Liberties*, 41 RUTGERS L. REV. 813, 816 (1989) (describing separation of powers as a precondition to a system of checks and balances necessary to protect individuals).

[244] Metzger, *The Administrative State Under Siege*, *supra* note 21.

adjudicators. The Supreme Court's decision in *Heckler v. Campbell*,[245] involving a denial of disability benefits, illustrates one way that bureaucratic independence can co-exist with political leadership. Pursuant to the Social Security Act, an individual is entitled to disability payments upon establishing at an adjudicative hearing that her physical or mental impairment precludes her from pursuing gainful employment in the national economy.[246] Historically, adjudicators determined the availability of such gainful employment through the receipt of expert testimony in individual hearings.[247] In 1978, however, the agency's political leadership promulgated regulations setting forth a matrix to calculate the types and numbers of jobs existing in the national economy.[248] Campbell challenged the use of this matrix to deny her benefits, arguing that she was entitled to present evidence of the absence of jobs at her individualized hearing.[249] Rejecting her claim, the Supreme Court stated:

> It is true that the statutory scheme contemplates that disability hearings will be individualized determinations based on evidence adduced at a hearing . . . . But this does not bar the Secretary from relying on rulemaking to resolve certain classes of issues. The Court has recognized that even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its own rulemaking authority to determine issues that do not require case-by-case consideration.[250]

Heckler v. Campbell relied on the traditional distinction between adjudicative facts, which must be resolved by the adjudicator, and legislative facts, which may be resolved by the political leadership. The Court explained:

> The first inquiry involves a determination of historic facts, and the regulations properly require the Secretary to make these findings on the basis of evidence adduced at a hearing . . . . The second inquiry requires the Secretary to determine an issue that is not unique to each claimant—the types and numbers of jobs that exist in the national economy. This type of general factual issue may be resolved as fairly through rulemaking as by introducing the testimony of vocational experts at each disability hearing.[251]

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245 461 U.S. 458, 464 (1983).
246 *Id.* at 460.
247 *Id.* at 461.
248 *Id.* at 460–62.
249 *Id.* at 463.
250 *Id.* at 467.
251 *Id.* at 467–68.

Thus, *Campbell* demonstrates that even where the power to establish adjudicative facts is allocated exclusively to an independent adjudicator, the political leadership may retain power to establish more general legislative facts. The independence of the initial decision maker need not eliminate the possibility of politicized outcomes; but it does discipline them—mandating a deliberative process more likely to result in accurate, or at least better-informed, decisions.

Even in the context of resolving individual cases, as opposed to broader policy decisions, the independence of adjudicators need not displace political oversight. This principle is illustrated in the Supreme Court's decision in *Accardi v. Shaughnessy*, holding that the Attorney General improperly interfered with the BIA's independence in adjudicating a noncitizen's removal.[252] In that case, Accardi's application for discretionary relief from removal had been denied by the trial-level IJ.[253] While his appeal was pending before the BIA, the Attorney General allegedly circulated a list of "unsavory characters" whom he wished to deport.[254] The BIA subsequently affirmed the IJ's denial of relief. On appeal, the Supreme Court held that the Attorney General overstepped his authority by violating his own regulations requiring the BIA to exercise independent judgment on appeals.[255] It held, "as long as the regulations [mandating the BIA to exercise independent judgment in each case] remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner."[256]

The decision may appear puzzling at first, given that Congress vested discretion personally in the Attorney General to grant or deny relief from removal.[257] Moreover, the Supreme Court acknowledged that regulations preserved the Attorney General's unfettered discretion to reverse any decision of the BIA.[258] Yet the holding can be understood as promoting a version of internal separation of powers.[259] The BIA's exercise of independent judgment in the case becomes a part of the formal record; while the Attorney General may be free to reverse that decision, any subsequent review of the Attorney General's

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252 347 U.S. 260, 267–68 (1954).

253 *Id.* at 263.

254 *Id.* at 264.

255 *Id.* at 266–67.

256 *Id.* at 267.

257 *Id.* at 262–63.

258 *Id.* at 266–67.

259 Metzger, *The Interdependent Relationship*, *supra* note 212 (discussing administrative law's separation of functions between adjudicative functions and other agency functions); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 484 (2010) (arguing that much of administrative law is informed by but not necessarily mandated by constitutional concerns).

final decision—whether by a federal court or the public at large—will consider it alongside the opinion and reasoning of the independent adjudicator. Thus, while the Attorney General's final decision may be motivated by political rather than legal considerations, such motivations would be uncovered in the act of reversal. Allowing the Attorney General to influence the agency adjudicator *before* he or she exercises independent judgment evades such disclosure.[260] In this way, *Accardi*'s guarantee of adjudicative independence imposes a check, though not an absolute one, on the exercise of raw political power in individual cases.

From the separation-of-powers perspective, then, the legitimacy of political influence over agency adjudications depends in part on the extent to which it complies with congressional intent, as well as the extent to which it allows space for the types of checks and balances contemplated by our constitutional framers.

As this discussion suggests, the degree of independence that should be afforded to agency adjudications is complex and context specific. The proper balance between individual interests and majoritarian preferences, and the need for checks against unilateral action, will differ across agencies and even across types of political interference within a given agency.[261] This variance is demonstrated in the next section, which evaluates the Trump Administration's reforms to removal proceedings along these metrics.

B. A Context-Specific Assessment of Politicized Removal Proceedings

The metrics set forth in the preceding section suggest that overall, presidential politics should play only a limited role in removal adjudications. As a general matter, even if the current Administration's immigration court reforms could be characterized as electorally responsive, the gravity of the individual interests at stake and the need to preserve checks on unilateral power counsel against presidential intervention.

The Trump Administration has been explicit in defending its reforms to immigration courts as responsive to a popular mandate. Addressing IJs directly, the Attorney General asserted: "The American people have spoken. They have spoken in our laws and they have spoken in our elections. They want a safe, secure border and a lawful system of immigration that actually works. Let's

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[260] *Cf.* Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 860 (2015) (suggesting that *ex ante* interference is more tolerable than *ex post* interference).

[261] *See* Shah, *The Attorney General's Disruptive Immigration Power*, *supra* note 17, at 139–40.

deliver it for them."[262] In another set of remarks, this time to the Criminal Justice Legal Foundation, he stated:

> In the 2016 election, voters said loud and clear that they wanted a lawful system of immigration that serves the national interest. They said we've waited long enough. I believe that this is one of the main reasons that President Trump won. He promised to tackle this crisis that had been ignored or made worse by so many before him. And now he's doing exactly what the American people asked him to do.[263]

To the extent the electoral returns granted President Trump a mandate to rid the country of "illegals," the Administration's efforts to ensure that all removable aliens are in fact removed arguably are politically justified.[264]

But even if one agrees that the Administration's reforms are democratically responsive (a point that is highly contested),[265] such political accountability must be balanced against individual due process interests. Removal proceedings epitomize the sort of individualized determinations triggering due process protections under *Londoner* and *Bi-Metallic,* and the Supreme Court has long recognized that noncitizens threatened with deportation are entitled to due process protections.[266] The threatened deprivation—detention and ultimately removal—constitute unusually weighty interests,[267] and noncitizens present precisely the type of "discrete and insular minorities" whose interests are

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[262] Sessions Remarks at Legal Training, *supra* note 125.

[263] Jeff Sessions, U.S. Att'y Gen., Remarks to the Criminal Justice Legal Foundation in Los Angeles, Cal. (June 26, 2018).

[264] This view is consistent with political theories vesting the body politic with the power to define the composition of the polity. *See* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 157–58 (1996) (discussing theory of immigration as part of process of national self-definition); Michael Walzer, *The Distribution of Membership*, *in* BOUNDARIES: NATIONAL AUTONOMY AND ITS LIMITS 1–2, 32 (Peter Brown & Henry Shue, eds., 1981); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 31–32, 34, 62 (1983) (discussing political theory of membership in the polity). Since the late-nineteenth century, the Supreme Court has characterized decisions relating to the exclusion and deportation of noncitizens as fundamentally *political*, vested exclusively in the Congress and the President as a power inherent in sovereignty. Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77, 79, 93 (2017).

[265] *See* Sara Kehaulani Goo, *What Americans Want to Do About Illegal Immigration*, PEW RES. CENTER (Aug. 24, 2015), http://www.pewresearch.org/fact-tank/2015/08/24/what-americans-want-to-do-about-illegal-immigration/ (showing that a majority of Americans support granting path to legal citizenship for undocumented noncitizens currently residing in the United States if they satisfy certain requirements, and only 17% support deporting all noncitizens who are here without documentation).

[266] Yamataya v. Fisher, 189 U.S. 86, 89, 91 (1903).

[267] *See e.g.*, Judulang v. Holder, 565 U.S. 42, 58 (2011) ("In a foundational deportation case, this Court recognized the high stakes for an alien who has long resided in this country, and reversed an agency decision that would 'make his right to remain here dependent on circumstances so fortuitous and capricious.'") (quoting Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947)).

underrepresented in political processes.[268] Under these circumstances, the independence of agency adjudicators is crucial to moderate the excesses of raw majoritarianism.[269]

Presidential control over immigration adjudications also arguably contravenes congressional intent. As mentioned earlier, the INA vests the power to adjudicate removal proceedings personally and exclusively in IJs, not the agency's political leadership.[270] Moreover, unlike the APA, the INA does not purport to vest political leadership with unfettered review authority.[271] These provisions suggest that Congress contemplated individual removal decisions be made free from political influence.[272]

More importantly, presidential control over removal proceedings presents a significant threat of unfettered unilateral power in contravention of separation-of-powers principles. The need for independence in immigration adjudications is particularly acute given the virtual absence of external checks and balances.[273] Congress's ability to discipline removal decisions *ex post* is extremely limited—Congress retains power to reverse an order of removal by enacting a private immigration bill, but out of the nearly 400 such bills proposed over the past 10 years, few have been enacted.[274] Indeed, it was this legislative inertia that prompted Congress to create the one-house legislative veto subsequently invalidated in *INS v. Chadha*.[275] Federal courts likewise impose relatively limited constraints on Executive Branch removal decisions. Pursuant to the "plenary power doctrine," federal courts have declined to impose rigorous constitutional checks on removal decisions.[276] Moreover, courts are statutorily proscribed from exercising review over an extensive array of removal decisions, including challenges to the denial of discretionary relief or to the removal of

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[268] *See* Graham v. Richardson, 403 U.S. 365, 372 (1971).

[269] *See* Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1426, 1448–51 (2013); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 52–53, 56, 63 (1985).

[270] *See supra* note 85 and accompanying text.

[271] *See supra* notes 81, 83 and accompanying text.

[272] Concededly, other statutory provisions lend support for the contrary position, that Congress intended for removal proceedings to be subject to a degree of political control. The INA provides that IJs are appointed by and "shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe." 8 U.S.C. § 1101(b)(4) (2012). It further vests the power to grant discretionary relief from removal personally in the Attorney General, not in IJs. *See supra* note 84–86 and accompanying text.

[273] *See generally* Amanda Frost, *Independence and Immigration*, 89 S. CAL. L. REV. 485, 507 (2016).

[274] CONG. RESEARCH SERV., THE LEGAL AND PRACTICAL EFFECTS OF PRIVATE IMMIGRATION LEGISLATION AND RECENT POLICY CHANGES (2017).

[275] 462 U.S. 919, 928 (1983).

[276] *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 707, 711, 731–32 (1893) (sustaining a requirement that Chinese aliens produce a white witness to testify to their lawful presence to challenge removal).

criminal aliens.[277] The limited role of Congress and federal courts in disciplining Executive decisions to deport noncitizens makes *internal* checks on Executive power all the more important. These factors suggest that overall, presidential politics should play little role in removal proceedings.

At a more granular level, however, the normative calculus differs across different forms of political intervention.[278] Perhaps counterintuitively, interventions that have the largest aggregate impact on decisional outcomes arguably enjoy a stronger claim to legitimacy than some of the other interventions. Both the INA[279] and administrative law doctrine under *Heckler v. Campbell*[280] make clear that the Attorney General retains authority to announce broadly applicable policies to which IJs must adhere. Attorney General Sessions' announcement in *In re A-B-* that asylum generally should not be granted on the basis of private criminal violence arguably presents the type of legislative fact-finding that does not require an independent assessment of historical adjudicative facts.[281] This is not to say that this decision is legally correct as a matter of constitutional or statutory interpretation, or that it is morally defensible—in my view, it is not. But it does suggest that allowing the Attorney General rather than unelected bureaucrats to make this policy decision more closely reflects an appropriate allocation of power between political operatives and the bureaucracy.[282] Moreover, the blanket nature of the mandate enhances

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[277] *See, e.g.*, 8 U.S.C. § 1252(a)(2)(B) (2012) (precluding judicial review over denials of discretionary relief); 8 U.S.C. § 1252(a)(2)(C) (same for removal orders involving criminal aliens). *But see* INS v. St. Cyr, 533 U.S. 289, 297–98, 302–03, 305 (2001) (construing statutory denial of judicial review over removal decisions narrowly in light of constitutional concerns).

[278] Legomsky, *War on Independence*, *supra* note 17, at 387 (noting that different forms of political influence over adjudication raise different normative concerns).

[279] 8 U.S.C. § 1103(g) (2012).

[280] 461 U.S. 458 (1983); *see supra* notes 245–57 and accompanying text.

[281] *See supra* notes 148–51 and accompanying text.

[282] Importantly, the Attorney General's actions in both *In re A-B-* and *In re E-F-H-L-* raise legitimacy concerns separate and apart from any improper interference in agency adjudications. Unlike the policy at issue in *Heckler v. Campbell*, the current Administration's new asylum policies were announced through the refer-and-review mechanism rather than through the notice and comment rulemaking procedures of the APA. *See* 5 U.S.C. § 553 (2012) (requiring agencies to publish notice of proposed rulemaking in Federal Register and offer public opportunity to comment before promulgation of new regulation). The Supreme Court in *Campbell* emphasized the importance of notice-and-comment procedures to ensure the factual accuracy of the challenged agency decision. 461 U.S. at 470. The Attorney General's decisions in *In re A-B-* and *In re E-F-H-L-* depart significantly from those procedures. In *In re A-B-*, notice did not appear in the Federal Register, and public comments were accepted through amicus briefs only. *See In re* A-B-, 27 I. & N. 227, 227 (A.G. 2018). In *In re E-F-H-L-*, no prior notice or opportunity to comment was provided at all. *See In re* E-F-H-L-, 27 I. & N. 226, 226 (A.G. 2018). The Attorney General's use of the refer-and-review mechanism circumvented the careful deliberation and thorough explanation that notice-and-comment procedures would have provided, thereby compromising the legitimacy of those decisions.

uniformity and, given its relative public salience, is more likely to be held to public account.[283]

At the other end of the spectrum, efforts to pressure individual IJs to reach particular outcomes in a given case—such as by threatening negative performance reviews, casting aspersions on the credibility of certain types of witnesses or certain types of claimants, or the hiring or firing of IJs on the basis of ideology—demonstrate the gravest misallocation of authority between political leadership and bureaucracy. Few would doubt that such efforts compromise the impartiality of adjudicators, thereby violating due process norms. Such interventions in individual cases depart furthest from statutory directives vesting the power to adjudicate removal proceedings in IJs and raise precisely the sorts of concerns addressed in cases like *Chadha* and *Accardi*. At the same time, they are not likely to improve uniformity and are far less publicly salient.

Between these two extremes lie interventions relating to the procedures used in removal proceedings, such as the denial of the power to grant administrative closure, limiting the power to grant continuances, or directives to adjudicate cases within a particular time frame.[284] Arguably such interventions constitute precisely the types of managerial controls we would demand of any organization. The systematic failure to resolve cases in a timely manner not only increases costs to the system but also harms noncitizens, particularly detained noncitizens, who seek an efficient system to review their claims to relief from removal.[285]

But as articulated in the previous section, it is virtually impossible to separate these dictates from the Administration's stated preference for reaching particular outcomes—i.e., maximizing the number of deportations as quickly as possible, a directive at odds with the independence of hearing-level adjudicators. The

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[283] *See* ASIMOW, *supra* note 54, at 17–18 (discussing importance of uniformity for perceptions of legitimacy); Krent & Morris, *supra* note 198 (same).

[284] Others similarly have noted the difficulty in distinguishing between different types of political influence over adjudication. Friendly, *The Federal Administrative Agencies*, *supra* note 21, at 1299–1300 (stating that one could not "reasonably quarrel with [the] view that the congestion of the dockets of the agencies [and] the delays incident to the disposition of cases . . . are all a part of the President's constitutional concern to see that the laws are faithfully executed . . . . [Yet] I still find difficulty in the proposal that the President should not merely see to it that agencies function but should tell them how"); *see also* Legomsky, *War on Independence*, *supra* note 17, at 385, 387 (distinguishing "decisional independence" involving interference with individual case outcomes from "institutional independence" involving interference with the overall process of adjudication but acknowledging they "cannot always be separated neatly").

[285] *See* Jennings v. Rodriguez, No. 15-1204, slip op. at 5–7 (U.S. Feb. 27, 2018) (involving plaintiffs detained over a year pending removal decisions).

pressure to speed up case resolution obstructs the noncitizen's ability to present his or her case or obtain counsel, compromises the IJ's ability to engage in an accurate assessment of the facts at issue, and, in the end, risks denying relief to unknown numbers of noncitizens notwithstanding their legal eligibility for such relief. Importantly, there are numerous alternatives to address the backlog in case processing in removal proceedings.[286] Indeed, EOIR commissioned a study to identify such solutions, which concluded that if performance reviews were to be utilized at all, they should emphasize fair process and independence rather than quotas and deadlines.[287] Rather than limiting the time judges can spend on a given case, the agency could continue to hire more judges but ensure that such hiring is conducted in a non-partisan manner, improve working conditions for these judges, and expand access to counsel, reforms that would address the backlog while not tilting decisional outcomes in favor of removal.[288] While measures to ensure the efficient resolution of cases are permissible, those that stack the deck in favor of a preferred case outcome unduly compromise the independence and integrity of adjudicative proceedings.

CONCLUSION

Administrative law scholars have long documented the emergence of presidential control over agencies engaged in Executive and Legislative functions, but they have generally assumed that such control does not extend to administrative adjudication. The Trump Administration's recent reforms to immigration courts challenge that assumption. Through a series of mechanisms, the Administration has eliminated IJs' ability to administratively close cases, limited the availability of asylum, discouraged the release of aliens from detention, and imposed significant restrictions on IJs' ability to carefully consider and deliberate on cases. This Article contextualizes these reforms within the extant debate over the legitimacy of presidential control over agencies, with the ultimate goal of informing future efforts to reconcile tensions between norms of political accountability and protections for individual due process interests, and between regulatory efficiency and bureaucratic independence.

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[286] *See, e.g.*, *Strengthening and Reforming America's Immigration Court System: Hearing Before the Senate Judiciary Comm., Border Sec. & Immigration Subcomm.*, 115th Cong. 2, 8–9, 11–12 (2018) (statement of Judge A. Ashley Tabaddor, President, Nat'l Ass'n of Immigration Judges) (attributing backlog to overall lack of resources, including the number of IJs and technology utilized in the courts), https://www.naij-usa.org/images/uploads/publications/NAIJ_Senate_Final_Testimony_4.18_.2018_.pdf.

[287] BOOZ ALLEN HAMILTON, *supra* note 14.

[288] *Id.*