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Taking Liberty Decisions Away from "Imitation" Judges

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> "I think that condemning people to jail is a job for the judiciary in accordance with procedural 'due process of law.' To farm out this responsibility to the police and prosecuting attorneys is a judicial abdication in which I will have no part."[1]

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1. Carlson v. Landon, 342 U.S. 524, 555 (1952) (Black, J., dissenting).

Justice Black warned in 1952 about the dangers of giving immigration police and prosecutors the authority to jail human beings with very little involvement by the judiciary. Today's immigration detention machine illustrates Justice Black's fears: U.S. Department of Homeland Security ("DHS") agents have both arrested 182,869 people in a single year[2] and decided whether those individuals will be released or remain incarcerated for the remainder of their removal proceedings. For those entitled to immigration judge review, the judge works for the Department of Justice ("DOJ") under the supervision of the Attorney General, the nation's top prosecutor.[3] Immigration judges' lack of independence has long been a subject of critique,[4] leading some to refer to themselves as "'U.S. imitation

2. U.S. IMMGR. & CUSTOMS ENF'T, FISCAL YEAR 2020 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 7, https://www.ice.gov/doclib/news/library/reports/annual-report/eroReportFY2020.pdf; U.S. IMMIGR. & CUSTOMS ENF'T, FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 5 https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf (reporting that DHS agents arrested 510,854 people in fiscal year 2019).

3. *Organizational Chart*, U.S. DEP'T JUST., https://www.justice.gov/agencies/chart (last visited May 2, 2021); *About the Office*, U.S. DEP'T JUST., https://www.justice.gov/eoir/about-office (last visited May 2, 2021).

4. *See, e.g.*, Mary Holper, *The Fourth Amendment Implications of "U.S. Imitation Judges"*, 104 MINN. L. REV. 1275, 1278 (2020); Joint Letter from Am. Bar Ass'n, Am. Immigr. Laws. Ass'n, Fed. Bar Ass'n, and Nat'l Ass'n of Immigr. Judges to Congress (July 11, 2019), https://lawprofessors.typepad.com/files/7-11-joint-letter-1.pdf [hereinafter Joint Letter] (calling on Congress to "establish an immigration court system that is independent of the U.S. Department of Justice"); Fatma E. Marouf, *Executive Overreaching in Immigration Adjudication*, 93 TUL. L. REV. 707, 760–76 (2019); Amit Jain, *Bureaucrats in Robes: Immigration "Judges" and the Trappings of "Courts"*, 33 GEO. IMMIGR. L.J. 261, 309 (2019); TESS HELLGREN, ET AL., INNOVATION L. LAB & S. POVERTY L. CTR., THE ATTORNEY GENERAL'S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL (June 2019), https://innovationlawlab.org/media/COM_PolicyReport_The-Attorney-Generals-Judges_FINAL.pdf; *Strengthening and Reforming America's Immigration Court System: Hearing Before the Subcomm. on Border Sec. & Immigr. of the S. Judiciary Comm.*, 115th Cong. 7 (2018) (statement of J. A. Ashley Tabaddor, President, Nat'l Ass'n of Immigr. Judges), https://www.judiciary.senate.gov/imo/media/doc/04-18-18%20Tabaddor%20Testimony.pdf [hereinafter Tabaddor]; Hon. Denise Noonan Slavin & Hon. Dana Leigh Marks, *Conflicting Roles of Immigration Judges: Do You Want Your Case Heard by a "Government Attorney" or by a "Judge"?*, 16 BENDER'S IMMIGR. BULL. 1785, 1788–90 (2011); AM. BAR ASS'N COMM'N IMMIGR., REFORMING THE IMMIGRATION SYSTEM (2010), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.pdf; Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1644 (2010); Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGR. BULL. 3, 3–4, 10–11 (2008); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 369–70 (2006); Peter J. Levinson, *The Façade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9 BENDER'S IMMIGR. BULL. 1154, 1164 (2004); U.S. COMM'N ON IMMIGR. REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 175–83 (1997), https://files.eric.ed.gov/fulltext/ED424310.pdf [hereinafter BECOMING AN AMERICAN]; Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 NOTRE DAME LAW. 644, 645–47 (1981); Maurice A. Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 SAN

judges.'"[5] In sum, when the DHS police arrest a person, only a prosecutor reviews that decision. Most of these crucial decisions about a person's liberty occur without any review by an Article III judge.

In this Article, I propose that Congress, in recognition that immigration detention is punishment, strip imitation judges of their authority to review decisions about physical liberty. Such decisions should only be entrusted to a federal magistrate judge, with review by an Article III judge. The procedures are already in place elsewhere; Congress need look no further than the Bail Reform Act, which applies when a person is held while awaiting a criminal trial.[6] Federal courts have borrowed heavily from criminal pretrial detention procedures, engaging in piecemeal oversight of the immigration detention system through habeas corpus review. I argue that these decisions reflect lower federal courts' persistence in monitoring the rights of immigration detainees, even in the face of legislation that has aimed to limit the judiciary's role.[7] Yet such review has happened for only a subset of detainees—those who are savvy enough to file a habeas corpus petition and lucky enough (or rich enough) to have habeas counsel, *and* those for whom the federal court reaches the merits of the custody challenge before the deportation case concludes (which moots the petition).[8] The work of these lower federal courts has been laudable, but a better solution that reaches every immigration detainee is necessary.

Now is the right moment to address this critical issue. The Biden administration should focus on reforming both our broken immigration detention and immigration adjudication systems.[9] Immigration detention reached an all-time high during the Trump administration, with a daily population reaching over 55,000, many being warehoused by the private

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DIEGO L. REV. 1, 7 (1980); SELECT COMM'N ON IMMIGR. & REFUGEE POL'Y, 96TH CONG., 2D SESS., SEMIANNUAL REP. TO CONGRESS (Joint Comm. Print 1980).

5. Hon. Denise Noonan Slavin & Hon. Dorothy Harbeck, *A View from the Bench by the National Association of Immigration Judges*, FED. LAW., Oct.–Nov. 2016, at 70 ("As one of our colleagues put it, we often feel that we are 'U.S. imitation judges.'").

6. See *infra* Part III.B.

7. See *infra* Part II.

8. See *infra* Part III.D.

9. See Paul Wickham Schmidt, *From the Heights of Kasinga to the Depths of America's Deadly Star Chambers: Will the Biden Administration Tap the New Due Process Army to Fix EOIR & Save Our Nation?* IMMIGRATION COURTSIDE (Nov. 12, 2020), https://immigrationcourtside.com/2020/11/12/from-the-heights-of-kasinga-to-the-depths-of-americas-deadly-star-chambers-will-the-biden-administration-tap-the-new-due-process-army-to-fix-eoir-save-our-nation/; T. ALEXANDER ALEINIKOFF & DONALD KERWIN, CTR. FOR MIGRATION STUD., THE NEW SCH. & ZOLBERG INST. ON MIGRATION & MOBILITY, IMPROVING THE U.S. IMMIGRATION SYSTEM IN THE FIRST YEAR OF THE BIDEN ADMINISTRATION (Nov. 2020), https://cmsny.org/publications/immigration-recommendations-biden/.

prison industry.[10] The Trump administration ensured a rise in immigration arrests each year.[11] The attorneys general of the Trump administration did significant work to strip immigration judges of their independence, building off similar work done by prior attorneys general.[12] Two recent empirical studies of immigration judge decisions demonstrate that rates of denials of bond and relief from removal increased in the Trump administration, providing evidence that judges are not truly independent.[13] Retired immigration judges and Board of Immigration Appeals members have critiqued the Trump administration for repeatedly undermining the independence of immigration judges.[14] Four major national organizations—the American Bar Association, the American Immigration Lawyers Association, the Federal Bar Association, and the National Association of Immigration Judges—sent a joint letter to Congress in July 2019, asking for an independent immigration court,[15] and Congress held such a hearing in January 2020.[16]

This Article merges two themes from the existing scholarship: (1) immigration judges' lack of independence and (2) lack of procedural rights for immigration detainees. Scholars, lawyers, judges, and congressional committees have been recommending a more independent immigration adjudication system for decades.[17] My proposal advocates for a change to a subset of immigration decisions, those involving physical custody. Detention is different from other immigration decisions—scholars have argued that it

10. TRAC Immigration, *ICE Detainees* (2021), https://trac.syr.edu/immigration/detentionstats/pop_agen_table.html ; Denise Gilman & Luis A. Romero, *Immigration Detention, Inc.*, 6 J. MIGRATION & HUM. SEC. 145, 148 (2018).

11. Ron Nixon, *Immigration Arrests and Deportations Are Rising, I.C.E. Data Show*, N.Y. TIMES (Dec. 14, 2018), https://www.nytimes.com/2018/12/14/us/politics/illegal-immigrant-arrests-deportations-rise.html.

12. See *infra* Part I.

13. Catherine Y. Kim & Amy Semet, *Presidential Ideology and Immigrant Detention*, 69 DUKE L.J. 1855, 1855–56 (2020); Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control Over Immigration Adjudication*, 108 GEO. L.J. 579, 585 (2020).

14. Paul Wickham Schmidt, *Barr Continues Restrictionist Assault on Immigration Courts: Intends to Reverse BIA Precedents Giving "Full Faith & Credit" to State Court Sentence Modifications—Another Disingenuous Request For "Amicus Briefing!"*, (May 30, 2019), https://immigrationcourtside.com/2019/05/30/barr-continues-restrictionist-assault-on-immigration-courts-intends-to-reverse-bia-precedents-giving-full-faith-credit-to-state-court-sentence-modifications-another-disi/; Jeffrey S. Chase, *AILA Press Call: The Immigration Courts*, OPS./ANALYSIS ON IMMIGR. L. (May 20, 2019), https://www.jeffreyschase.com/blog/2019/5/20/aila-press-call-the-immigration-courts.

15. Joint Letter, *supra* note 4.

16. *Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts: Hearing Before the Subcomm. on Immigr. & Citizenship*, 116th Cong. (2020), https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2757.

17. See *supra* note 4 and accompanying text.

is punishment.[18] Thus, imitation judges should have no role in these decisions. Nor does the immigration judge have any particular expertise in determining danger and flight risk; rather, magistrate judges make these decisions for criminal defendants on a daily basis.[19] I go further than others by proposing that the adjudicator not be an administrative law judge or even an Article I court, but a magistrate judge, whose decisions are subject to review by an Article III judge. I and others have advocated for stronger procedural protections in immigration detention decisions, such as a government-borne burden of proof, a prompt probable cause hearing, court-appointed counsel, and the requirement that judges determine alternatives to detention and a detainee's ability to pay; with these procedures, immigration bond hearings can more closely track criminal pretrial detention hearings.[20] My proposal here differs in that it physically moves the procedures to an entirely different court. Rather than importing procedural protections piecemeal into immigration court, with oversight by federal judges through habeas corpus, I propose a system where all decisions regarding physical custody are removed from immigration court and placed in federal district court.

In Part I, I will describe how immigration judges are not truly independent, but are attorneys who work under the Attorney General and may suffer personal consequences for ruling against the enforcement priorities of the DOJ.[21] This Part will discuss examples of how immigration judges' independence suffers, particularly in detention decisions, because their

18. *See, e.g.*, César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1349 (2014); DANIEL WILSHER, IMMIGRATION DETENTION: LAW, HISTORY, POLITICS xxii–xxiii (2012).

19. *See infra* Part III.B.

20. *See, e.g.*, Mary Holper, *Promptly Proving the Need to Detain for Post-Entry Social Control Deportation*, 52 VAL. U.L. REV. 231, 231–32 (2018); Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2141 (2017); Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157, 157 (2016); Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RES. L. REV. 75, 76 (2016); Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 168–69 (2015); Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 161–62 (2013); Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 63 (2012); Frances M. Kreimer, *Dangerousness on the Loose: Constitutional Limits to Immigration Detention as Domestic Crime Control*, 87 N.Y.U. L. REV. 1485, 1519–22 (2012); Travis Silva, *Toward a Constitutionalized Theory of Immigration Detention*, 31 YALE L. & POL'Y REV. 227, 229–30 (2012); Faiza W. Sayed, *Challenging Detention: Why Immigrant Detainees Receive Less Process Than "Enemy Combatants" and Why They Deserve More*, 111 COLUM. L. REV. 1833, 1833 (2011); David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 719–22 (2009).

21. *See infra* Part I.

decisions can and have been unilaterally overruled by law enforcement actors.[22] Thus, the current system's lack of an independent judge undermines the legitimacy of immigration detention decisions.[23] In Part II, I will outline the role that Article III courts have played in custody decisions in the modern era of immigration detention.[24] Even when Congress attempted to take away Article III court oversight of custody decisions, the lower federal courts in particular have monitored the right to physical liberty for immigration detainees.[25] In Part III, I will outline a proposal for reform, calling on Congress to remove all custody decisions from the DOJ and grant jurisdiction instead to Article III courts.[26] I will conclude the article in Part IV.[27]

I. THE LACK OF AN INDEPENDENT IMMIGRATION JUDGE

In this section, I draw from scholarship and reports critiquing the immigration system as lacking an independent judge, to highlight why the involvement of Article III judges in immigration detention decisions is needed now more than ever. I focus on examples where immigration judges' independence has been undermined in immigration detention decisions.

A. The Historically Commingled Functions and "War on Independence"

The various federal agencies that have enforced immigration law throughout history have never truly separated prosecutorial and adjudicative functions.[28] The Supreme Court in 1950 held that the so-called "'one-man' hearing[]," [29] with one person acting as both prosecutor and adjudicator in a deportation case, did not comport with the hearing requirements of the Administrative Procedure Act ("APA").[30] The APA requires these functions to be separate in order to bring trial-like procedures into administrative hearings.[31] Yet Congress then exempted deportation hearings from the

22. *See id.*
23. *See id.*
24. *See infra* Part II.
25. *See id.*
26. *See infra* Part III.
27. *See infra* Part IV.
28. See Holper, *supra* note 4, at 1307–13.
29. *See* Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 65 INTERPRETER RELEASES 453–59 (1988), *reprinted in* STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 686, 687–88 (6th ed. 2015).
30. Wong Yang Sung v. McGrath, 339 U.S. 33, 45–48 (1950).
31. 5 U.S.C. § 554(d) (stating that an adjudicatory officer shall not "be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency" and "[a]n employee or agent engaged in the performance

APA,[32] which caused the Supreme Court to later permit a "two-man" hearing where the prosecutor and adjudicator worked together in the same agency.[33]

Eventually the judges broke away from the prosecutors, starting to wear robes in 1973 and graduating to the title of immigration judge instead of "special inquiry officer."[34] Starting in 1983, immigration prosecutors and judges took up residence in different agencies within the DOJ.[35] The prosecutors continued to work for the Immigration and Naturalization Service ("INS"), while the immigration judges and Board of Immigration Appeals ("BIA" or "Board") started to work for the newly-created Executive Office for Immigration Review ("EOIR"), an agency of the DOJ.[36] An empirical study of bond hearings conducted in the Chicago immigration court demonstrated an institutional culture of judges during this time period that valued their desire for enhanced stature and independence, "probably [to] encourage their independence from the INS."[37]

The immigration adjudication system established in 1983 persists to this day, with immigration judges in courts throughout the country making trial-level decisions.[38] Either the prosecutor or noncitizen can appeal an immigration judge's decision to the Board, a single appellate body that sits in Virginia.[39] The manner in which Board members make their decisions drastically changed in 2002. While Board members typically decided cases by three-member panels issuing written decisions, Attorney General Ashcroft

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of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review . . . except as witness or counsel in public proceedings."). The APA language regarding separation of functions is largely the same as when the APA first was enacted in 1946. *See Wong Yang Sung*, 339 U.S. at 35 n.1 (quoting 5 U.S.C. § 5 (1946)).

32. *See* Marcello v. Bonds, 349 U.S. 302, 306–307 (1955).

33. Rawitz, *supra* note 29, at 687–88; *see also* Marcello, 349 U.S. at 306–10.

34. *See* Jeffrey S. Chase, Lecture at Cornell L. Sch., Berger Int'l Speaker Series: The Immigration Court: Issues and Solutions (Mar. 28, 2019), https://www.jeffreyschase.com/blog/2019/3/28/i6el1do6l5p443u1nkf8vwr28dv9qi; Rawitz, *supra* note 29, at 688–89. A Department of Justice policy in 1994 required robes to be worn during hearings. Jain, *supra* note 4, at 290.

35. Board of Immigration Appeals; Immigration Review Function; Editorial Amendments, 48 Fed. Reg. 8,056 (Feb. 25, 1983) (to be codified at 28 C.F.R. pt. 0).

36. *Id.*

37. Janet A. Gilboy, *Administrative Review in a System of Conflicting Values*, 13 L. & SOC. INQUIRY 515, 524 (1988); *see also* Janet A. Gilboy, *Setting Bail in Deportation Cases: The Role of Immigration Judges*, 24 SAN DIEGO L. REV. 347 (1987) (providing more detailed findings from an empirical study of Chicago immigration courts' bond redetermination practices).

38. Legomsky, *Restructuring Immigration Adjudication*, *supra* note 4, at 1641–42. Today, there are seventy-one separate immigration courts throughout the United States. *EOIR Immigration Court Listing*, U.S. DEP'T JUST., https://www.justice.gov/eoir/eoir-immigration-court-listing (last updated May 11, 2021).

39. Legomsky, *Restructuring Immigration Adjudication*, *supra* note 4, at 1643.

announced procedural shortcuts in 2002 that allowed a single Board member to affirm an immigration judge's decision without a written opinion.[40] The immigration adjudication system also permits the Attorney General to act as an adjudicator, and thus decide certain precedent-setting cases that immigration judges and the Board are bound to follow.[41]

Twenty years after the creation of EOIR, immigration prosecutors were moved to the newly-created DHS and no longer worked within the same agency as the adjudicators.[42] Yet, a key component of the original blended functions remained—judges and the Board, the supposedly independent adjudicators, were supervised by the country's top law enforcement officer, as they all worked for the DOJ.[43] At this same time, the DOJ began what Stephen Legomsky has called a "war on independence" of the immigration adjudicators.[44] Legomsky outlines three types of constraints that executive or legislative actors can impose on the authority of the adjudicator: (1) the substitution of a general rule for individualized adjudication or judgment; (2) a decision by an executive or administrative official to intervene in a pending case; and (3) a threat of personal consequences to adjudicators (including reassignment to a less desirable position, nonrenewal of appointment, or loss of compensation) if they do not reach a certain type of outcome.[45]

In 2002, not long after the National Association of Immigration Judges ("NAIJ") issued a proposal for an independent court, Attorney General Ashcroft published a final rule that reduced the size of the Board from twenty-three to eleven members.[46] This caused Board members who ruled most frequently in favor of immigrants to be reassigned to non-adjudicative positions within the Department.[47] The DOJ reminded critics of the move

40. *Id.* at 1657–58; *see also* Legomsky, *Deportation and the War on Independence*, *supra* note 4, at 375. This change in the procedures used by the Board were accompanied by the other changes that impacted the Board, which this Article describes *infra* in notes 39–44 and accompanying text.

41. *See* 8 C.F.R. § 1003.1(h). This Article further discusses the Attorney General's use of this authority to decide immigration precedential decisions in the detention context *infra* notes 84–143.

42. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

43. *See, e.g.*, Marks, *supra* note 4, at 3–4; *see also* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 1024 (1998) ("The Attorney General . . . and other political appointees in the Justice Department are politically accountable for their success in creating the reality or appearance of border control, in general or in well-publicized cases.").

44. *See* Legomsky, *Deportation and the War on Independence*, *supra* note 4, at 370 ("I submit it is accurate to depict the sum of these various measures as an all-out war on the very notion of decisional independence in the adjudication of immigration cases.").

45. *Id.* at 369–71. In his article, Legomsky focuses on the third type of decisional independence. *Id.* at 387–89.

46. *Id.* at 373–76.

47. *Id.* at 376 (citing Levinson, *The Façade of Quasi-Judicial Independence*, *supra* note 4, at 1164).

that "[e]ach Board member is a Department of Justice attorney who is appointed by, and may be removed or reassigned by, the Attorney General."[48] These reassignments marked the first time in the Board's history that an Attorney General had removed a Board member.[49] The 2002 final DOJ rule also identified a different degree of independence by the Board.[50] Legomsky noted that although the reassignments impacted only Board members, "the reference to '[*a*]*ll* attorneys' makes clear that the attorney general intended the quoted language to apply to immigration judges as well."[51] In the Trump administration, former Attorney General Sessions reminded immigration judges of their subservient role in carrying out the Trump administration's priorities of having "zero illegal immigration in this country."[52] Sessions went so far as to remove one immigration judge from adjudicating several cases because of that judge's lenience toward noncitizens.[53]

In 2002, the DOJ also formally implemented "case completion goals" for the immigration adjudicators.[54] Case completion goals often dictate a result that favors the government, and thus gives one party appearing before a supposedly "neutral" judge an unfair advantage.[55] The DOJ did not publicly state that actions would be taken against individual judges for failure

48. Board of Immigration Appeals; Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,893 (Aug. 26, 2002) (codified at 8 C.F.R. pt. 3 (2002)).

49. Legomsky, *Deportation and the War on Independence*, *supra* note 4, at 379.

50. *Id.* Until 2002, a regulation stated that "Board members shall exercise their independent judgment and discretion in the cases coming before the Board." *Id.* (quoting former 8 C.F.R. § 3.1(a)(1) (2002)). The new rule rearranged the priorities, stating that "Board members shall be attorneys appointed by the Attorney General to act as the Attorney General's delegates in the cases that come before them." *Id.* (quoting 8 C.F.R. §§ 3.1(a)(1), 3.1(d)(1)(ii) (2003)). Only later does a "diluted version" of the decisional independence language appear. *See* 8 C.F.R. § 1003.1(d)(1)(ii) (2005) ("Subject to the governing standards . . . , Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board . . . .").

51. Legomsky, *Restructuring Immigration Adjudication*, *supra* note 4, at 1670 (alteration in original) (quoting Board of Immigration Appeals; Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,893 (Aug. 26, 2002) (codified at 8 C.F.R. pt. 1003)).

52. Catherine Y. Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1, 22 (2018) (quoting 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)). In remarks during the EOIR's Legal Training Program, Attorney General Sessions asserted, "'all of us should agree that, by definition, we ought to have zero illegal immigration in this country,' and reminded immigration judges in attendance that they [must] "conduct designated proceedings 'subject to such supervision and shall perform such duties as the Attorney General shall prescribe.'" *Id.* (alteration in original).

53. Tal Kopan, *Immigration Judge Removed from Cases After Perceived Criticism of Sessions*, CNN (Aug. 8, 2018, 5:49 PM), https://www.cnn.com/2018/08/08/politics/immigration-judges-justice-department-grievance/index.html.

54. Noonan Slavin & Marks, *supra* note 4, at 1787.

55. *See* Holper, *supra* note 4, at 1317–19; Chase, *supra* note 34 ("[J]ust to be clear, the quotas are not designed to have a neutral impact; the administration hopes that forcing more completions will also result in more denials.").

to comply, yet a 2008 study concerning immigration judge burnout revealed a common perception of the mandatory nature of the case completion goals.[56] In the Trump administration, immigration judges' fears became a reality, when Attorney General Sessions in 2018 proposed individual production quotas on immigration judges, instead of the former case completion goals that were imposed on each immigration court.[57] A judge's failure to complete a certain number of cases would impact the judge's performance evaluation.[58] According to the President of the NAIJ, this "unprecedented move . . . violates every tenet of an independent court and judges,"[59] as "the NAIJ is not aware of a single state or federal court across the country that imposes the type of production quotas and deadlines on judges like those that EOIR has now announced."[60]

In 2006, Attorney General Gonzales announced a system of performance evaluations for each immigration judge and Board member.[61] In 2007, regulations went into effect that made explicit the legal authority to establish such a performance evaluation system—without any input or public disclosure of the procedures, and without criteria for determining what

56. *See* Noonan Slavin & Marks, *supra* note 4, at 1787–88; *see also* Stuart L. Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57, 64–66 (2008) (quoting an immigration judge who stated "[w]hat is required . . . is quantity over quality").

57. *EOIR Performance Plan: Adjudicative Employees*, CNN, http://cdn.cnn.com/cnn/2018/images/04/02/immigration-judges-memo.pdf; Tal Kopan, *Justice Department rolls out case quotas for immigration judges*, CNN (Apr. 2, 2018, 8:55 PM), https://www.cnn.com/2018/04/02/politics/immigration-judges-quota/index.html; Tabaddor, *supra* note 4, at 7 (comparing former court-specific case completion goals with new quotas for individual judges).

58. Tabaddor, *supra* note 4, at 7. At the same time, Attorney General Sessions took other measures to ensure that fewer noncitizens could ultimately be granted relief by an immigration judge. For one, he eliminated administrative closure, a measure that takes a noncitizen's case off the docket of the immigration court while an application for relief is pending in another agency. *See* Matter of Castro-Tum, 27 I. & N. Dec. 271, 281 (A.G. 2018). He also instructed judges to be more stringent in their continuances, requiring them to factor in both "administrative efficiency" (case completion goals) and DHS objections when deciding whether to grant continuances. *See* Matter of L-A-B-R-, 27 I. & N. Dec. 405, 415–17 (A.G. 2018). These two cases combined to ensure that those with applications for relief pending before another agency were more likely to be ordered deported before that application is decided.

59. Tabaddor, *supra* note 4, at 7.

60. *Id.* at 8; *see also* Betsy Swan, *New Quotas for Immigration Judges are 'Incredibly Concerning,' Critics Warn*, DAILY BEAST (Apr. 2, 2018, 6:58 PM), https://www.thedailybeast.com/new-quotas-for-immigration-judges-are-a-recipe-for-disaster-critics-warn?ref=scroll.

61. *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, 496 (2007) (citing Press Release, U.S. Dep't. of Justice, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006), http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html).

constitutes good "performance."[62] The newest rendition of the performance evaluation criteria includes both individual quotas for case completion and a limit on the number of reversals by the Board.[63] Because the Board members left in place after the 2002 purge proved more likely to reverse an immigrant-friendly decision, under the new performance metrics, an immigration judge who rules too often in favor of a noncitizen runs the risk of exceeding the limit on the number of Board reversals.[64] Legomsky writes that the combined effect of the reassignments of Board members, adjusted "independence" regulations, and performance evaluations "remind surviving and future BIA members and immigration judges that they hold their jobs at the discretion of one of the opposing parties in the cases that come before them."[65]

In 2008, concern over the political hiring of immigration judges caused a congressional committee to examine these claims. The DOJ's former liaison to the White House, Monica Goodling, testified before the U.S. House Judiciary Committee that, from 2004 to 2006, the DOJ and White House appointed immigration judges based on their Republican Party affiliations or conservative political views, bypassing the usual procedures.[66] Although these concerns righted themselves in response to this congressional inquiry,[67] the concerns reemerged when the Trump administration hired additional

62. *Id.* at 496 (citing Authorities Delegated to the Director of the Executive Office for Immigration Review, and the Chief Immigration Judge, 72 Fed. Reg. 53,673, 53,675 (Sept. 20, 2007) (codified at 8 C.F.R. pts. 1003, 1240 (2007)); Tabaddor, *supra* note 4, at 5 (critiquing immigration judges' performance reviews by comparing them to other judges' reviews, where "the overwhelming majority of these reviews follow a judicial model—a transparent, public process where performance is evaluated by input from the stakeholders (attorneys, witnesses, and court staff) based on quality and temperament, not quantity, and is not tied to discipline.").

63. EOIR Performance Plan, *supra* note 57.

64. *See* Legomsky, *Deportation and the War on Independence*, *supra* note 4, at 376; Levinson, *The Façade of Quasi-Judicial Independence*, *supra* note 4, at 1164.

65. Legomsky, *Restructuring Immigration Adjudication*, *supra* note 4, at 1671.

66. *Id.* at 1665–66 (citing U.S. DEP'T OF JUSTICE, OFF. OF PRO.' RESP. & OFF. OF THE INSPECTOR GEN.,' AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL 69–124 (2008), https://oig.justice.gov/sites/default/files/legacy/special/s0807/final.pdf. The usual procedures involved an announcement of the vacancy, minimum requirements, and a statement that the DOJ does not discriminate on bases such as political affiliation. *Id.* at 72. The announcement also stated that applicants must fulfill three or more of five criteria: (1) knowledge of immigration laws and procedures; (2) substantial litigation experience, preferably in a high-volume context; (3) experience handling complex legal issues; (4) experience conducting administrative hearings; and (5) knowledge of judicial practices and procedures. *Id.* EOIR Officials would then conduct an interview process conducted by the Chief Immigration Judge and Assistant Chief Immigration Judges, with a recommendation to the EOIR Director for the desired candidates. *Id.*

67. *See* Legomsky, *Restructuring Immigration Adjudication*, *supra* note 4, at 1666 (discussing Attorney General's 2007 "new immigration judge appointment process in which EOIR would once again play the dominant role").

immigration judges to clear up the current case backlog.[68] In this process, there were allegations that candidates were rejected "based on their perceived political or ideological views."[69] Jeffrey Chase, a former immigration judge-turned immigration court-watcher, blogged in March 2019 that "[a]t present, nearly all new IJ hires are former prosecutors or those who otherwise have been deemed to fit this administration's ideological profile."[70] Chase's views reflect an empirical reality that spans beyond the Trump administration; the past three administrations have disproportionately hired immigration judges with backgrounds as immigration prosecutors, instead of those who worked as defense counsel.[71]

The Biden administration has followed the same well-worn path of hiring former immigration prosecutors as judges. The first seventeen immigration judges the Biden administration hired were selected during the Trump administration and their immigration experience, if any, involved working for ICE.[72] The hiring priorities for immigration judges stands in stark contrast to the administration's selection process for Article III judges, which has prioritized hiring candidates from diverse professional backgrounds,[73] including former public defenders.[74]

What we see developing over the past two decades in the "war on independence" is a shift in the institutional culture of the agency housing immigration adjudicators.[75] While immigration judges worked hard in the 1970s and 80s to distance themselves from INS prosecutors,[76] the DOJ reined the judges in, reminding them in various ways that they served at the pleasure

68. *See* Tom Dart, *Jeff Sessions Accused of Political Bias in Hiring Immigration Judges*, GUARDIAN (June 16, 2018), https://www.theguardian.com/us-news/2018/jun/16/jeff-sessions-political-bias-hiring-immigration-judges.

69. *Id.*; *see also* Legomsky, *Restructuring Immigration Adjudication*, *supra* note 4, at 1689 ("The tawdry hiring practices that so badly tarnished EOIR and other components of the Department of Justice have since been corrected, but without congressional action, nothing prevents future Justice Department and White House officials from lapsing.") (citations omitted).

70. Chase, *supra* note 34.

71. Kim & Semet, *Political Control Over Immigration Adjudication*, *supra* note 13, at 612–16; Legomsky, *Restructuring Immigration Adjudication*, *supra* note 4, at 1666.

72. Rebecca Beitsch, *Biden Fills Immigration Court with Trump Hires*, HILL (May 8, 2021), https://thehill.com/policy/national-security/552373-biden-fills-immigration-court-with-trump-hires.

73. Madeleine Carlisle, *Inside Joe Biden's Plan to Confirm Diverse Federal Judges*, TIME (May 11, 2021), https://time.com/6047501/joe-biden-federal-judges/.

74. *On the Bench: Federal Judiciary; ACS's Judicial News Roundup*, AM. CONST. SOC'Y, (May 13, 2021), https://www.acslaw.org/judicial-nominations/on-the-bench/ ("[T]he White House put an emphasis on the professional and personal diversity of these nominees. The White House particularly highlighted that several of the nominees had spent time as federal defenders.").

75. *See* Legomsky, *Deportation and the War on Independence*, *supra* note 4, at 369–70.

76. *See* Gilboy, *Administrative Review*, *supra* note 37, at 524.

of the Attorney General and that their jobs were threatened if their results were too immigrant-friendly.[77] The DOJ has twice sought to decertify the immigration judges' union, an effort to destroy a major voice advocating for the creation of an independent immigration court, which saw success on the eve of the November 2020 election.[78]

B. Undermining Immigration Judges' Independence by Substituting a General Detention Rule for Individual Adjudication

While the previous section describes how judges were made to believe they would suffer professional consequences for ruling against the government, this Section outlines examples of DOJ actors substituting a general rule for individual adjudication by judges, which presents another manner in which immigration judges' independence is undermined.[79] Each of these examples impacted immigration judges' detention decisions.

Immigration judges' assertion of greater judicial independence in the late 1970s and early 1980s led to a high rate of judges lowering bonds set initially by the INS.[80] INS officials viewed "immigration judges as pushy intruders whose demands in the name of due process only obstruct the [INS]

77. *See* Legomsky, *Deportation and the War on Independence*, *supra* note 4, at 372; Jain, *supra* note 4, at 306.

78. *See* Richard Gonzales, *Trump Administration Seeks Decertification of Immigration Judges' Union*, NPR (Aug. 12, 2019, 9:17 PM), https://www.npr.org/2019/08/12/750656176/trump-administration-seeks-decertification-of-immigration-judges-union. On July 31, 2020, the Federal Labor Relations Authority ("FLRA") rejected this attempt, refusing to revisit its 2000 decision that immigration judges were not "management officials" and therefore could unionize. Decision and Order, *Dep't of Justice, EOIR and NAIJ*, WA-RP-19-0067 (F.L.R.A. July 31, 2020). The FLRA abruptly reversed course on November 2, 2020, in what the NAIJ has referred to as a "politically-motivated decision." Decision and Order, Dep't of Justice, EOIR and NAIJ, WA-RP-19-0067 (F.L.R.A. November 2, 2020); Letter from NAIJ to Att'y Gen. Merrick Garland (June 7, 2021), https://www.naij-usa.org/images/uploads/newsroom/Final%2B06072021%2BSign%2Bon%2BLetter%2B-%2BNAIJ%2BDOJ%2BWithdraw%2BFLRA%2BPetition.pdf. The NAIJ has sought reconsideration of the decision. *See* Joe Davidson, *For Judges, Biden's Actions Are a Split Decision*, WASH. POST (July 4, 2021, 4:17 PM EDT), https://www.washingtonpost.com/politics/for-judges-bidens-actions-are-a-split-decision/2021/07/04/3233f122-dce9-11eb-a501-0e69b5d012e5_story.html.

79. *See* Legomsky, *Deportation and the War on Independence*, *supra* note 4, at 387–88.

80. *See* Gilboy, *Setting Bail*, *supra* note 37, at 368–69 (reporting results of an empirical study of immigration judge bonds set during a period in 1983 by Chicago immigration judges—the busiest immigration court in the country at the time—where 95% who asked an immigration judge to review the INS bond got a lower bond, and no immigration judge increased the bond amount). In a white paper to the INS regarding its detention strategies in 1997, Peter Schuck noted disparities between INS and immigration judge bonds, and recommended that the Deputy Attorney "adopt guidelines and policies designed to better coordinate bonding decisions and to impose departmental priorities and policies on EOIR as well as the INS." Peter H. Schuck, *INS Detention and Removal: A "White Paper,"* 11 GEO. IMMIGR. L.J. 667, 683–84 (1997).

mission."[81] INS's General Counsel publicly stated that the agency's regulatory agenda was to set higher minimum bonds for judges to impose. Alternatively, INS aimed to entirely eliminate immigration judge review of their bonds, which would leave INS' bond decision as final and unreviewable by any other agency actor.[82] Under the General Counsel's view, immigration judge review of INS bond decisions was an "'outrageous waste of their time,' time presumably better spent on conducting deportation hearings to reduce court delays and absconding."[83]

The DOJ responded to INS's concerns over immigration judges reducing INS bonds, first through the automatic stay regulation.[84] Adopted initially in 1998, the "automatic stay" created an INS override to an immigration judge's decision to release a noncitizen.[85] This regulation effectively allows an INS prosecutor, after losing at a bond hearing, to overrule the immigration judge's decision during the appeal period.[86] Initially, the automatic stay only applied to noncitizens who were deportable for certain criminal convictions, and thus subject to laws that required either presumptive or mandatory detention.[87] In the wake of the September 11,

81. Roberts, *supra* note 4, at 8–9. It is important to note that immigration prosecutors have multiple reasons to oppose release. First, they perform a law enforcement role of protecting the public against those they perceive to be dangerous. Second, they seek to ensure that persons do not frustrate efforts at future deportation, should that be ordered. *See* Demore v Kim, 538 U.S. 510, 517–21 (2003) (discussing government's stated goals of immigration detention). Finally, there is an unspoken goal of detention: immigration prosecutors are more likely to obtain a removal order because detainees often give up meritorious claims, are less adequately prepared with evidence to support their claims, and are less likely to obtain representation. *See* Jayashri Srikantiah, *Reconsidering Money Bail in Immigration Detention*, 52 U.C. DAVIS L. REV. 521, 542 (2018).

82. Gilboy, *Setting Bail*, *supra* note 37, at 394–95 (citing Maurice C. Inman, Jr., Gen. Couns., IMMIGR. & NATURALIZATION SERV., Speech at the American Immigration Lawyers Association Annual Conference (June 4–9, 1985) (on file with Convention Seminar Cassettes)).

83. *Id.* at 350 (quoting Maurice C. Inman, Jr., Gen. Couns., IMMIGR. & NATURALIZATION SERV., Speech at the American Immigration Lawyers Association Annual Conference (June 4–9, 1985) (on file with Convention Seminar Cassettes)).

84. 8 C.F.R. §§ 1003.6(c)(1)–(5), 1003.19(i)(2) (2020). For critiques of this regulation, *see* Raha Jorjani, *Ignoring the Court's Order: The Automatic Stay in Immigration Detention Cases*, 5 INTERCULTURAL HUM. RTS. L. REV. 89, 90 (2010); David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1030–31 (2002); Marks, *An Urgent Priority*, *supra* note 4, at 12; David A. Martin, *Preventive Detention: Immigration Law Lessons for the Enemy Combatant Debate*, 18 GEO. IMMIGR. L.J. 305, 312–13 (2004) (arguing that the press distorted the meaning of the DOJ's actions in its expansion of the automatic stay regulation post 9/11, but that the regulation still needs to be revisited).

85. Procedures for the Detention and Release of Criminal Aliens by the INS and for Custody Redeterminations by the EOIR, 63 Fed. Reg. 27,441, 27,443, 27,447 (May 19, 1998) (codified at 8 C.F.R. pts. 3, 236).

86. Jorjani, *supra* note 84, at 101.

87. Procedures for the Detention and Release of Criminal Aliens by the INS and for Custody Redeterminations by the EOIR, 63 Fed. Reg. 27,441, 27,443, 27,447 (May 19, 1998) (codified at 8 C.F.R. pts. 3, 236); *see also* Holper, *Beast of Burden*, *supra* note 20, at 83–88 (describing the

2001 terrorist attacks Attorney General Ashcroft expanded the authority in an interim regulation, which he promulgated quickly without awaiting the comment period.[88] Under the 2001 interim regulation, the INS trial attorney could invoke this authority in any case where the INS set either no bond or a minimum bond of $10,000 in its original custody determination.[89] No longer was the authority limited to those who were deemed presumptively unbailable by Congress.[90] Thus, the INS could essentially determine the outcome of a bond hearing before an immigration judge by setting an initial bond of at least $10,000 or no bond, thereby allowing its prosecutors to later invoke the automatic stay and hold someone in detention regardless of the immigration judge's ruling.[91]

The final rule was issued in 2006 after a notice-and-comment period in which modest changes were made to the final rule, none of which addressed concerns over immigration judge independence.[92] Responding to comments that the automatic stay undermined immigration judge independence, EOIR characterized immigration judges and immigration prosecutors (who at that point were housed within the DHS) as all acting together, carrying out the

evolution of the statute governing detention of those convicted of certain crimes and terrorism, which at first rendered detainees "presumptively unbailable" and now requires mandatory detention without a bond hearing).

88. Executive Office for Immigration Review; Review of Custody Determinations, 66 Fed. Reg. 54,909, 54,910 (Oct. 31, 2001) (codified at 8 C.F.R. pt. 3).

89. *Id.* at 54,910.

90. *See* Procedures for the Detention and Release of Criminal Aliens by the INS and for Custody Redeterminations by the EOIR, 63 Fed. Reg. at 27,447.

91. Some habeas courts addressed the adjudicator independence problem that the 2001 version of the regulation created. *See, e.g.*, Ashley v. Ridge, 288 F. Supp. 2d 662, 671 (D.N.J. 2003) (reasoning that the automatic stay "produces a patently unfair situation by 'tak[ing] the stay decision out of the hands of the judges altogether and giv[ing] it to the prosecutor who has by definition failed to persuade a judge in an adversary hearing that detention is justified.'") (quoting Cole, *supra* note 84, at 1031) (alteration in original); Zabadi v. Chertoff, No. C 05-01796 WHA, 2005 WL 1514122, at *1–2 (N.D. Cal. June 17, 2005) (holding that the regulation was *ultra vires* as it "eliminate[d] the discretionary authority of immigration judges to determine whether an individual may be released, thereby exceeding the authority bestowed" by Congress and reasoning that it "impermissibly merge[d] the functions of adjudicator and prosecutor."); Almonte-Vargas v. Elwood, No. CIV.A. 02-CV-2666, 2002 WL 1471555, at *4 (E.D. Pa. June 28, 2002) (describing the automatic stay as "accomplishing Petitioner's mandatory detention" by allowing the trial attorney to override the judge's release order).

92. Review of Custody Determinations, 71 Fed. Reg. 57,873 (Oct. 2, 2006) (codified at 8 C.F.R. pt. 1003). The final rule set a time limit on the duration of the automatic stay, providing that it would expire in ninety days if the Board did not decide the appeal of the bond decision. *Id.* at 57,874. The final rule also requires that a supervisory DHS officer sign off on the automatic stay filing, and that the DHS certify that there is factual and legal support for its position. *Id.*

Attorney General's broad authority to detain and release a noncitizen on bond pending a decision to deport.[93]

A second example of the undermining of immigration judges' independence in detention decisions involves a pair of detention-related decisions made by two different Attorneys General pursuant to the referral authority.[94] The referral authority regulation allows the Attorney General to take a decision away from the Board and become the final adjudicator on a legal issue. The first detention case of importance is Attorney General Ashcroft's 2003 decision in *In re D-J-*.[95] In that case, Attorney General Ashcroft instructed judges and the Board to consider national security interests—including deterring mass migrations from one country—in addition to dangerousness and flight risk when making bond determinations.[96] Earlier in the proceedings, the Judge and Board had rejected such arguments by the government and released a Haitian detainee on bond.[97] Having lost these arguments, the Attorney General converted himself from the nation's top law enforcement officer into the nation's top immigration adjudicator, utilizing the referral authority to change the rules of bond determinations to accommodate his enforcement priorities.

Over a decade later, under the Obama administration, the DHS reprised the deterrence rationale, citing *In re D-J-*, to detain Central American migrants after a "surge" of border crossings in 2014.[98] In a class action lawsuit more than a decade after *In re D-J-*, a federal district court held that general deterrence of future border crossers was not a permissible reason to justify civil detention.[99] For the many Haitian detainees who lost their bond hearings in the immediate aftermath of *In re D-J-*, but before the class action suit, no federal court stepped in to tell immigration adjudicators that it was unconstitutional to consider deterrence into a bond decision. Only twelve

93. *Id.* at 57,877 ("Under longstanding provisions of the Immigration and Nationality Act, the Attorney General has had broad detention authority. Now, after enactment of the HSA, the Secretary of Homeland Security exercises that discretion in carrying out the detention and enforcement authority formerly administered by the INS, and the Attorney General and his delegates (the Board and the immigration judges) exercise that discretion in the review of the custody decisions initially made by DHS.") (citations omitted). Once the final regulation went into effect, setting a time limit of ninety days on the duration of detention under the automatic stay, many habeas courts were not able to reach a decision on the legal challenge because the issue became moot. *See*, *e.g.*, Hussain v. Mukasey, 510 F.3d 739, 742–43 (7th Cir. 2007); Altayar v. Lynch, No. CV-16-02479-PHX-GMS (JZB), 2016 WL 7383340, at *3–4 (D. Ariz. Nov. 23, 2016).

94. 8 C.F.R. § 1003.1(h)(1) (2020).

95. 23 I. & N. Dec. 572 (A.G. 2003).

96. *Id.* at 581.

97. *Id.* at 573–74.

98. R.I.L.-R v. Johnson, 80 F. Supp. 3d 164, 175 (D.D.C. 2015).

99. *Id.* at 188–89.

years later was the government told by an Article III court that bond decisions justified by the deterrence rationale were illegal.[100]

A more recent detention case is Attorney General Barr's 2019 decision in *In re M-S-*,[101] which entirely removed immigration judges' discretion over bond for some asylum-seekers.[102] This decision specifically overruled a 2005 Board decision that asylum-seekers who recently crossed the border were eligible for bond.[103] The *M-S-* decision was enjoined pending a challenge in federal court,[104] yet the Supreme Court in 2021 vacated that order and remanded the case to the Ninth Circuit.[105] It is uncertain whether the *M-S-* decision will suffer the same demise as the deterrence rationale for detention that Attorney General Ashcroft established in *D-J-*.[106] Regardless of the fate of this decision, it stands as another example of an affront to immigration judges' independence that Article III courts must consistently police.[107] Significantly troubling is that the decision came on the heels of empirical findings that, for recently-arrived families seeking asylum, immigration judges were routinely lowering bonds initially set by the DHS, putting freedom within reach while the families fought their cases.[108] The *M-S-* decision represents Attorney General Barr going even further to take away immigration judges' independence than Attorney General Ashcroft, in

100. *See id.*

101. 27 I. & N. Dec. 509 (A.G. 2019).

102. *Id.* at 509–10, 518–19.

103. *See id.* at 519 (overruling Matter of X-K-, 23 I. & N. Dec. 731, 735–36 (BIA 2005)).

104. *See* Padilla v. ICE, No. 19-35565, __ F.3d __, 2020 U.S. App. LEXIS 9603, *12–13, 15–27 (9th Cir. March 27, 2020).

105. Immigr. & Customs Enf't v. Padilla, 141 S. Ct. 1041 (2021). The Court ordered the Ninth Circuit to reconsider its decision in light of its 2020 holding in *Dep't Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020). *Padilla*, 141 S. Ct. at 1041–42. In *Thursaissigiam*, the Court considered a Due Process challenge to immigration procedures brought by a noncitizen who physically entered the United States but was arrested by immigration authorities close to the border. 140 S.Ct. at 1981–82. The Court held that the Due Process clause did not apply because the noncitizen's status was assimilated to that of an "alien seeking initial entry," who do not enjoy any Due Process protections. *Id.*

106. *See R.I.L.-R*, 80 F. Supp. 3d at 188–89; *see also* HILLEL R. SMITH, CONG. RSCH. SERV., IS MANDATORY DETENTION OF UNLAWFUL ENTRANTS SEEKING ASYLUM CONSTITUTIONAL*?* 4 (2021), https://crsreports.congress.gov/product/pdf/LSB/LSB10343.

107. *See* Letter from Robert M. Carlson, President, Am. Bar Ass'n, to William P. Barr, U.S. Att'y Gen. (Apr. 23, 2019), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/aba-letter-to-ag-barrre-matter-of-m-s-4-23-19.pdf ("We are also concerned that this decision [in *Matter of M-S-*] is one more step in a series of recent actions by the Department of Justice to remove discretion and restrict the authority of immigration judges.").

108. *See* INGRID EAGLY, STEVEN SHAFER, & JANA WHALLEY, AM. IMMIGR. COUNCIL, DETAINING FAMILIES: A STUDY OF ASYLUM ADJUDICATION IN FAMILY DETENTION 3 (Aug. 2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/detaining_families_a_study_of_asylum_adjudication_in_family_detention_final.pdf.

response to a President who demanded more detention to deter future border-crossers and appease his political base.[109]

While many have critiqued the Attorney General's referral authority,[110] former Attorney General Alberto Gonzales and DOJ Office of Immigration Litigation ("OIL") attorney Patrick Glen defended the authority in a 2016 law review article.[111] Gonzales and Glen tell the story of a Board that is not an independent adjudicatory body at all, but rather a set of attorneys who serve to advise the Attorney General.[112] This view presents a clear contradiction to the way the NAIJ, various committees of Congress, lawyers, and scholars have viewed the role of immigration adjudicators—as independent actors who should be free from political influence.[113] Rather, Gonzales and Glen unabashedly describe the Board as part of the DOJ's policymaking

109. *See* Schmidt, *supra* note 14; Philip Rucker & David Weigel, *Trump Advocates Depriving Undocumented Immigrants of Due-Process Rights*, WASH. POST (June 25, 2018, 8:38 AM), https://www.washingtonpost.com/powerpost/trump-advocates-depriving-undocumented-immigrants-of-due-process-rights/2018/06/24/dfa45d36-77bd-11e8-93cc-6d3beccdd7a3_story.html?noredirect=on&utm_term=.05c119748f4a.

110. *See, e.g.*, Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 IOWA L. REV. ONLINE. 129, 153 (2017) (arguing that the attorney general review authority has "interrupted the development of immigration law by the judiciary, altered legislative standards, and restructured the agency's own application of immigration policy, often with partisan interests in mind."); Legomsky, *Restructuring Immigration Adjudication*, *supra* note 4, at 1671–72 ("In the present context, agency head review is particularly troublesome because the agency head is the attorney general, who serves as the nation's chief law enforcement official. Allowing a law enforcement official to reverse the decision of an adjudicatory tribunal is problematic—particularly in proceedings in which the government is one of the opposing parties."); Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 544 (2011); Justin Chasco, *Judge Alberto Gonzales? The Attorney General's Power to Overturn Board of Immigration Appeals' Decisions*, 31 S. ILL. U. L.J. 363, 381 (2007); Margaret H. Taylor, *Behind the Scenes of* St. Cyr *and* Zadvydas*: Making Policy in the Midst of Litigation*, 16 GEO. IMMIGR. L.J. 271, 288 (2002) ("To critics, Attorney General review of BIA decisions violates the independence of the Board, and (especially when review is at the behest of the INS) breaches the separation of function between the immigration enforcers at INS and the adjudicators at the Executive Office for Immigration Review."); BECOMING AN AMERICAN, *supra* note 4, at 244–45, 248; Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 458–62 (2007); Marks, *An Urgent Priority*, *supra* note 4, at 17–18; Levinson, *A Specialized Court*, *supra* note 4, at 650.

111. Hon. Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841, 848–50 (2016).

112. *See id.* at 848–57. In response to critiques about how this authority encroaches on the Board's independence, Gonzales and Glen state, "The Attorney General is not usurping the authority of the Board when he reviews its decisions, but is exercising an authority that has been given to him by Congress." *Id.* at 899. They cite to one AG's justification of this authority, "[T]he Board acts on the Attorney General's behalf rather than as an independent body. The relationship between the Board and the Attorney General thus is analogous to an employee and his superior rather than to the relationship between an administrative agency and a reviewing court." *Id.* at 899–900 (quoting Matter of Hernandez-Casillas, 20 I. & N. Dec. 262, 289 n.9 (A.G. 1991) (alteration in original)).

113. *See supra* note 4.

process.[114] They write that "the referral authority [to the Attorney General] can be a robust tool for the advancement of executive branch immigration policy,"[115] and describe several examples of Attorneys General "setting policy" through the review authority so that future cases decided by immigration judges and the Board would be bound by that policy.[116] Although it is true that agency head review is common across administrative law,[117] the Department of Justice, which litigates on behalf of agencies, usually does not have authority over the administrative adjudications of other executive branch agencies.[118]

What is particularly troubling about this review authority is that the OIL and the U.S. Attorneys' Office, which both prosecute immigration cases when they reach the federal courts, are also housed within the DOJ.[119] It would presumably be quite easy for these prosecutors—who advocate for interpretations of immigration statutes that result in deportation, detention, or denial of immigration status—to persuade their boss to issue a decision that favors their position before a federal court.[120] Considering that the Attorney

114. Gonzales and Glen Gonzales describe the referral authority as "adjudication" notwithstanding its proposed use in policymaking, which is a separate function. *See* Gonzales & Glen, *supra* note 111, at 896.

115. *Id.*

116. *See id.* at 874–85. Indeed, they argue that attorney general review is disfavored when the issue is discretionary, fact-determinative, or "not susceptible to bright-line rulemaking." *Id.* at 860.

117. *See* Legomsky, *Learning to Live with Unequal Justice*, *supra* note 110, at 458; 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, 1270 (1974).

118. *See* Taylor, *supra* note 110, at 294; *see also* Shah, *supra* note 110, at 136 (noting that the "exercise of the referral and review power [by the AG] runs counter to administrative decision-making norms and may even be unconstitutional.") (citing Bridges v. Wixon, 326 U.S. 135, 159 (1945)); Legomsky, *Restructuring Immigration Adjudication*, *supra* note 4, at 1672 ("Allowing a law enforcement official to reverse the decision of an adjudicatory tribunal is problematic—particularly in proceedings in which the government is one of the opposing parties.").

119. *See* 28 C.F.R. § 0.45(k) (2020). When a noncitizen files a petition for review of an order of removal pursuant to 8 U.S.C. § 1252, the Office of Immigration Litigation Appellate Section normally defends the government's position before the circuit court of appeals. *See Appellate Section,* U.S. DEP'T JUSTICE, CIV. DIV., OFF. OF IMMIGR. LITIG., (last updated Jan. 12, 2017), https://www.justice.gov/civil/appellate-section. When an immigration case reaches the federal district court through a habeas petition (where an immigration detainee challenges unlawful detention), mandamus action (where a noncitizen asks the court to force the agency to adjudicate a case), or APA petition (where a federal court reviews the denial of an immigration petition by the U.S. Citizenship and Immigration Services), the U.S. Attorney's Office normally defends the government's position, unless the U.S. Attorney's Office decides to call upon OIL's District Court Section. *See District Court Section,* U.S. DEP'T JUSTICE, CIV. DIV., OFF. OF IMMIGR. LITIG., (last updated Aug. 14, 2017), https://www.justice.gov/civil/district-court-section.

120. *See* Memorandum of Law of Amici Curiae Am. Immigr. Laws. Ass'n et al., in Support of Reconsideration of Matter of Silva-Trevino, 24 I. & N. Dec 687 (AG 2008) 10, https://www.aila.org/infonet/amicus-brief-cristoval-silva-trevino ("Because the Office of

General frequently writes published opinions defining ambiguous immigration law terms, and thus arguably commanding of *Chevron* deference with that decision so long as it reasonable,[121] the prosecutors can almost guarantee a win in court by pushing their boss to interpret a statute in a way that favors their litigation position.[122] As a result, noncitizens and their advocates lose faith in the immigration adjudication system, which ostensibly exists to provide a neutral forum, yet permits the prosecutor's opinion to become law.[123]

C. The Increasingly Frail Independence of Immigration Judges

The DOJ's control over immigration adjudication has steadily increased. The Trump administration's Attorneys General made broad-brush asylum decisions, seeking to cut off asylum eligibility to various groups.[124] Proposed asylum rules by the EOIR and the DHS sought to severely limit

Immigration Litigation . . . [is] part of the Department of Justice, and [is] charged with defending the agency in court, the Attorney General bears a special responsibility to maintain both the appearance and actuality of impartiality in the adjudication of removal charges and to protect the certification process from efforts to make it a backdoor mechanism for one-sided *ex parte* communication by the office's litigators."); *see also* Taylor, *supra* note 110, at 288–89 (describing use of attorney general review authority in immigration law to advance the government's litigation position in the Supreme Court case *INS v. St. Cyr*). Gonzales and Glen describe this type of non-objective interference as a "caricature." Gonzales & Glen, *supra* note 111, at 919. Margaret Taylor has disputed such a characterization. *See* Margaret H. Taylor, *Midnight Agency Adjudication: Attorney General Review of Board of Immigration Appeals Decisions,* 102 IOWA L. REV. ONLINE 18, 35–36 n.121 (2016).

121. *See* Gonzales & Glen, *supra* note 111, at 857; *see also* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844–45 (1984) (holding deference is accorded to an agency's interpretation of an ambiguous statute so long as the interpretation is reasonable); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981–82 (2005) (permitting deference to an agency's change of position within the *Chevron* framework so long as the agency adequately explains that change). *But see* Shah, *supra* note 110, at 141 ("[B]ecause the Attorney General is removed from the agency's expertise in immigration, scholars might also debate the proper level of judicial deference to administrative decision-making in immigration or perhaps any are of law in which a political official exercise [sic] discretion beyond her core competencies.").

122. *See* Gonzales & Glen, *supra* note 111, at 919 (acknowledging that "Attorney General review could have beneficial effects on litigation, in the form of a final agency decision that would be entitled to *Chevron* deference before the courts," but asserting that "the machinery of referral and review is not aimed at such ends."). *But see* Matter of Silva-Trevino, 24 I. & N. Dec. 687, 688–89 (A.G. 2008) (invoking *Brand X* to justify the AG's decision to modify interpretation of moral turpitude statute); Taylor, *supra* note 110, at 288 ("The Attorney General interceded to vacate a rare *en banc* opinion of the BIA at a critical juncture—on precisely the date that the Solicitor General's brief was due—to clear the way for the INS to assert a contrary interpretation before the Supreme Court.").

123. *See* Taylor, *supra* note 110, at 273–74.

124. *See, e.g.*, Matter of L-E-A-, 27 I. & N. Dec. 581, 596–97 (A.G. 2019) (overturning Board case law that family can establish a particular social group); *In re* A-B-, 27 I. & N. Dec. 316 (A.G. 2018) (overturning a BIA precedential decision in In re A-R-C-G-, 26 I. & N. Dec. 388 (BIA 2014), that victims of domestic violence can establish a particular social group).

immigration judges' independence by creating categories of asylum claims to presumptively deny.[125] These efforts aimed to ensure that fewer people could qualify for asylum.[126] New case law implemented by Attorney General Sessions also ensured that more asylum-seekers could suffer summary deportation orders before the full adjudication of their claims.[127] New case law and policy aiming to reduce asylum eligibility also leads to more detention given recent Board case law permitting immigration judges to find those with weak asylum claims to be a presumptive flight risks in bond hearings.[128]

There are other examples of the DOJ asserting control over immigration adjudicators. A "gag rule," refusing to allow immigration judges to speak to the public has become the subject of First Amendment litigation.[129]

125. *See* Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36,264 (June 15, 2020); Letter from Round Table of Former Immigration Judges to Lauren Alder Reid, Assistant Dir., Off. of Pol'y, Exec. Off. for Immigr. Rev. and Maureen Dunn, Chief, Div. of Humanitarian Affs., Off. of Pol'y & Strategy 13 (July 13, 2020) (on file with the Round Table of Former Immigration Judges) ("The proposed regulations short-circuit legal analysis of an asylum applicant's claim in particularly dangerous ways, by providing a checklist of groups that would be 'generally' insufficient to establish a particular social group under the refugee definition in order to provide uniformity and save Court time."). The final rule, which was published in December 2020 and would become effective January 2021, was enjoined by a federal district court. *See* Pangea Legal Svcs v. U.S. Dep't Homeland Sec'y, __F. Supp. 3d __, 2021 WL 75756, *7 (N.D. Ca. Jan. 8, 2021).

126. *See* Jeffrey S. Chase, *Taking a Sledgehammer to Asylum*, OPS./ANALYSIS ON IMMIGR. L. (June 23, 2020), https://www.jeffreyschase.com/blog/2020/6/23/taking-a-sledgehammer-to-asylum.

127. Attorney General Sessions reversed Board case law that required immigration judges to hear testimony from an asylum applicant even if the applicant had not made out a prima facie case for asylum prior to the testimony. *See* Jeffrey S. Chase, *Are Summary Denials Coming to Immigration Court?*, OPS./ANALYSIS ON IMMIGR. L. (June 24, 2018), https://www.jeffreyschase.com/blog/2018/6/24/are-summary-denials-coming-to-immigration-court. Attorney General Sessions further announced in *A-B-* that immigration judges need not examine the remaining elements of an asylum claim if there is one flaw in the case. *Id.* Former immigration judge Jeffrey Chase noted that these two cases reminded immigration judges that they could speed up deportation orders by refusing to permit more testimony, which would assist in their production quotas because they could complete cases more quickly. *Id.*; *see also supra* Part I.A. (describing the 2018 proposal for individual production quotas on immigration judges).

128. *See* Matter of R-A-V-P-, 27 I. & N. Dec. 803, 806–07 (BIA 2020) (upholding an immigration judge's bond denial based on flight risk and reasoning that "for various reasons, eligibility for asylum can be difficult to establish, and an Immigration Judge may consider an alien's circumstances in determining how likely it is that his application for relief will ultimately be approved."); Jeffrey S. Chase, *BIA: "Lock Them Up!"*, OPS./ANALYSIS ON IMMIGR. L. (Apr. 6, 2020), https://www.jeffreyschase.com/blog/2020/4/6/bia-lock-them-up (critiquing *R-A-V-P-* by stating, "[t]he question isn't whether the respondent will be granted asylum; it's whether his application for asylum will provide enough impetus for him to appear for his hearings relating to such relief. From my experience both as an attorney and an immigration judge, the answer in this case is yes.").

129. Jacqueline Thomsen, *Immigration Judges Sue DOJ, Alleging Unconstitutional Gag on Speech*, NAT'L L.J. (July 1, 2020), https://www.naij-usa.org/images/uploads/newsroom/

Previously, immigration judges regularly spoke to audiences such as law students and practicing lawyers to discuss immigration law and procedures, giving a short disclaimer that their views did not represent those of their agency.[130] This ended when EOIR set forth a policy that required the judges to seek permission from the agency director and then repeatedly refused such permission, silencing judges during a time when they could provide input on rapidly-changing immigration laws and procedures.[131] This policy ensured that the judges could not publicly express dissent about the agency's immigration agenda.[132]

An interim rule announced in August 2019,[133] which became final in early November 2020, grants adjudication authority to the EOIR director—an appointee of the Attorney who directly reports to the Deputy Attorney General.[134] The NAIJ has critiqued this rule because it permits the EOIR director to "unilaterally rewrite immigration law with the issuance of precedential cases, without even the internal checks in place for the certification process that apply to the Attorney General."[135] This regulation allows a political appointee to write precedential case law that immigration judges and Board members are bound to follow, thus putting in in place a mechanism that permits top political actors at DOJ to substitute their own views for that of the supposedly independent adjudicators.[136]

The EOIR director, amid the financial crisis brought on by the COVID-19 pandemic, offered to buy out Board members appointed before the Trump

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2020.07.01.01.pdf. EOIR is undertaking full review of the agency's policy regarding judges speaking in public, which has put the litigation on hold. Knight First Amendment Institute at Columbia University, *Lawsuit: National Association of Immigration Judges v. McHenry* (last visited May 28, 2021), https://knightcolumbia.org/cases/naij-v-mchenry.

130. Cristian Farias, *The Trump Administration is Gagging America's Immigration Judges*, ATLANTIC (Feb. 28, 2020), https://www.theatlantic.com/ideas/archive/2020/02/immigration-judges-first-amendment/607195/.

131. *Id.*

132. *See id.*

133. Organization of the Executive Office for Immigration Review, 84 Fed. Reg. 44,537 (Aug. 26, 2019) (to be codified at 8 C.F.R. pts. 1001, 1003, 1292).

134. *See* Organization of the Executive Office for Immigration Review, 85 Fed. Reg. 69,465 (Nov. 3, 2020) (to be codified at 8 C.F.R. pts. 1001, 1003, 1292); Abigail Hauslohner, *New Rule Gives Trump Administration More Discretion to Change Asylum Law*, WASH. POST (Aug. 23, 2019, 7:29 PM), https://www.washingtonpost.com/immigration/new-rule-gives-trump-administration-more-discretion-to-change-asylum-law/2019/08/23/5f09efca-c5c7-11e9-b5e4-54aa56d5b7ce_story.html.

135. *The State of Judicial Independence and Due Process in U.S. Immigration Courts: Hearing before Subcomm. on Immigr. & Citizenship of the H. Comm. on the Judiciary*, 116th Cong. 8 (2020) (statement of J. A. Ashley Tabaddor, President, Nat'l Ass'n of Immigr. J.), https://docs.house.gov/meetings/JU/JU01/20200129/110402/HHRG-116-JU01-Wstate-TabaddorA-20200129.pdf.

136. *See id.*

administration, proposing financial incentives if they retired or resigned.[137] The American Immigration Lawyers Association critiqued this as an attempt to replace existing Board members with new Board members who would have higher asylum denial rates.[138] Although none of the existing Board members took the offer, it represents another example of politics playing a role in deciding who will be an immigration adjudicator.[139] It is yet another example of how the structure of the immigration adjudication system—with adjudicators as employees of the DOJ—can impact who becomes an adjudicator and thus control the decisions they make.[140]

In August 2020, the EOIR proposed new rules that would eliminate procedural devices that immigration adjudicators use to benefit noncitizens, such as sua sponte reopening authority, BIA remands to consider new evidence, and administrative closure.[141] Sua sponte reopening authority gives immigration judges or Board members the option to reopen a case even when a noncitizen has not met requirements such as the time or numerical limits on a motion to reopen.[142] BIA remand authority permits the Board to remand when new evidence or relief becomes available while a case is on appeal.[143] Administrative closure authority allows an immigration judge to take a case off of the court's regular docket, typically because an application is pending before the Citizenship and Immigration Services agency and that application, if granted, would provide new relief for a noncitizen in immigration court.[144] Although they have been preliminarily enjoined by a

137. Tanvi Misra, *DOJ memo offered to buy out immigration board members*, ROLL CALL (May 27, 2020, 5:04 PM), https://www.rollcall.com/2020/05/27/doj-memo-offered-to-buy-out-immigration-board-members/.

138. *Id.*; *see also* Press Release, Am. Immigr. Law. Ass'n, EOIR Director Attempts to Buy Out Remaining Board Members to Solidify Control of Immigration Courts, AILA Doc. No. 20052830 (May 28, 2020), https://www.aila.org/advo-media/press-releases/2020/eoir-director-attempts-to-buy-out-remaining-.

139. *See* Misra, *supra* note 137; *see also supra* Part I.A. (describing politicized hiring of immigration judges under Attorney General Ashcroft).

140. *See* Misra, *supra* note 137.

141. Appellate Procedures and Decisional Finality in Immigration Proceedings; Administrative Closure, 85 Fed. Reg. 52,491, 52,491–52,506 (Aug. 26, 2020) (to be codified at 8 C.F.R. pt. 1003, 1240).

142. Am. Immigr. Coun., *Practice Advisory: The Basics of Motions to Reopen EOIR-Issued Removal Orders* 2–3 (Feb. 7, 2018), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/the_basics_of_motions_to_reopen_eoir-issued_removal_orders_practice_advisory.pdf.

143. Aruna Sury, Immigrant Legal Resource Center, *Practice Advisory: Motions before the BIA* 2-3 (March 2020), https://www.ilrc.org/sites/default/files/resources/motions_with_bia-final.pdf.

144. Nat'l Immigr. Just. Cntr., *Practice Advisory: The Return of Administrative Closure* 1–3 (July 2020), https://immigrantjustice.org/for-attorneys/legal-resources/file/practice-advisory-return-administrative-closure.

federal district court,[145] these proposed rules present yet another attack on adjudicators' independence, as they reduce the flexibility and discretion immigration judges have to use procedural mechanisms to improve a noncitizen's chances of success in a removal hearing.[146]

The EOIR also issued a press release boasting about increases in deportation orders during the Trump administration, apparently unconcerned that, as the agency housing the adjudicators, it should at least appear to be impartial.[147] Meanwhile, Board members, answering only to only one master, have gone so far as to defy a remand order by a federal appeals court, describing the federal court's decision as incorrect because the Attorney General said so.[148]

These systemic problems with a biased immigration adjudication system have become the subject of recent federal court litigation. In December 2019, immigrants' rights organizations brought a lawsuit alleging violations under the U.S. Constitution, Immigration and Nationality Act, and Administrative Procedure Act, which gave rise to a biased immigration adjudication system.[149] In July 2020, the federal district court presiding over the suit allowed the case to proceed beyond a motion to dismiss for the plaintiffs' claim that the administrative of the immigration courts violates the immigration statute's "impartial adjudicator" requirement, recognizing that there is "at least plausible evidence of systemic bias" in the immigration adjudication system.[150]

The many examples explained in this Section show how frail an immigration judges' independence is, especially when it comes to the important question of determining physical liberty from detention. A recent study examining immigration judges' bond decisions from 2001 through

145. *See* Centro De La Raza v. EOIR, 2021 WL 916804, at *1 (N. D. Ca. Mar. 10, 2021).

146. *See* Emily Creighton, *Department of Justice Proposes New Limit to the Board of Immigration Appeals' Power*, AM. IMMIGR. COUNCIL (Aug. 25, 2020), https://immigrationimpact.com/2020/08/25/board-immigration-appeals-2020-rule/#.X1dol_lKjIV.

147. *See* Marouf, *supra* note 4, at 711–12; Jeffrey S. Chase, *The Need for an Independent Immigration Court*, OPS./ANALYSIS ON IMMIGR. L. (Aug. 17, 2017), https://www.jeffreyschase.com/blog/2017/8/17/the-need-for-an-independent-immigration-court.

148. Baez-Sanchez v. Barr, 947 F.3d 1033, 1035 (7th Cir. 2020) ("What happened next beggars belief. The Board of Immigration Appeals wrote, on the basis of a footnote in a letter the Attorney General issued after our opinion, that our decision is incorrect.").

149. *See* Complaint at 52–61, Las Americas Immigr. Advoc. Ctr. v. Trump (No. 3:19-cv-2051), https://www.splcenter.org/sites/default/files/documents/ecf_1_las_americas_v._trump_no._19-cv-02051-sb_d._or.pdf.

150. *Las Americas Immigr. Advoc. Ctr.*, 475 F. Supp. 3d 1194, 1201, 1215 (D. Or. 2020). As evidence of such bias, the court cited the unusually high rates of asylum denials in some immigration courts, the case completion goals, and statements made by Trump administration Attorneys General suggesting that asylum seekers are "'breaking into this country' and 'exploiting' the process,'" while making "baseless [asylum] claims." *Id.* at 1214 (alteration in original).

2019 suggested that the current president in power, not the president whose Attorney General appointed the judge, was the key indicator of outcome.[151] In bond decisions, noncitizens fared worse in the Trump administration than in the Obama or George W. Bush administrations.[152]

One can be optimistic that all of these attacks on immigration adjudicators' independence will die down in the Biden administration.[153] However, the Biden administration has not prioritized reform to the immigration adjudication system, and EOIR is still primarily staffed by Trump appointees.[154] The 300 immigration judges appointed during the Trump administration increased the asylum denial rate from 50 percent during the Obama years to 72 percent during the Trump years.[155] Furthermore, assigning important liberty decisions to an agent of the prosecutor, regardless of the politics of that prosecutor, is a system that must be fixed. To use the cautionary words of Gerald Neuman, "[t]he ability to determine the scope of one's own authority . . . is too great a power to place in the hands that already wield the sword."[156]

II. THE PERSISTENCE OF ARTICLE III JUDGES IN IMMIGRATION DETENTION DECISIONS

This Part describes how, in the modern era of immigration detention, Article III judges have played a significant role in immigration detention decisions. Despite efforts by Congress to curtail Article III judges' jurisdiction, Article III courts, in one way or another, have continued to monitor immigration detention. For immigration detainees, the Supreme Court has at times been their hero, vindicating the right to physical liberty. At other times it has been their villain, allowing executive officers to play an

151. *See* Kim & Semet, *Presidential Ideology and Immigrant Detention*, *supra* note 13, at 1885–91. The authors acknowledge that their study did not control for factors that could impact the outcomes, such as the individual circumstances of the noncitizen, the demographic characteristics of the immigration judges, changes in migration patterns, sociopolitical or socioeconomic contexts, geographic factors, or actions by other actors such as Congress, federal courts, or the Board. *Id.* at 1866. The authors suggested future empirical research that would account for such factors. *Id.* at 1891.

152. *Id.*

153. *See, e.g.*, Schmidt, *supra* note 9 (proposing that immigration court reform should be a major priority of a Biden administration); AM. IMMIGR. LAW. ASS'N, *A Vision for America as a Welcoming Nation: AILA Recommendations for the Future of Immigration*, AILA Doc. No. 20110933, 6 (Nov. 10, 2020) (recommending the creation of an Article I immigration court that is independent from the DOJ).

154. Gregory Chen, *JustSecurity: Biden's First 100 Days on Immigration: A Test of Leadership* (Apr. 29, 2021), https://www.justsecurity.org/75934/bidens-first-100-days-on-immigration-a-test-of-leadership/.

155. *Id.*

156. Neuman, *supra* note 43, at 1024.

outsized role in liberty decisions. In spite of these forces, lower Article III courts have continued to play a significant role in deciding physical liberty, refusing to simply assign such important decisions to immigration police and prosecutors.

This Article's omission of a more detailed history of immigration detention[157] does not suggest there was no judicial involvement in monitoring immigration detention, particularly during the earliest years of federal immigration regulation[158] and when detention became a tool of social control during the Red Scare.[159] As of 1954, the official DOJ policy was to make immigration detention the exception;[160] this caused a 90% reduction in immigration detention.[161] During the next several decades, bail was the norm for those undergoing deportation proceedings.[162] Release on parole was also the norm for those in exclusion proceedings because they were not "'clearly and beyond a doubt entitled to land,'" notwithstanding the statute's mandate to detain these individuals.[163] This use of immigration detention as the exception continued until the 1980s.[164]

A. Litigation Concerning Haitian Detainees

The 1980 Mariel boatlift marked what Jonathan Simon has described as "part of a larger series of immigration flows during the 1980s that would

157. Daniel Wilsher and César Cuauhtémoc García Hernández have given more comprehensive historical summaries of U.S. immigration detention law and policy. *See generally* CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS (2019); WILSHER, *supra* note 18. Elliott Young also tells the history of U.S. immigration detention with a focus on five stories that illustrate specific detention policies. *See generally* ELLIOT YOUNG, FOREVER PRISONS: HOW THE UNITED STATES MADE THE WORLD'S LARGEST IMMIGRATION DETENTION SYSTEM (2021).

158. The Chinese Exclusion Act of 1882 launched a "habeas corpus mill," where lower federal courts frequently ruled in favor of the Chinese, who were challenging their exclusions. *See* Christian G. Fritz, *A Nineteenth Century "Habeas Corpus Mill": The Chinese Before the Federal Courts in California*, 32 AM. J. LEGAL HIST. 347, 348 (1988); *see generally* LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 18 (1995).

159. Daniel Wilsher describes courts' decisions limiting indefinite detention for those who could not be deported because they were stateless due to borders shifting in the post-war period. *See* WILSHER, *supra* note 18, at 29–34.

160. Address by Hon. Herbert Brownell, Jr., U.S. Attorney General, *Humanizing the Administration of the Immigration Law* (Jan. 26, 1955), https://www.justice.gov/sites/default/files/ag/legacy/2011/09/12/01-26-1955.pdf.

161. Will Maslow, *Recasting our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 360–61 (1956).

162. *See* WILSHER, *supra* note 18, at 58.

163. Jonathan Simon, *Refugees in a Carceral Age*, 10 Public Culture 577, 581 (1998); *see also* 8 U.S.C. § 12251225(b)(1)(B)(IV) (statute mandating detention for "arriving aliens"); 8 U.S.C. § 1182(d)(5) (statute providing for parole).

164. Simon, *supra* note 163, at 578-79.

transform the face of immigration to the United States."[165] Previously, those seeking to enter the United States without permission were primarily Mexican, and they typically accepted deportation once apprehended rather than seeking asylum.[166] But the new illegal entrants of the 1980s, hailing from the Caribbean and Central America, raised colorable claims under the recently-enacted Refugee Act.[167] The INS deemed these new refugees dangerous and undesirable, yet the Refugee Act removed the INS's discretion to summarily exclude them.[168] The Reagan administration's response was more detention and fewer grants of parole to arriving asylum-seekers, a practice intended to deter future migrants.[169] According to Attorney General William French Smith, "[d]etention of aliens seeking asylum was necessary to discourage people like the Haitians from setting sail in the first place."[170]

A class of detainees sued, claiming that the new parole policy did not follow the proper administrative law procedures and denied them equal protection because it discriminated on the basis of race and national origin.[171] A federal district court decided that the new policy violated the administrative law requirement of notice and comment and ordered the release of 1,700 class members.[172] After this order, the INS promulgated new regulations that complied with its obligations under the Administrative Procedure Act, and many were released under the new regulations.[173] On appeal, the Supreme Court, in the 1985 case *Jean v. Nelson*,[174] decided that the statute and new regulations required nondiscrimination in the consideration of parole; the Court did not reach the equal protection claim.[175]

165. *Id.* at 582.

166. *Id.*

167. *Id.*; *see also* Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102.

168. Simon, *supra* note 163, at 582–83.

169. *Id.* at 583 ("The new imprisonment policy was aimed at substituting the deterrent of the prison for the removal discretion lost to the Refugee Act."); *see also* Louis v. Nelson 544 F. Supp. 973, 979–81 (S.D. Fla. 1982) (discussing President Reagan's adoption of the federal task force's recommendation to use detention as deterrence, and stating that "[t]he policy was designed to deal with another Mariel type situation, regardless of the nationality or number of the arriving aliens").

170. MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS 7 (2004).

171. *See* Jean v. Nelson, 472 U.S. 846, 849 (1985).

172. *Id.* at 850.

173. *Id.* at 850.

174. 472 U.S. 846 (1985).

175. *Id.* at 854–55, 857. Hiroshi Motomura describes the *Jean* case as an example where the Court applied "phantom norms," whereby important constitutional rights are realized through statutory interpretation. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547–49 (1990). The Court did not reach the constitutional question of whether the parole policy violated equal protection, which would have required it to either accept or reject past holdings that the political branches have plenary power over immigration decisions. *See id.* at 547; *see also Jean*, 472 U.S. at 868–81 (Marshall, J., dissenting) (reaching the constitutional issue and deciding that, contrary to

One lesson that can be gleaned from the *Jean* litigation is that federal courts became *more* involved in scrutinizing executive officers' parole decisions, causing the INS to recalibrate its parole policies.[176] Even if the abuse of discretion standard of review was quite deferential to INS officers,[177] it demonstrated a federal court monitoring individual decisions about immigration detainees' physical liberty.[178] As Jonathan Simon writes, detention became the source of rights, notwithstanding the plenary power that caused courts to give immense deference to the political actors in this context.[179] Ironically, the judiciary's invocation of some rights for even the most rights-less (those who had never legally entered the United States)[180] may have prompted the executive branch to interdict Haitian refugees on the high seas to prevent them from reaching U.S. territory and jails, where they had access to lawyers and the protections of the Constitution.[181]

B. Litigation Concerning the 1996 Detention Laws

Congress prioritized detention as social control in the late 1980s and 1990s, which César Cuauhtémoc García Hernández describes as part of a broader effort to incarcerate more people of color in the war on drugs.[182] A series of legislative experiments[183] led to the 1996 enactment of the mandatory detention statute, 8 U.S.C. § 1226(c).[184] This statute completely

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the Eleventh Circuit's opinion, aliens who have not been admitted to the United States do have constitutional rights).

176. *See Jean*, 472 U.S. at 850 (citing 8 C.F.R. § 212.5 (1985); 47 Fed. Reg. 30,044 (1982), *as amended*, 47 Fed. Reg. 46,494 (1982)).

177. The Eleventh Circuit determined that, on remand, the District Court should examine individual parole decisions to determine whether the INS officers could advance "facially legitimate and bona fide reason[s]" for denying parole. *Jean*, 472 U.S. at 853 (quoting Jean v. Nelson, 727 F.2d. 957, 977 (11th Cir. 1984)).

178. On remand, the District Court was to consider whether the INS "made individualized determinations of parole" and "exercised this broad discretion under the statutes and regulations without regard to race or national origin." *Id.* at 857.

179. *See* Simon, *supra* note 163, at 600.

180. *See, e.g.*, WILSHER, *supra* note 18, at 61 ("[*Mezei*] revealed the full extent of the aliens [sic] power to create essentially 'political' prisoners detained outside the framework of legal rules even during peacetime.").

181. *See* Simon, *supra* note 163, at 600; *see also* Sale v. Haitian Cntrs. Council, 509 U.S. 155, 160–70 (1993) (describing the history leading up to the Executive Order that required the Coast Guard to interdict Haitians on the high seas and return them to Haiti).

182. *See* García Hernández, *supra* note 18, at 1360–79.

183. Holper, *Beast of Burden*, *supra* note 20, at 81–87 (chronicling the set of laws leading up to the mandatory detention statute, all of which required the detainee in a crime-related class to bear the burden of proving lack of dangerousness or flight risk).

184. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, div. C, § 303, 110 Stat. 3009-546, 3009-585 (codified as amended at 8 U.S.C. § 1226).

removed immigration judge review of bond for noncitizens removable for terrorism-related grounds of inadmissibility and deportability, noncitizens inadmissible for crime-related reasons, and noncitizens deportable due to multiple crimes involving moral turpitude, firearms offenses, aggravated felonies, drug crimes.[185] No longer would the habeas court oversee bond decisions made by executive officials if proceedings became prolonged, in contrast to the 1952 provisions.[186] Also gone was any six-month limitation on detention following a final order of removal,[187] which had been included in earlier immigration statutes out of recognition that indefinite detention would be unconstitutional.[188] Instead, the statute gave discretion to INS officials over all post-order detention decisions, with no judicial role anticipated.[189]

Congress also made all discretionary decisions related to detention unreviewable by Article III courts.[190] This was part of a broader

185. *See* 8 U.S.C. § 1226(c) (2000). Only in cases of witness protection can an immigration judge decide whether to release a noncitizen in these categories on bond. *Id.*

186. *See* Immigration and Nationality Act ("INA"), Pub. L. No. 82-414, ch. 477, sec. 242(a), 66 Stat. 209 (1952) (requiring judicial oversight through habeas corpus when the "Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability"); *see also* IIRIRA, Pub. L. No. 104-208, div. C, § 306(a)(2), 110 Stat. 3009-607 (1996) (removing this portion of the 1952 language).

187. *See* David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, 2001 SUP. CT. REV. 47, 61 (2001).

188. *See* Internal Security Act of 1950, Pub. L. No. 81-831, § 23, 64 Stat. 987, 1011. The Senate Report for the Hobbs Act, which provides the legislative history of what became the Internal Security Act of 1950 ("ISA"), stated:

> [t]he bill, as it passed the House of Representatives, provided power in the Attorney General to indefinitely detain deportable aliens in certain cases. This provision in the bill as it passed the House of Representatives appears to present a constitutional question. The committee, without undertaking to pass on the constitutionality of this provision, has decided to delete the provision and to provide in its stead penal provisions to be invoked by judicial process against deportable aliens in the subversive, criminal, and immoral classes who fail to depart from the United States.

S. REP. NO. 81-2239, at 8–9 (1950) (facilitating deportation of aliens); *see also* Carlson v. Landon, 342 U.S. 524, 540 (1952) (referring to the legislative history of the Hobbs Act as providing such history for the ISA, since it contained almost identical language). The 1952 INA retained the six-month limit on detention following a deportation order. *See* 8 U.S.C. § 1252(c) (1952).

189. 8 U.S.C. § 1231(a)(6)(1996). David Martin discusses the Antiterrorism and Effective Death Penalty Act ("AEDPA") version of the statute, which would have mandated detention of all noncitizens convicted of an aggravated felony. *See* Martin, *supra* note 187, at 63–67. The IIRIRA version gave discretion to the INS to release those who could not be deported under an order of supervision, but also added that persons with status violations would also be subjected to the post-order removal statute. *Id.* at 67. Thus, this statute now applied to ninety-seven percent of noncitizens ordered removed. *Id.*

190. 8 U.S.C. § 1226(e) (2000). Section 1226(e) was enacted with IIRIRA and reads: "The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this

Congressional agenda to remove many immigration questions from review by Article III courts,[191] especially discretionary decisions.[192] These efforts ironically resulted in *more* immigration cases being reviewed by federal courts, since new questions of jurisdiction created its own subset of litigation.[193] This statute further limited the role the Supreme Court had assigned to federal judges when it held in the 1952 case *Carlson v. Landon*[194] that there was no right to bail in deportation proceedings.[195] While the *Carlson* court upheld the Attorney General's authority to make discretionary bail decisions and to delegate these decisions to his subordinates, the Court also held that these decisions were subject to abuse-of-discretion review in federal court.[196] Congress later removed even this limited role for Article III courts.[197]

The first of the 1996 detention statutes to reach the Supreme Court was the statute dealing with post-removal order detention. In *Zadvydas v. Davis*,[198] the Court decided whether the INS could indefinitely detain lawful permanent residents who had been ordered deported because of criminal convictions, yet were either stateless or from a country that would not repatriate them.[199] The Court interpreted the post-order removal statute to permit detention for only six months (finding this limit in the 1952 version), after which the detainee would be released if deportation was not foreseeable.[200] By applying due process norms that apply to other types of civil detention, *Zadvydas* stands as a high-water mark for the Court's recognition of constitutional rights for those detained by the immigration

section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." *Id.*

191. *See* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 229 (2007).

192. *See* Reno v. Am.-Arab Anti-Discrimination Comm. ("AADC"), 525 U.S. 471, 486 (1999) ("*[M]any* provisions of IIRIRA are aimed at protecting the Executive's discretion from the courts—indeed, that can fairly be said to be the theme of the legislation."); Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2583 (1998).

193. *See* Family, *supra* note 110, at 583 ("The federal courts, perhaps counterintuitively given the cuts in jurisdiction, have also seen huge increases in the numbers of immigration appeals filed in the courts of appeals."); *id.* at 585 (noting that "stripping judicial review creates litigation over the court's jurisdiction.").

194. 342 U.S. 524 (1952).

195. *See id.* at 540–41.

196. *See id.*

197. *See* García Hernández, *supra* note 18, at 1355 ("To an observer of the modern immigration detention apparatus, the [*Carlson*] Court's reference to discretion sounds quaint, because much of that discretion was eliminated in a series of policy practices and statutory enactments beginning in the early 1980s and culminating in 1996.").

198. 533 U.S. 678 (2001).

199. *Id.* at 684.

200. *Id.* at 701.

authorities.[201] The Court stated, "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."[202] Yet, the Court did not go so far as to strike down the statute as unconstitutional. Instead, the Court interpreted the statute to allow release if the government could not show deportation was foreseeable six months after a final order of removal.[203] The Court thus resurrected the prior versions of the statute that limited post-order detention to six months.[204]

Meanwhile, multiple courts of appeals held that the statute mandating detention during removal proceedings violated Due Process,[205] and even the government believed that it was likely to lose when the issue reached the Supreme Court, especially when applying the *Zadvydas* decision.[206] Yet, the Court upheld the statute against a due process challenge in the 2003 case of *Demore v. Kim*.[207] As Margaret Taylor writes, this was the first immigration case to reach the Supreme Court after the September 11, 2001 terrorist attacks, so the Court was bowing to executive authority to detain noncitizens

201. *See id.* at 690 (comparing indefinite immigration detention to civil commitment, where the government must bear the burden of proving that special circumstances, "such as a harm-threatening mental illness, outweigh[] the 'individual's constitutionally protected interest in avoiding physical restraint.'") (quoting Kansas v. Hendricks, 521 U.S. 346, 356 (1997)).

202. *Id.*

203. *Id.* at 701. Justice Breyer's opinion in *Zadvydas* signaled an important constitutional ruling; it stands as an excellent example of Hiroshi Motomura's "phantom constitutional norms," where courts undermine the plenary power through statutory interpretation. *See* Motomura, *supra* note 175, at 549. The manner of interpretation proved to be instrumental to providing a path to freedom for some Mariel Cubans who were never admitted to the United States, yet were ordered excluded due to criminal convictions and could not be repatriated. *See* Clark v. Martinez, 543 U.S. 371, 386 (2005). The Court in 2005 applied its *Zadvydas* holding to inadmissible Cubans, despite the government's arguments that because the Cubans had never been admitted, they should not benefit from the *Zadvydas* holding. *Id.* at 382–86. Justice Scalia, writing for the majority, reasoned that because the same statute applied to those who had been deported and those who had never been admitted to the United States, the Cubans could benefit from the Court's *Zadvydas* holding. *Id.*

204. *See* Martin, *supra* note 187, at 73 ("In a move not much seen since Warren Court days, it laid down precise numerical guidance for habeas courts. . . . This [six-month] time period was expressly borrowed from the long-standing pre-1996 statutory framework for deportable aliens.").

205. *See, e.g.*, Kim v. Ziglar, 276 F.3d 523, 537 (9th Cir. 2002), *rev'd*, Demore v. Kim, 538 U.S. 510 (2003); Welch v. Ashcroft, 293 F.3d 213, 227 (4th Cir. 2002), *abrogated*, Demore v. Kim, 538 U.S. 510 (2003); Hoang v. Comfort, 282 F.3d 1247, 1251 (10th Cir. 2002), *vacated*, Weber v. Phu Chang Hoang, 538 U.S. 1010 (2003); Patel v. Zemski, 275 F.3d 299, 314 (3d Cir. 2001), *abrogated*, Demore v. Kim, 538 U.S. 510 (2003).

206. As Margaret Taylor writes, the government viewed the *Demore v. Kim* case as one "[t]he INS wouldn't mind losing." Margaret H. Taylor, Demore v. Kim*: Judicial Deference to Congressional Folly*, *in* IMMIGRATION STORIES 343 (2005). Also, several former INS employees signed an amicus brief in *Demore v. Kim*, supporting Mr. Kim in his argument that mandatory detention violated Due Process. *Id.*

207. 538 U.S. 510 (2003).

deemed a threat.[208] The *Demore* Court reasoned that because such periods of detention were brief, a categorical rule of detention without an individualized hearing was constitutionally permissible.[209] Justice Kennedy warned in his concurrence, though, that if mandatory detention becomes unreasonably prolonged, it no longer serves the statute's goals.[210]

C. Litigation Concerning Prolonged Detention and Procedural Protections in Bond Hearings

Following *Demore*, multiple courts held that once mandatory detention became unreasonably prolonged, detainees were entitled to a bond hearing.[211] Detention lengths were quite staggering: for a class of detainees challenging their prolonged detention without periodic (or in some cases any) bond hearings, detention lengths averaged between 346–427 days, with some lasting up to 1,585 days.[212] Although the statute no longer contained the 1952 allowance for judicial involvement if the government did not act with "reasonable dispatch" in the proceedings,[213] courts still saw themselves in the role of monitoring detention without a bond hearing if detention during proceedings lasted too long.

What is more, Article III courts, once analyzing whether detainees had a right to a bond hearing, also began to dictate the contours of that bond

208. Taylor, *supra* note 206, at 345.

209. *Demore*, 538 U.S. at 529.

210. *Id.* at 532 (Kennedy, J., concurring) (reasoning that a detainee "could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified.") (citing Zadvydas v. Davis, 533 U.S. 678, 684–86 (2001)).

211. *See, e.g.*, Sopo v. U.S. Att'y Gen., 825 F.3d 1199, 1212–13 (11th Cir. 2016), *vacated*, 890 F.3d 952 (11th Cir. 2018) (collecting cases); Reid v. Donelan, 819 F.3d 486, 494 (1st Cir. 2016), *withdrawn*, Nos. 14-1270, 14-1803, 14-1823, 2018 WL 4000993 (1st Cir. May 11, 2018) ("The case before us tests the assumption upon which *Demore* was based, and asks whether Congress may employ categorical, mandatory detention for 'the period necessary for removal proceedings' when that period turns out not to be so 'brief' after all.").

212. *See* Rodriguez v. Robbins, 804 F.3d 1060, 1079–85 (9th Cir. 2015), *rev'd*, 138 S. Ct. 830 (2018). The Rodriguez class was subdivided into three subclasses. *Id.* at 1078. For those subject to mandatory detention pursuant to 8 U.S.C.§ 1226(c), the average length of detention was 427 days, with the longest-detained class member confined for 1,585 days (and counting). *Id.* at 1079. The 8 U.S.C. § 1225(b) subclass members had "been detained for as long as 831 days, and for an average of 346 days each." *Id.* at 1081. "At the time petitioners generated their report, [one 8 U.S.C. § 1226(a) subclass member] had been detained for 1,234 days with no definite end in sight." *Id.* at 1085.

213. *See* 8 U.S.C. § 1252(a) (1952) ("Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.").

hearing.[214] This made immigration bond hearings look more like bail hearings for pretrial detainees.[215] In some cases, Article III courts, exercising their equitable powers under the habeas statute, held their own bond hearings or simply ordered release.[216] In other cases, courts closely monitored how immigration judges conducted the bond hearings that courts had ordered. This typically arose when litigants did not believe that the immigration judge properly followed the procedural requirements mandated by the courts.[217]

Article III courts also repeatedly ignored the "entry fiction"[218] that purported to create a constitution-free zone for those stopped at the nation's borders.[219] In case after case, noncitizens who were stopped at the border and detained pending the presentation and appeal of an asylum claim invoked the

214. For example, courts determined that the government, not the detainee, should bear the burden of proof at the bond hearings for which previously mandatory detainees were now eligible. *See*, *e.g.*, Lora v. Shanahan, 804 F.3d 601, 616 (2d Cir. 2015), *vacated*, Shanahan v. Lora, 138 S. Ct. 1260 (2018); Diop v. ICE/Homeland Sec., 656 F.3d 221, 233 (3d Cir. 2011). *But see Sopo*, 825 F.3d at 1220 (holding that those detained under 8 U.S.C. § 1226(c) for a prolonged period such that the statute should require a bond hearing do not deserve more process than those detained under 8 U.S.C. § 1226(a), who must bear the burden of proof according to regulation and Board precedent). Courts also decided that the standard of proof should be clear and convincing evidence. *See, e.g.*, Singh v. Holder, 638 F.3d 1196, 1203–04 (9th Cir. 2011) (concluding that "a clear and convincing evidence standard of proof provides the appropriate level of procedural protection" in light of "the substantial liberty interest at stake.").

215. *See* 18 U.S.C. § 3142(f) (2000) (requiring, when a pretrial detainee is charged with certain enumerated offenses, that the government move for a detention hearing at which the government must prove, by clear and convincing evidence, that the detainee is dangerous and that no conditions can ensure the safety of the community).

216. *See, e.g.*, Flores-Powell v. Chadbourne, 677 F. Supp. 2d 455, 476–77 (D. Mass. 2010) (collecting cases of district courts that held their own bond hearings pursuant to equitable habeas powers).

217. *See, e.g.*, *Singh*, 638 F.3d at 1203–04 (evaluating procedures used in bond hearing mandated by the court's earlier decision in Casas-Castrillon v. Dep't Homeland Sec., 535 F.3d 942 (9th Cir. 2008)); Hechavarria v. Whitaker, 358 F. Supp. 3d 227, 239–43 (W.D.N.Y. 2019) (granting a motion to enforce the judgment when the immigration judge did not apply the clear and convincing burden of proof to the government in a court-ordered bond hearing).

218. GARCÍA HERNÁNDEZ, *supra* note 157, at 25. César Cuauhtémoc García Hernández describes the origins of the entry fiction in immigration law. *See id.* at 23–25. This legal fiction allowed arriving migrants to land on U.S. soil, relieving steamship companies of holding them on ships while immigration officers vetted them using the growing list of exclusion grounds. *Id.* The legal fiction permitted this arrangement, but excluded the migrants from claiming any constitutional rights that normally would accompany presence on U.S. soil. *Id.*

219. *See, e.g.*, Rosales-Garcia v. Holland, 322 F.3d 386, 409 (6th Cir. 2003) ("The government first contends in these appeals that . . . the detention of excludable aliens cannot raise constitutional concerns because such detention 'does not *implicate* the Fifth Amendment.' We could not more vehemently disagree. Excludable aliens—like all aliens—are clearly protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.") (citation omitted); *see also id.* at 410 ("The fact that excludable aliens are entitled to less process, however, does not mean that they are not at all protected by the Due Process Clauses of the Fifth and Fourteenth Amendments."); Chi Thon Ngo v. INS, 192 F.3d 390, 396 (3d Cir. 1999).

Due Process Clause, claiming a constitutional right to be free from prolonged detention while their cases were pending.[220] Such courts were careful to limit the Supreme Court's 1953 holding in *Shaughnessy v. U.S. ex. rel. Mezei*[221] to its facts, holding that the Due Process Clause was only inapplicable because the detainee was ordered excluded for national security reasons.[222] Thus, even those with the fewest statutory and constitutional rights to be free still managed to convince Article III judges that the constitution required an individualized bond hearing when detention became unreasonably prolonged.[223]

Finally, Article III courts began to examine the quality of the bond hearings that occur pursuant to the general bond statute, 8 U.S.C. § 1226(a). Here, Article III courts repeatedly found immigration judges' bond hearings constitutionally defective. For example, courts have held that: (1) detainees

220. *See, e.g.*, Tuser v. Rodriguez, 370 F. Supp. 3d 435, 443 (D.N.J. 2019); Jamal v. Whitaker, 358 F. Supp. 3d 853, 857 (D. Minn. 2019); De Ming Wang v. Brophy, No. 17-CV-6263-FPG, 2019 U.S. Dist. LEXIS 1826, at *5 (W.D.N.Y. Jan. 3, 2019); Perez v. Decker, No. 18-cv-5279 (VEC), 2018 WL 3991497, at *3–4 (S.D.N.Y. Aug. 20, 2018) (collecting cases from the Southern District of New York); Ahad v. Lowe, 235 F. Supp. 3d 676, 682 (M.D. Pa. 2017); Maldonado v. Macias, 150 F. Supp. 3d 788, 812 (W.D. Tex. 2015). *But see* Poonjani v. Shanahan, 319 F. Supp. 3d 644, 649 (S.D.N.Y. 2018) ("[B]ecause the immigration statutes at issue here do not authorize a bond hearing, *Mezei* dictates that due process does not require one here.").

221. 345 U.S. 206 (1953). In *Mezei*, the petitioner was ordered excluded under the Passport Act and its implementing regulations yet forced to remain detained on Ellis Island because no other nation would receive him. *Id.* at 205–06. The Court ruled that his continued exclusion and detention without a hearing did not deprive him of any statutory or constitutional right, because the constitution did not apply to him. *Id.* at 215–16. The *Mezei* decision suffered serious critique, even at the time, owing to the Court's determination that the constitutional right of Due Process did not even apply. *See, e.g.*, WILSHER, *supra* note18, at 61; Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 982–84 (1995) (describing post-decision public critique and congressional efforts that ultimately led to the Attorney General releasing Mezei on parole); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1392 (1953).

222. *See, e.g.*, Kouadio v. Decker, 352 F. Supp. 3d 235, 239 (S.D.N.Y. 2018) ("*Mezei* was decided in the interest of national security, against a petition whose detention was authorized under 'emergency regulations promulgated pursuant to the Passport Act.'") (quoting *Mezei*, 345 U.S. at 214–15); *id.* at 240 ("It is well-established that national security concerns affect the scope of due process. . . . The world remains threatening to the United States' interests, but we are far from the dark climate of World War II and the Korean and Vietnamese wars. As the Sixth Circuit held en banc, *Mezei* is limited to the national security context in which it was decided."); *see also Rosales-Garcia*, 322 F.3d at 413–14 (distinguishing *Mezei* from the case of a paroled Cuban who was ordered excluded by stating that "the *Mezei* Court explicitly grounded its decision in the special circumstances of a national emergency and the determination by the Attorney General that Mezei presented a threat to national security"); *id.* at 414 (holding that *Mezei* was also distinguishable because "the Court's implicit conclusion in *Mezei* is eclipsed by the conclusion drawn from the *Salerno* line of cases that the indefinite detention of excludable aliens does raise constitutional concerns").

223. *See, e.g.*, Rosales-Garcia, 322 F.3d at 413–14; Kouadio, 352 F. Supp. 3d at 239–40.

should not be required to bear the burden of proof;[224] (2) the appropriate standard of proof is clear and convincing evidence;[225] (3) immigration judges must consider alternatives to detention;[226] (4) detainees should not suffer detention merely because they are unable to pay the bond set by an immigration judge;[227] (5) judges must keep a contemporaneous record of the hearings;[228] and (6) judges must immediately state the reasons for a bond denial (as opposed to writing post-hoc reasons for denial).[229] In these cases, government arguments that Article III courts have no role to play in reviewing immigration judges' and officers' discretionary bond decisions have proven unconvincing.[230] In fact, because detainees presented these arguments as procedural due process violations, it was necessary for the detainees to show they were prejudiced by the procedures[231]—and that

224. *See, e.g.*, Velasco Lopez v. Decker, 978 F.3d 842, 846, 854 (2d Cir. 2020); Dubon Miranda v. Barr, 463 F. Supp. 3d 632, 646 (D. Md. 2020); Brito v. Barr, 415 F. Supp. 3d 258, 263 (D. Mass. 2019); Linares Martinez v. Decker, No. 18-CV-6527 (JMF), 2018 WL 5023946, at *3 (S.D.N.Y. Oct. 17, 2018); Pensamiento v. McDonald, 315 F. Supp. 3d 684, 692 (D. Mass 2018).

225. *See, e.g.*, *Velasco Lopez*, 978 F.3d at 854–55; Singh v. Holder, 638 F.3d 1196, 1204–05 (9th Cir. 2011); *Linares Martinez*, No. 18-CV-6527 (JMF), 2018 WL 5023946, at *5 (S.D.N.Y. Oct. 17, 2018).

226. *See*, *e.g.*, Hernandez v. Sessions, 872 F.3d 976, 291–92 (9th Cir. 2017); *Dubon-Miranda*, 463 F. Supp. 3d 632 (D. Md. 2020); Brito v. Barr, 415 F. Supp. 3d 258, 263, 271 (D. Mass. 2019); Abdi v. Nielson, 287 F. Supp. 3d 327, 333 (W.D.N.Y. 2018).

227. *See Abdi*, 287 F. Supp. 3d at 333.

228. *See*, *e.g.*, *Singh*, 638 F.3d at 1200.

229. Padilla v. U.S. Immigr. & Customs Enf't, 379 F. Supp. 3d 1170, 1173, 1178 (W.D. Wash. 2019) (granting a preliminary injunction for prompt bond hearings with several procedural protections that are currently lacking in bond hearings conducted under 8 U.S.C. § 1226(a) for a class of asylum-seekers who recently entered the United States and passed a credible fear interview).

230. *See, e.g.*, *Hernandez*, 872 F.3d at 987 ("[8 U.S.C. § 1226(e)] does not, however, preclude 'habeas jurisdiction over constitutional claims or questions of law.' . . . '[C]laims that the discretionary [bond] process itself was constitutionally flawed are cognizable in federal court on habeas because they fit comfortably within the scope of § 2241.'" (quoting *Singh*, 638 F.3d at 1196, 1202)) (citations omitted) (alterations in original); *Singh*, 638 F.3d at 1202 ("Like § 1226(e), § 1252(a)(2)(B)(ii) restricts jurisdiction only with respect to the executive's exercise of discretion. It does not limit habeas jurisdiction over questions of law, . . . including 'application of law to undisputed facts, sometimes referred to as mixed questions of law and fact.'" (quoting Ramadan v. Gonzales, 479 F.3d 646, 648 (9th Cir. 2007))) (citations omitted); *Linares Martinez*, 2018 WL 5023946, at *4 n.4 (S.D.N.Y. Oct. 17, 2018) ("One of [the government's] arguments—that the Court lacks jurisdiction to review Linares's detention . . . —barely warrants scrutiny. It is well established that Section 1226(e) . . . does not preclude judicial review of '[c]laims of constitutional infirmity in the procedures followed at a bond hearing.'" (quoting Bogle v. DuBois, 236 F. Supp. 3d 820, 822 (S.D.N.Y. 2017)).

231. *See, e.g.*, *Singh*, 638 F.3d at 1205; Maldonado-Velasquez v. Moniz, 274 F. Supp. 3d 11, 13–15 (D. Mass 2017) (declining to reach the issue of whether a misallocated burden of proof violated the detainee's due process rights because the detainee was not prejudiced by the error).

prejudice inquiry requires courts to analyze whether the result could have been different with the proper procedures.[232]

D. COVID-19 Cases

When the COVID-19 pandemic caused worldwide closures, stay-at-home orders, and health-expert-mandated social distancing, immigrant advocates wondered what would happen to immigration detainees.[233] Immigration detention sites were a tinderbox for spreading the virus,[234] with detainees sharing bedrooms, bathrooms, and dining spaces, while lacking protective equipment or sanitizer. Detainees were further exposed to numerous corrections staff.[235]

Again, Article III courts played an important role in monitoring the right to liberty in these exigent circumstances. In one case, a federal district court ordered U.S. Immigration and Customs Enforcement ("ICE") to conduct new custody determinations for all of its detainees with risk factors that would increase the detainees' risk of serious illness or death if infected by COVID-19.[236] In other cases, federal courts granted injunctive relief, ordering ICE to release certain vulnerable detainees[237] or depopulate its jails.[238]

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232. *See Singh*, 638 F.3d at 1205 (holding that the court applied the incorrect standard of proof in a bond hearing, and that "the standard of proof could well have affected the outcome."); Doe v. Tompkins, No. 18-12266-PBS, 2019 WL 8437191, at *1–2 (D. Mass. Feb. 12, 2019) (holding that placing the burden of proof on a detainee violated due process rights and that a different burden allocation could have impacted the outcome).

233. *See* César Cuauhtémoc García Hernández & Carlos Moctezuma García, *Close Immigration Prisons Now*, N.Y. TIMES (Mar. 19, 2020), https://www.nytimes.com/2020/03/19/opinion/coronavirus-immigration-prisons.html.

234. *See* Catherine E. Shoichet, *Doctors Warn of 'Tinderbox Scenario' if Coronavirus Spreads in ICE Detention*, CNN (Mar. 20, 2020, 8:21 PM), https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html.

235. *See* Decl. of Robert B. Greifinger, MD, *Augusto v. Moniz*, No. 1:20-cv-10685-ADB, Docket No. 36 (D. Mass 2020) (on file with author).

236. *See* Fraihat v. U.S. Immigr. & Customs Enf't, 445 F. Supp. 3d 709, 750 (C.D. Cal. 2020).

237. *See, e.g.*, Coreas v. Bounds, 458 F. Supp. 3d 352, 360–61 (D. Md. 2020); Jeferson V.G. v. Decker, No. 20-3644 (KM), 2020 WL 1873018, *3–9 (D.N.J. Apr. 15, 2020); Thakker v. Doll, 451 F. Supp. 3d 358, 365, 367, 369 (M.D. Pa. 2020); Basank v. Decker, 449 F. Supp. 3d 205, 213, 215 (S.D.N.Y. 2020); *see also* Xochihua-Jaimes v. Barr, 962 F.3d 1065, 1066 (9th Cir. 2020) (ordering *sua sponte* release of a noncitizen whose petition for review was pending before the court of appeals "[i]n light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers"). *But see* Dawson v. Asher, 447 F. Supp. 3d 1047, 1048–49 (W.D. Wash. 2020) (denying a temporary restraining order seeking release of medically vulnerable immigration detainees).

238. *See*, *e.g.*, Roman v. Wolf, No. EDCV 20-00768 TJH (PVCx), 2020 WL 1952656, *9–12 (C.D. Cal. Apr. 23, 2020); *see also* Savino v. Souza, 459 F. Supp. 3d 317, 320 (D. Mass. 2020) (ordering ICE to test all detainees and staff at one detention facility and to not admit any more immigration detainees to that facility).

Article III courts also began to conduct their own bail hearings for immigration detainees, taking the liberty decisions away from ICE officers and immigration judges. A little-known doctrine permits Article III courts to release a detainee on bail if there are extraordinary circumstances that make the granting of bail necessary to make habeas effective.[239] In several cases, federal courts decided bail for immigration detainees using this doctrine.[240] In some cases, the detainee sought an immigration court bond hearing in the underlying habeas corpus petition, but it was unclear when that bond hearing would happen due to immigration court delays caused by the pandemic.[241] The Article III courts reasoned that the remedy sought by the habeas petition—a bond hearing—would be rendered ineffective if the detainee was not immediately released, since more time in custody meant greater likelihood of infection, and possibly death, before an immigration court bond hearing.[242] Immigration detainees also sought release as a remedy to an overpopulated detention center, arguing that their forced communal living in a pandemic amounted to a due process violation.[243] While courts sorted out these substantial legal claims, they also considered bail for detainees, again so that the remedy the detainees sought would not be rendered ineffective if the detainees died from the virus before the case could be resolved in court.[244]

These cases demonstrate that the federal courts, not immigration judges, became the guardians of freedom for immigration detainees when accessing freedom was crucial for their physical safety. As one district court stated:

> Our Constitution and laws apply equally to the most vulnerable among us, particularly when matters of public health are at issue. This is true even for those who have lost a measure of their freedom. If we are to remain the civilized society we hold ourselves out to be, it would be heartless and inhumane not to recognize Petitioners' plight. And so we will act.[245]

The global pandemic exposed to the public the many flaws in the U.S. immigration detention system, as there were over 12,000 reported virus cases

239. *See* Mapp v. Reno, 241 F.3d 221, 226 (2d Cir. 2001).

240. *See, e.g.*, Yanes v. Martin, 464 F. Supp. 3d 467, 475 (D.R.I. 2020); Gomes v. U.S. Dep't Homeland Sec., 460 F. Supp. 3d 132, 156 (D.N.H. 2020); *Savino*, 459 F. Supp. 3d at 322; Avendaño Hernandez v. Decker, 450 F. Supp. 3d 443, 446–47 (S.D.N.Y. 2020); Arana v. Barr, No. 19cv7924 (PGG) (DF), 2020 WL 1502039, at *1, *4 (S.D.N.Y Mar. 27, 2020); Coronel v. Decker, 449 F. Supp. 3d 274, 289–90 (S.D.N.Y. 2020).

241. *See, e.g.*, *Coronel*, 449 F. Supp. 3d at 280, 286; *Arana*, No. 19cv7924 (PGG) (DF), 2020 WL 1502039, at *1.

242. *Coronel*, 449 F. Supp. 3d at 283.

243. *See, e.g.*, *Savino*, 459 F. Supp. 3d at 327–31; *Avendaño Hernandez*, 450 F. Supp. 3d at 447; *Coronel*, 449 F. Supp. 3d at 280, 285–87.

244. *Coronel*, 449 F. Supp. 3d at 287.

245. Thakker v. Doll, 451 F. Supp. 3d 358, 372 (M.D. Pa. 2020).

in ICE detention.[246] One solution was for Article III courts to step in and make liberty decisions, taking those away from ICE prosecutors and immigration judges.

E. Federal Courts Applying a Familiar Map

These examples of federal court involvement in protecting immigration detainees' rights demonstrate that federal courts have played a significant role in custody decisions, even in the face of statutes attempting to limit their jurisdiction. Why? The best explanation, offered by historians studying judicial involvement in immigration detention and Chinese exclusion, is that Article III courts have a familiar map onto which they must make sense of an immigration case.[247] For example, during the Chinese exclusion period, lower federal judges hearing the cases harbored their own anti-Chinese biases, and popular opinion was anti-Chinese.[248] Yet, the judges applied settled judicial doctrines such as the presumption of freedom and certain evidentiary doctrines, knowing that they would suffer significant critique.[249] Reflecting on the Red Scare, when courts considered the question of indefinite detention for communists who could not be deported, Daniel Wilsher describes how some judges still applied "the 'old map' of habeas corpus" and the presumption of freedom in the new world of alien controls, although these courts struggled with the decisions.[250]

Courts have honored the common law presumption of freedom, often releasing immigration detainees on bail while they fought against exclusion or deportation, even though this limited form of authorization overrode Congress' decision to exclude or deport such a person.[251] The political branches' plenary power over deportation and exclusion decisions, which told judges to stay out of the decisions, was in conflict with the common law presumption of freedom—*if* detention was viewed as a necessary part of that exclusion and deportation power.[252] The solution for many judges was to

246. Isabel Niu, Emily Rhyne, and Aaron Byrd, *How ICE's Mishandling of Covid-19 Fueled Outbreaks Around the Country*, The New York Times (Apr. 25, 2021), https://www.nytimes.com/video/us/100000007707896/immigration-detention-covid.html.

247. *See, e.g.*, WILSHER, *supra* note 18, at 150; SALYER, *supra* note 158, at xvi.

248. *See* SALYER, *supra* note 158, at xvi, 18, 21.

249. *See id.* (discussing federal judges' willingness to believe Chinese witnesses and documents because the government frequently could not prove that they were not credible or fraudulent); *see also* WILSHER, *supra* note 18, at 22 (describing a judge's decision to limit detention post-exclusion for a Chinese person whose ship had already departed as a "principled solution showing considerable fortitude, given the hostile political environment.").

250. *See* WILSHER, *supra* note 18, at 33–34.

251. *See infra* Part II; WILSHER, *supra* note 18, at xx.

252. *See* WILSHER, *supra* note 18, at 6–8.

view detention as a separate legal issue.[253] Detention could even be viewed as a source of additional rights.[254]

To be sure, the Supreme Court has not always vindicated the rights of immigration detainees. Perhaps the most damaging passage, repeated by the Supreme Court during the Chinese Exclusion Era, the Cold War, and the more recent War on Terror, is the statement that "[d]etention is necessarily a part of this deportation procedure."[255] This doctrinal intertwining of detention with the exclusion and deportation powers suggests that the political branches' power over immigration detention is also plenary.[256] Yet, a laser focus on these statements by the Supreme Court neglects the role that lower federal courts have played in upholding the presumption of freedom for immigration detainees.[257] Lower courts, when asked to evaluate the

253. Carlson v. Landon, 342 U.S. 524, 551 (1952) (Black, J., dissenting) ("A power to put in jail because dangerous cannot be derived from a power to deport."); Flores by Galvez-Maldonado v. Meese, 934 F.2d 991, 1015 (9th Cir. 1990) (Fletcher, J., dissenting) (critiquing as an "unwarranted [judicial] leap" the majority's "moving from the uncontroverted propositions that the political branches have plenary authority over deciding whom to admit into the country and that such political decisions are largely immune from judicial review, to the unsupportable conclusion that how it treats those whom it detains while the deportation process is underway is likewise beyond judicial review"); Cole, *supra* note 84, at 1038 (arguing that defenders of unchecked detention as part of the deportation process "have confused the power to deport with the power to detain.").

254. Jonathan Simon explains that detention provides additional rights. *See* Simon, *supra* note 163, at 600. Otherwise, the U.S. government would not have resorted to the extraordinary policy of interdicting Haitian boats in the 1990s; the policy aimed to prevent the migrants from arriving on U.S. territory, after which their detention in a U.S. jail would permit them to seek relief in federal court. *Id.*

255. Demore v. Kim, 538 U.S. 510, 524 (2003) (quoting *Carlson*, 342 U.S. at538) (alteration in original); *see, e.g.*, *id.* at 523 ("[T]his Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process. As we said more than a century ago, deportation proceedings 'would be vain if those accused could not be held in custody pending the inquiry into their true character.'" (quoting Wong Wing v. United States, 163 U.S. 228, 235 (1896))); *Carlson*, 342 U.S. at 538 ("Detention is necessarily a part of this deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings.").

256. *See* WILSHER, *supra* note 18, at 6.

257. *See* SALYER, *supra* note 158, at xv (discussing the intervention by federal district courts in San Francisco in response to the Chinese Exclusion Acts, where these judges "played a more active role, at least initially, a fact missed by legal scholars, perhaps because they have focused on the Supreme Court and East Coast European immigrants."). As an example of scholarship that has focused mainly on the Supreme Court, Lenni Benson has argued that the judiciary repeatedly has allowed immigration authorities to expand the use of immigration detention. Lenni B. Benson, *As Old as the Hills: Detention and Immigration*, 5 INTERCULTURAL HUM. RTS. L. REV. 11, 15 (2010). Summarizing the Supreme Court's doctrine of immigration exceptionalism during the Chinese Exclusion Acts and Red Scare, she observes that the Court has refused to hold immigration detention to be an unconstitutional deprivation of liberty. *Id.* at 17, 21–37. The only time the Court got close, she argues, was in its 2001 decision in *Zadvydas v. Davis*, yet the Court did not reach the constitutional question, thus not going far enough to recognize constitutional rights of immigration detainees. *Id.* at 15–16.

constitutionality of immigration detention in various contexts, have repeatedly invoked the rights-granting language of *Zadvydas* and distinguished *Demore*,[258] demonstrating their willingness to guard the right to physical liberty, even when the person in front of the court is not a citizen or facing criminal charges.[259] In fact, that lower federal courts have vindicated immigration detainees' rights, *in spite of* such harsh statements by the Supreme Court and Congressional language that repeatedly attempts to limit their jurisdiction, only suggests that the federal judiciary will continue to play an active role in monitoring immigration detention.

Of course, one response that could be expected from the Supreme Court is a reversion to the harshest version of the plenary power. This occurred with the recent decision in *DHS v. Thuraissigiam*,[260] where the Court affirmed the *Mezei* rule that arriving aliens have no due process rights, and even extended the rule to those who were physically within a U.S. border, although only twenty-five yards inside of the border.[261] As David Martin warned decades ago:

> Due process . . . threatens to become the kudzu vine of constitutional law: allow it to take root and it soon takes over the whole hillside . . . . [T]he Court often seems a lonely and perhaps unconvincing machete-wielder, cutting back on the luxuriant growth that appears continually to spring forth in the lower courts. If the Court feels embattled in these efforts, the *Knauff-Mezei* doctrine will appear increasingly attractive.[262]

One of the most instructive opinions about the lower courts' willingness to distinguish the harshest Supreme Court cases on immigration detention came in 2015 from the Ninth Circuit. In *Rodriguez v. Robbins (Rodriquez*

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258. *See, e.g.*, Pensamiento v. McDonald, 315 F. Supp. 3d 684, 691 (D. Mass 2018) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." (quoting Zadvydas v. Davis, 533 U.S. 678, 690 (2001))); *id.* at 692 ("But *Demore* is not applicable here because it involved criminal aliens subject to mandatory detention. In contrast, this case involves a different statutory section, § 1226(a), which permits release of non-criminal aliens pending their removal proceedings. The Supreme Court has not yet determined what process is due when an immigration judge does hold an individualized bond hearing for non-criminal aliens."); Linares Martinez v. Decker, No. 18-CV-6527 (JMF), 2018 WL 5023946, at *2, *4 (S.D.N.Y. Oct. 17, 2018); Portillo v. Hott, 322 F. Supp. 3d 698, 703–06 (E.D. Va. 2018).

259. *See, e.g.*, Singh v. Holder, 638 F.3d 1196, 1204 (9th Cir. 2011) ("We are not persuaded by the government's argument that we should deviate from this principle and apply the lower preponderance of the evidence standard because the liberty interest at stake here is less than for people subject to an initial finding of removal or other types of civil commitment.").

260. 140 S. Ct. 1959 (2020).

261. *Id.* at 1981–83.

262. David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 188–89 (1983).

III),[263] the court interpreted immigration statutes that purported to mandate immigration detention without a bond hearing.[264] The court interpreted the statutes to provide a bond hearing every six months, in order to avoid the constitutional problems that the statutes would otherwise present.[265] The court reviewed key Supreme Court decisions on immigration detention and wrote:

> Early cases [such as *Carlson* and *Wong Wing v. United States*[266]] upholding immigration detention policies were a product of their time . . . . Yet even these cases recognized some limits on detention of non-citizens pending removal. Such detention may not be punitive . . . and it must be supported by a legitimate regulatory purpose. Under these principles, the Court authorized the 'detention or temporary confinement' of Chinese-born non-citizens 'pending the inquiry into their true character, and while arrangements were being made for their deportation.' . . . Similarly, the Court approved detention of communists to limit their 'opportunities to hurt the United States during the pendency of deportation proceedings.' . . . The Court recognized, however, that 'purpose to injure could not be imputed generally to all aliens subject to deportation.' . . . Rather, if the Attorney General wished to exercise his discretion to deny bail, he was required to do so at a hearing, the results of which were subject to judicial review.[267]

On review of the Ninth Circuit's decision, the Supreme Court, in its 2018 decision in *Jennings v. Rodriguez*,[268] did not opine on the constitutionality of prolonged immigration detention. The *Jennings* majority held that the lower court was wrong to engage in statutory interpretation to find such a right to a bond hearing and remanded for the Ninth Circuit to

263. 804 F.3d 1060 (9th Cir. 2015) (*Rodriguez III*), *rev'd and rem'd*, Jennings v. Rodriguez, 138 S. Ct. 830 (2018)).

264. *Id.* at 1076.

265. *Id.*

266. The court here refers to *Carlson v. Landon*, in which the Court upheld the constitutionality of a Congressional delegation of bail decisions to an executive branch official. 342 U.S. 524, 542–44 (1952). The court also refers to *Wong Wing*, in which the Court invalidated the portion of the 1892 Geary Act that required a year at hard labor prior to the deportation of a Chinese national, deeming it punishment that was deserving of the procedural protections of a criminal trial. 163 U.S. 228, 234–35 (1896). However, in dicta, the Court wrote that detention was a valid part of the deportation process. *Id.* at 235 ("We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation.").

267. *Rodriguez III*, 804 F.3d at 1076.

268. 138 S. Ct. 830 (2018).

determine the constitutional issue.[269] In his dissent, Justice Breyer reasoned that prolonged immigration detention without a bond hearing violated the Due Process Clause.[270] Time will tell how a majority of the Supreme Court will assess the constitutional right to a bond hearing during removal proceedings when detention has become prolonged; the only current Supreme Court justice's opinion on this issue is Justice Breyer's *Jennings* dissent.

This Part, together with Part I, demonstrates the very different decision-making maps used by Article III judges and immigration judges. Article III courts frequently interpret the U.S. constitution; this provides an explanation for why the presumption of freedom often has overridden immigration law's plenary power.[271] Immigration judges, on the other hand, do not interpret the constitution.[272] They spend much of their time deciding applications for relief from removal, where the applicant bears the burden of proof[273] and typically must beg for a favorable exercise of discretion.[274] When an immigration judge conducts a bond hearing, the expectation is also that the detainee must beg for mercy.[275] Yet, liberty should be for the detainee to *take*, not beg for.[276] To make matters worse, immigration judges work for a law enforcement agency that has long had a public agenda of using detention for social control and deterring future border crossers.[277] Immigration judges have been sent the message that they rule against the government at their own

269. *Id.* at 834–836.

270. *Id.* at 861–63 (Breyer, J., dissenting).

271. *See* WILSHER, *supra* note 18, at 6–8; *see also* Zadvydas v. Davis, 533 U.S. 678, 695 (2001) ("But that power [the plenary power,] is subject to important constitutional limitations.").

272. *See* Matter of C-, 20 I. & N. Dec. 529, 532 (BIA 1992) ("[I]t is settled that the immigration judge and [the BIA] lack jurisdiction to rule upon the constitutionality of the Act and the regulations."). *But cf.* Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485, 491 (2018) (arguing that federal agencies like the Board of Immigration Appeals have the power to decide constitutional issues and should utilize this power).

273. 8 U.S.C. § 1229a(c)(4)(A).

274. *See generally* Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703 (1997).

275. This is particularly so because the Board has ruled that the detainee bears the burden of proof in a bond hearing. *See* Matter of Guerra, 24 I. & N. Dec. 37, 38 (BIA 2006); *see also* Holper, *Beast of Burden*, *supra* note 20.

276. *See* Abira Ashfaq, *We Have Given Them This Power: Reflections of an Immigration Attorney*, NEW POLITICS 66, 67 (Summer 2004); *see also* Gilman, *supra* note 20, at 175 (critiquing immigration bond hearings because they begin with a default presumption of detention instead of liberty).

277. *See* Emily Ryo, *Detention as Deterrence*, 71 STAN. L. REV. ONLINE 237, 239–40 (2019); Mark Noferi, *Mandatory Immigration Detention for U.S. Crimes: The Noncitizen Presumption of Dangerousness*, *in* IMMIGRATION DETENTION, RISK AND HUMAN RIGHTS: STUDIES ON IMMIGRATION AND CRIME 217 (Maria João Guia, Robert Koulish & Valsamis Mitsilegas eds., 2016); Margaret H. Taylor, *Symbolic Detention*, 20 DEF. ALIEN 153, 154–55 (1997).

peril, or at the risk of being overruled by a law enforcement official.[278] It is unsurprising, therefore, when an immigration judge chooses a bond outcome that favors detention over freedom.

III. PROPOSAL

The involvement of federal judges described in Part II has only come when a detainee is savvy enough to file a habeas corpus petition pro se, or lucky enough to have counsel who would bring the custody decision to an Article III court. What would the world of immigration detention look like if all of those custody decisions went straight to federal district court, with federal magistrate judges deciding whether a detainee should remain in detention during their removal proceedings? Is it possible to dream up a world where imitation judges have no role to play in deciding detention matters, and only decide removability and relief from removal?

In this Part, I propose legislation that brings every immigration detainee before a federal district court for a review of detention. More concretely, I propose that magistrate judges, with review by Article III district judges, conduct custody hearings using the procedures of the Bail Reform Act. Before describing the proposed procedures, I start with a theoretical defense of this proposal.

A. Detention is Different

To put the theoretical defense of this proposal simply, detention is different from other decisions that immigration judges currently make. Several scholars have argued that immigration detention itself should be viewed as punishment, regardless of whether the removal proceedings are deemed civil.[279] Jonathan Simon describes how the new migrants arriving in the 1980s were deemed "nonwhite by United States racial stereotypes;" the Mariel Cubans were "viciously and largely inaccurately stamped from the start with the stigma of dangerousness" and the Haitians were "overwhelmingly black and mostly poor," with the added stigma of carrying AIDS.[280] The government's response to the arrival of masses of dangerous,

278. *See supra* Part I.

279. *See, e.g.*, García Hernández, *supra* note 18, at 1352 ("Immigration imprisonment has, in essence, taken on the same legal character as the immigration process and outcome that justify its existence: It is civil confinement because it is part of a civil proceeding to determine whether a civil sanction will be meted out."). García Hernández has also written that immigration detention should be abolished, because in its current state it is morally indefensible due to the high number of people of color in detention. César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 251, 270 (2017).

280. Simon, *supra* note 163, at 590–600.

dependent, and possibly disease-carrying migrants was social control through detention.[281] César Cuauhtémoc García Hernández argues that Congress had a punitive purpose in the expansion and use of immigration detention, which coincided with the War on Drugs in the 1980s; the legislative intent behind immigration detention was to stigmatize and penalize those who engage in drug activity.[282] Because the new, nonwhite migrants were stereotyped as drug dealers, the governmental response was incapacitation through detention.[283] Daniel Wilsher describes how "[d]etention has increasingly become unstuck from its ostensible function of selecting who to admit or enforcing the speedy and efficient physical return of unwanted immigrants" and now has "mutated into a more general form of executive and political control over unauthorized aliens."[284] Emily Ryo's empirical work has studied the role of immigration judges in deciding bond, where the goal of protecting the public "implicates one of the primary objectives of criminal punishment—incapacitation."[285] She has also studied immigrant detainees' perceptions of the system and found a central belief that immigration detention is an act of penal confinement, not "civil," as it has been classified.[286]

Because immigration detention is punishment, there are two possible solutions: (1) entrench it in criminal procedure; or (2) distance it from its punitive past, thus rendering it a truly "civil" detention system, where detention is the exception and not the norm.[287] The additional procedural protections in bond hearings are coming slowly but surely, thanks to Article III courts' involvement.[288] But there is more that can be done, and I propose

281. *See id.* at 600–04.

282. García Hernández, *supra* note 18, at 1350.

283. *See id.* at 1360.

284. Wilsher, *supra* note 18, at xxii–xxiii; *see also* Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1506 (2011) (describing how the criminal and immigration detention systems are significantly merged, how the lengths of immigration detention have become prolonged, and how the detention often takes place in the same facilities, so that "the distinction between the two forms of incarceration may depend for the most part on the intention of the government").

285. Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 L. & SOC'Y REV. 117, 119 (2016).

286. Emily Ryo, *Fostering Legal Cynicism through Immigration Detention*, 90 S. CAL. L. REV. 999, 1024–25 (2017).

287. García Hernández, *supra* note 18, at 1350–51; *see also* Mark Noferi, *Making Civil Immigration Detention "Civil," and Examining the Emerging U.S. Civil Detention Paradigm*, 27 J. CIV. RTS. & ECON. DEV. 533, 533–34 (2014) (offering prescriptive framework for a "'truly civil' immigration detention" system, which includes a comparison to the civil commitment of sex offenders).

288. *See, e.g.*, Hernandez v. Sessions, 872 F.3d 976, 1000 (9th Cir. 2017); Abdi v. Nielson, 287 F. Supp. 3d 327, 338 (W.D.N.Y. 2018); Pensamiento v. McDonald, 315 F. Supp. 3d 684, 692 (D. Mass 2018).

as a solution for every immigration detainee a bail hearing conducted by a magistrate judge whose judgment is subject to review by a district court judge. Since immigration detention is punishment, and the United States values and the Constitution protects the physical liberty of a human being, our laws should assign these decisions to an independent judge.

Scholars such as Alex Aleinikoff and Lenni Benson have proposed that Congress restore meaningful judicial review of ordinary detention decisions and discretion to immigration judges in detention decisions.[289] While restoring federal court review of discretionary detention decisions would be beneficial, relying on habeas corpus review is insufficient to challenge the federal government's overuse of immigration detention.[290] Giving discretion to immigration judges does little to fix the immigration detention system, when such judges cannot exercise their judgment in a truly independent manner.[291] As Denise Gilman writes, "[r]eview of detention decisions by an independent authority is a critical safeguard of liberty."[292]

The problem of immigration judges lacking independence and yet making these key liberty decisions is similar to elected judges deciding bail in the pretrial criminal detention context.[293] Elected state court judges are likely to err on the side of denying bail or setting high bail because they are "wary of bearing public responsibility for crimes that go unpunished—and new crimes that are committed—because of an erroneous decision to release defendants prior to trial."[294] In contrast, there is very little in the form of public accolades for releasing a defendant who does not commit any crimes and attends all hearings.[295] Like immigration judges, state court judges risk

289. Benson, *supra* note 257, at 54 (arguing that the "best and most long lasting changes would of course, come from Congress limiting the use of detention and putting strict, clear controls on the agency authority to use detention" and that "Congress should restore discretion in the detention decisions and allow both immigration judges and the federal courts to test and review detention decisions"); T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365, 366 (2002) ("*Zadvydas*, for all its Warren Court-like rulemaking, takes no steps toward ensuring what is most needed in the immigration detention system: meaningful judicial review of ordinary detention decisions."); *see also* Silva, *supra* note 20, at 262–63 (arguing for de novo review of immigration detention decisions by a federal court).

290. *See infra* Part III.D.

291. *See supra* Part I.

292. Gilman, *supra* note 20, at 188 (citing United States v. Salerno, 481 U.S. 739, 750 (1987)). *See also* Silva, *supra* note 20, at 262–64 (discussing immigration judges' lack of independence as a reason why federal courts should engage in de novo review of immigration detention decisions).

293. *See* Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 422 (2016).

294. *Id.* Wiseman also writes that elected judges may additionally "face pressure from a locally powerful bail lobby" to set high bails. *Id.* This critique may apply to immigration judges, although the policies described in Part I.B., *supra*, err on the side of no bond and thus would not favor any immigration bond companies.

295. *Id.* at 428.

losing their jobs if they rule too often in favor of release.[296] This has caused scholars to propose alternatives to such highly discretionary decision-making about liberty by a non-independent judge.[297]

For decades, scholars, congressional committees, practicing lawyers, and judges have argued that administrative law judges or an Article I court should decide immigration cases.[298] Yet I argue that for detention decisions, this fix simply does not go far enough. ALJs, although more protected from removal than immigration judges, still do not have structural independence;[299] they cannot, after all, overrule a decision by the executive branch.[300] Their relative independence has even been called into question by a 2018 Executive Order regarding the terms of their employment,[301] and a leaked Solicitor General memorandum defining "good cause" for removal to include failure to "perform adequately or to follow agency policies, procedures, or instructions."[302] Article I courts have suffered similar

296. *See id.* at 428–29.

297. *See, e.g.*, *id.* at 443–77 (proposing use of actuarial risk assessment tools instead of judicial discretion in bail decisions); Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE. L. REV. 1297, 1363–66 (2012) (proposing a "bail jury" to advise judges in making pretrial decisions); Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 554–55 (2012) (exploring criteria that would more accurately predict defendant dangerousness and suggesting that counties implement these models to guide judges); Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 995–96 (1965) (proposing elimination of money bail).

298. *See supra* note 4.

299. James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1211 (2006). Moliterno discusses how administrative law judges are meant to be impartial (fair-minded, neutral in their decision making), but not structurally independent in the same way as an Article III court. *Id.* at 1200–20.

300. *Id.* at 1209; *see also* Antonin Scalia, *The ALJ Fiasco—A Reprise*, 47 U. CHI. L. REV. 57, 61–62 (1979).

301. In response to the Supreme Court's 2018 decision in *Lucia v. SEC*, a July 2018 Executive Order changed the appointments process for ALJs, whose appointment processes will now be controlled by agency heads, instead of the less political Office of Personnel Management. Exec. Order No. 13,843, *Excepting Administrative Law Judges from the Competitive Service*, 83 Fed. Reg. 32,755 (July 10, 2018). Critics have raised concerns that this will lead to more political hiring of ALJs, reflecting the same concerns over political hiring for immigration judges. Eric Yoder, *Trump Moves to Shield Administrative Law Judge Decisions in Wake of High Court Ruling*, WASH. POST (July 10, 2018 5:50 PM), https://www.washingtonpost.com/news/powerpost/wp/2018/07/10/trump-moves-to-shield-administrative-law-judge-decisions-in-wake-of-high-court-ruling/?utm_term=.8a195a289e49; 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. The Biden administration has continued this Trump administration policy, facilitating the political hiring and firing of ALJs. See Davidson, *supra* note 78.

302. Memorandum from Solicitor General to Agency General Counsels on Guidance on Administrative Law Judges after *Lucia v. SEC* 9, https://static.reuters.com/resources/media/editorial/20180723/ALJ—SGMEMO.pdf. As Paul Verkuil has noted, the Solicitor

critiques about their independence.[303] Also, Article I courts are subject to the "Darwinian process by which agencies compete for funding." [304] An independent immigration adjudicative agency would likely fare much worse in obtaining funding than other similar agencies that deal with more popular causes such as veteran's benefits or tax adjudication.[305]

B. Adopting the Bail Reform Act Procedures

To envision what these procedures would look like, one need not assign a brand new task to Article III courts. Rather, magistrate judges already regularly decide whether a detainee with pending criminal charges is a danger or flight risk—which is the same inquiry immigration judges undertake when deciding bond. The procedures for such hearings in federal court, however, are considerably more protective of a pretrial detainee's rights than the current procedures provided by the immigration statutes and regulations.[306]

The Bail Reform Act of 1984 ("BRA")[307] created a procedure whereby prosecutors can ask for detention hearings when the case involves certain crimes that indicate a defendant's dangerousness, even though the defendant has yet to be tried for that offense.[308] The 1984 BRA also created rebuttable

General's memo expresses only litigation positions; however, the Executive Order took legal actions to "dramatically expand executive control over administrative adjudicators."). Paul R. Verkuil, *Presidential Administration, the Appointment of ALJs and the Future of For Cause Protection*, CSAS Working Paper 20-07, at 3 (Feb. 6, 2020), https://administrativestate.gmu.edu/wp-content/uploads/sites/29/2020/02/Verkuil-Presidential-Administration-the-Appointment-of-ALJs.pdf.

303. *See* Family, *supra* note 105, at 549–50 (summarizing scholarly critiques of independence of Article I courts such as the Tax Court and Veterans Court).

304. Russell R. Wheeler, *Practical Impediments to Structural Reform and the Promise of Third Branch Analytic Methods: A Reply to Professors Baum and Legomsky*, 59 DUKE L.J. 1847, 1853 (2010).

305. *Id.* at 1854; AM. BAR ASS'N COMM'N IMMIGR., *supra* note 4, at 6–7.

306. *See* Gilman, *supra* note 20, at 190–95 (comparing pretrial detention and immigration custody redetermination procedures); Cole, *supra* note 20, at 719–20 (recommending that Congress adopt procedures similar to the Bail Reform Act for immigration detainees); Matter of De La Cruz, 20 I. & N. Dec. 346, 352–61 (B.I.A. 1991) (Heilman, Board Member, dissenting) (interpreting the former immigration detention statute governing bond hearings for those convicted of certain crimes and advocating for the Board to interpret the provision in accordance with the Bail Reform Act because of the parallels in the statutory language).

307. Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended at 18 U.S.C. §§ 3141–3151).

308. 18 U.S.C. § 3142(f); S. REP. NO. 98-225, at 21–22, *as reprinted in* 1984 U.S.C.C.A.N.3182, 3204–05. There were previous versions of the BRA that permitted such a hearing after a conviction, while the defendant was appealing the case. The 1984 BRA was the first federal statute to permit pretrial detention based on dangerousness. *See* Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 376–77 (1970). It was modeled after the District of Columbia Court Reform and Criminal Procedures Act of 1970. *See id.* at 371 n.1. Scholars disputed how closely the BRA tracked the D.C. statute because the BRA

presumptions of dangerousness when defendants are charged with certain enumerated crimes,[309] effectively shifting the burden of production from the government to the defendant.[310] The judicial officer (typically a magistrate judge)[311] must determine whether the defendant is a danger to the community or flight risk, and whether any condition or combination of conditions will reasonably assure the appearance of the defendant at trial or the safety of the community.[312] Either party can request de novo review by a district court judge,[313] and can appeal the decision to the court of appeals in their respective circuit.[314] As described by the Supreme Court, which upheld the BRA against a constitutional challenge,[315] "[i]n a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person."[316]

Asking a magistrate judge to assess danger to the community is no different than an immigration judge deciding dangerousness in a bond hearing. Flight risk may be different.[317] Yet, when one considers the way immigration judges currently assess flight risk,[318] the myriad factors bear a

had fewer procedural protections. Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 347 (1990).

309. 18 U.S.C. § 3142(e)(3). The rebuttable presumptions have been amended over the years to include several offenses; today, offenses involving drug trafficking, terrorism, carrying a firearm in the commission of a crime of violence, and offenses involving minor victims (from sexual abuse to offenses involving child pornography) all create the rebuttable presumption of dangerousness. *Id.*

310. *See, e.g.*, United States v. Jessup, 757 F.2d 378, 380–81 (1st Cir. 1985), *abrogated*, United States v. O'Brien, 895 F.2d 810 (1st Cir. 1990) (in construing the BRA of 1984, determining that "Congress did not intend to shift the burden of persuasion to the defendant but intended to impose only a burden of production"); United States v. Diaz, 777 F.2d 1236, 1237 (7th Cir. 1985); United States v. Fortna, 769 F.2d 243, 250 (5th Cir. 1985); United States v. Carbone, 793 F.2d 559, 560 (3d Cir. 1986).

311. *See* PETER G. MCCABE, A GUIDE TO THE FEDERAL MAGISTRATE JUDGES SYSTEM 27–28 (updated Oct. 2016), https://www.fedbar.org/wp-content/uploads/2019/10/FBA-White-Paper-2016-pdf-2.pdf (describing magistrates' duties, which include presiding over bail and detention hearings).

312. 18 U.S.C. § 3142(e)(3).

313. 18 U.S.C. § 3145.

314. The review of the district court's decision is *de novo*, giving deference to the district court's determination. *See, e.g.*, United States v. O'Brien, 895 F.2d 810, 816 (1st Cir. 1990).

315. *See* United States v. Salerno, 481 U.S. 739, 741 (1987).

316. *Id.* at 750 (citing 18 U.S.C. § 3142(f)). The Court held that the procedural protections available under the BRA "are specifically designed to further the accuracy of that determination." *Id.* at 751. These procedures included the rights to court-appointed counsel, present witnesses, cross-examine the government's witnesses, written findings of fact, immediate appellate review, and the enumeration of several statutory factors that the judicial officer must consider. *Id.* at 751–52.

317. *See* Holper, *Beast of Burden*, *supra* note 20, at 127.

318. *See* Matter of Guerra, 24 I. & N. Dec. 37, 40 (BIA 2006) (instructing immigration judges in bond hearings to consider fixed address, length of residence, family ties, employment history,

striking resemblance to the factors used in criminal cases.[319] With respect to the availability of relief from removal, magistrate judges would be asked to opine on whether a detainee presents a prima facie asylum case, for example.[320] While this might seem like a daunting task, it is similar to the inquiry that federal courts already make when a detainee argues that prolonged mandatory detention is unconstitutional; courts there regularly evaluate whether the detainee is likely to be ordered removed.[321] Also, most immigration judges likely do not have time to engage with the merits of relief in bond hearings, given that the purpose of a bond hearing is not to evaluate the merits of the case.[322] Indeed, the Immigration Judge Benchbook, which was in use for several years, does not even list relief from removal as one of the flight risk factors.[323]

What about decisions on whether someone is subject to mandatory detention under 8 U.S.C. § 1226(c)? Under the BRA, a magistrate judge relies on the fact of an indictment for one of the enumerated crimes to allow

record of appearance in court, criminal record, history of immigration violations, attempts to flee authorities, manner of entry into the United States, and possibility of success on the merits of application for relief).

319. Denise Gilman has detailed how immigration bond determinations have borrowed heavily from pretrial bail law, which she refers to as "selective borrowing" because the procedural protections of the pretrial bail system do not apply, and the criminal custody system is moving away from a system that is overly focused on money bonds. Gilman, *supra* note 20, at 195–203; *see also id.* at 201 ("[I]t is as if news of these developments [(eliminating the use of money bonds in the criminal pretrial detention context)] has not even reached the immigration detention system, although many of the same problems with monetary bond identified in the criminal pretrial system apply in immigration cases.").

320. *See* Chase, *supra* note 126 (observing, from the view point of a former immigration judge, that the important inquiry for flight risk is not whether the applicant will win the case, but whether the applicant has a strong enough case that they will have an incentive to return to court).

321. *See, e.g.*, Reid v. Donelan, 819 F.3d 486, 500 (1st Cir. 2016); Portillo v. Hott, 322 F. Supp. 3d 698, 707 (E.D.Va. 2018).

322. *See* 8 C.F.R. § 1003.19(d) (2020) (providing that bond hearings and removal hearings are separate); In re Adeniji, 22 I. & N. Dec. 1102, 1126 (BIA 1999) (Rosenberg, Board Member, concurring and dissenting) ("The underlying purpose of [8 C.F.R. § 1003.19(d)] is not to limit the information an Immigration Judge may consider in redetermining bond, but to ensure that evidence presented in the far more informal bond hearing does not taint the ultimate adjudication of the charges of removability."); Ashfaq, *supra* note 276, at 67 (recounting a story of an immigration judge who critiqued a detainee's attorney for taking too much time developing the record for the merits hearing during a bond hearing).

323. *See* CHARLES A. WIEGAND, IMMIGRATION JUDGE BENCHBOOK: FUNDAMENTALS OF IMMIGRATION LAW, BOND AND CUSTODY HEARINGS 15–16, https://www.justice.gov/eoir/archived-resources (listing as significant factors in bond determinations: fixed address, length of residence in the United States, family ties, particularly those that can confer immigration status, employment history, immigration history, attempts to evade authorities, prior court appearances, and criminal record). Although the Benchbook is archived as of 2017 and no longer updated, it is an example of how immigration judges were instructed for many years to conduct bond hearings. *See* Matthew Hoppock, *Here is the Current Immigration Judge Bench Book (Sort Of)* (July 3, 2017), https://www.hoppocklawfirm.com/immigration-judge-bench-book/.

a prosecutor to present dangerousness arguments;[324] otherwise, only the traditional bail assessment of flight risk may be considered.[325] As part of my proposal, I join the chorus of scholars critiquing the mandatory detention statute and believe that any pretrial detention should involve a judge reviewing the individual facts of a detainee's case to determine whether detention is necessary to further a compelling government interest, such as protecting the community or ensuring that a detainee will not flee.[326]

Yet Congress need not entirely jettison 8 U.S.C. § 1226(c); instead, it can convert the enumerated offenses of Section 1226(c) into bases under which an immigration prosecutor could request a dangerousness hearing, as in the criminal pretrial detention context.[327] It would then be necessary for Congress to evaluate which offenses truly render a person presumptively dangerous and thus subject to a detention hearing.[328] It would also be necessary to remedy who is reviewing such charging decisions for probable cause, involving a magistrate judge in that decision as well[329] because in the immigration detention system, a finding that a person is deportable for one of the criminal grounds of deportability is made by an immigration judge. Finally, such a probable cause determination would have to be made expeditiously, as the immigration system currently has no requirement that a neutral magistrate promptly review the charge for probable cause in order to continue pretrial detention.[330]

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324. *See* 18 U.S.C. § 3142(e)(3).

325. Stack v. Boyle, 342 U.S. 1, 5 (1951) ("Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.").

326. *See, e.g.*, Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 601, 604 (2010) (arguing that the current framework for mandatory detention is unfair and inefficient); Margaret H. Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149, 150 (2004); Cole, *supra* note 84, at 1006–07; Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 U. MIAMI INTER-AM. L. REV. 531, 535 (1999).

327. *See* 18 U.S.C. § 3142(e)(3).

328. Margaret Taylor has argued that 8 U.S.C. § 1226(c) involved none of the careful Congressional study and deliberation that the Supreme Court in *Demore* attributed to it. *See* Taylor, *supra* note 206, at 343. Today, many would agree that the categories of presumptive dangerousness in both 8 U.S.C. § 1226(c) and the BRA stemmed from of the War on Drugs and "Severity Revolution," and should be reevaluated. *See, e.g.*, García Hernández, *supra* note 18, at 1360; Teresa Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 109–11 (2005); Jonathan Simon, *Sanctioning Government: Explaining America's Severity Revolution*, 56 U. MIAMI L. REV. 217, 219 (2001); Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 832–33 (2000).

329. *See* Holper, *supra* note 4, at 1277.

330. *See, e.g.*, Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 55–56 (1991); Gerstein v. Pugh, 420 U.S. 103, 114 (1975); *see also* Kagan, *supra* note 20, at 133 (arguing that immigration detainees have a right under the Fourth Amendment to receive prompt review of charges of immigration law

To more closely track the BRA procedures, immigration detainees would require court-appointed counsel in their custody hearings.[331] Scholars already have proposed the right to court-appointed counsel for immigration detention matters, arguing that the due process concerns in detention are great enough to merit government-paid counsel for at least the detention decisions that are made in immigration court.[332] In an empirical study of bond hearings, Emily Ryo found that representation by an attorney was one important factor that led an immigration judge to grant bond.[333] It also is often overlooked that federal courts may appoint (and pay) counsel for indigent civil detainees; this is a practice that federal courts have employed in immigration habeas corpus petitions.[334]

C. A Practical Defense

There are also practical reasons for why this Article's proposal would prove workable. For one, taking detention decisions from immigration judges would allow these judges to work on the over one million cases that are currently pending.[335] Immigration judges are critiqued for carrying out a

violations by a neutral judge, and assuming for the purpose of the article that immigration judges provide such a neutral judge); Holper, *supra* note 4, at 1283 (arguing that immigration detainees' Fourth Amendment rights are regularly violated because the system provides no review by a truly neutral judge, since immigration judges are not truly "neutral" within the meaning of the Fourth Amendment).

331. *See* United States v. Salerno, 481 U.S. 739, 751 (1987).

332. *See* Noferi, *supra* note 20, at 68 (arguing for a limited right to court-appointed counsel for "Joseph" hearings, in which it an immigration judge determines whether the detainee is properly included within a mandatory detention category); *see also* In re Joseph, 22 I. & N. Dec. 799, 800 (BIA 1999) (affirming that a mandatory detainee can seek review by an immigration judge about whether they are properly included in a mandatory detention category, and citing 8 C.F.R. § 1003.19(h)(2)(ii) as the source of this authority); Cole, *supra* note 20, at 720–21 (arguing that the liberty interest is so important that the Government should provide court-appointed counsel for immigration detainees in custody hearings).

333. *See* Ryo, *supra* note 285, at 119. The other factor was the existence of a criminal record, which made it less likely that a detainee would be granted bond. *Id.* at 146. Ryo suggests that—beyond the complexity of immigration law that attorneys can navigate on behalf of detainees—attorneys are "repeat players" who can negotiate with prosecutors ahead of time on a bond amount that the judge will accept. *Id.* at 145. Alternatively, the judge might see a detainee as more invested in the process if represented by a lawyer, or the judge could see the detainee as a "worthy opponent" if represented. *Id.* at 145–46.

334. *See* Docket Entry No. 24, Figueroa v. McDonald, Civ. No. 18-10097-PBS (D. Mass 2018) (appointing pro bono counsel); Docket Entry No, 22, Doe v. Smith, Case No. 17-cv-11231-LTS (D. Mass 2017) (appointing pro bono counsel).

335. *See* TRAC, *Immigration Court Backlog Surpasses One Million Cases* (Nov. 6, 2018), https://trac.syr.edu/immigration/reports/536/ (describing a historically high backlog of 768,257 cases in immigration courts nationwide, to which the Attorney General added 330,211 cases that had been administratively closed by taking them off of the administratively closed docket).

"deportation railroad."[336] This proposal gives each judge more time to carefully consider the merits of each immigration case without having to consider bond for the detainee. Immigration judges would be left to decide the issues in which they have more expertise, such as removability and relief from removal.[337] The issues in which they have no particular expertise—whether a person presents a danger to the community or is a flight risk—can be left to the magistrate judges who already make those decisions in the criminal pretrial detention context.[338]

This proposal naturally flows from the procedural mechanisms that already have segregated the detention decision from the other decisions in a removal case. For example, a regulation requires that bond hearings be separate and apart from the removal case.[339] The purpose of this regulation is "to ensure that evidence presented in the far more informal bond hearing does not taint the ultimate adjudication of the charges of removability."[340] Another regulation permits attorneys to represent clients in bond hearings; the same attorney need not commit to representation in the removal case.[341] The purpose of this regulation is to ensure better access to counsel for detainees, at least in their bond hearings, since attorneys can limit their representation to just bond hearings.[342]

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336. *See* Remarks by Paul Wickham Schmidt to Louisiana State Bar Immigration Conference, New Orleans, LA (Apr. 26, 2019), https://immigrationcourtside.com/2019/04/29/read-my-speech-to-the-louisiana-state-bar-immigration-conference-in-new-orleans-on-april-26-2019-good-litigating-in-a-bad-system/.

337. *See, e.g.*, Mosquera-Perez v. Immigr. & Naturalization Serv., 3 F.3d 553, 555 (1st Cir. 1993) (reasoning that a court is required to give deference to the Board's interpretation of ambiguous language in the INA unless the interpretation is "arbitrary, capricious, or manifestly contrary to the statute" and giving deference to the Board's interpretation of statute that barred relief from removal) (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984)).

338. *Cf.* Kisor v. Wilkie, 139 S. Ct. 2400, 2417 (2019) (reasoning that in order for an agency's interpretation of its regulation to receive deference, the interpretation must implicate the agency's "substantive expertise," and that "[s]ome interpretive issues may fall more naturally into a judge's bailiwick"); Tod v. Waldman, 266 U.S. 113, 119 (1924) (reasoning that questions of citizenship of the petitioner are appropriate for the district court because citizenship is "a question of frequent judicial inquiry," whereas for "technical" questions regarding the public charge ground of inadmissibility, "[t]he [district] court is not as well qualified in such cases to consider and decide the issues as the immigration authorities.").

339. 8 C.F.R. § 1003.19(d).

340. *In re* Adeniji, 22 I. & N. Dec. 1102, 1126 (BIA 1999) (Rosenberg, Board Member, concurring and dissenting).

341. 8 C.F.R. § 1003.17.

342. EXEC. OFF. IMMIGR. REV., DEP'T JUSTICE, Final Rule, *Separate Representation for Custody and Bond Proceedings*, to be codified at 8 C.F.R. pt. 1003, 3 (2015), https://www.justice.gov/eoir/file/772051/download ("Permitting such separate appearances is expected to encourage more attorneys and accredited representatives to agree to represent individuals who would otherwise appear pro se at their custody and bond proceedings, which, in turn, will benefit the public by increasing the efficiency of the Immigration Courts.").

There are, of course, practical drawbacks to such a proposal. Practicing immigration lawyers, DHS trial attorneys, and judges all benefit from the efficiency of having one time slot to resolve both the custody decision and preliminary matters addressed at a typical master calendar hearing (taking pleadings and applications, scheduling future hearings, and resolving issues of removability). Although the bond hearing is technically separate and apart from the removal hearing,[343] these hearings often occur at the same time and typically involve the same DHS trial attorney, respondent's attorney, and judge, with the only real separation being the record-keeping related to that hearing.[344] However, the gravity of the detention decision to all parties involved merits special attention to that decision. As Justice Brennan stated, "[t]here is no principle in the jurisprudence of fundamental rights which permits constitutional limitations to be dispensed with merely because they cannot be conveniently satisfied."[345] Also, as a practical matter, immigration judges may begin hearing bond decisions on different days from the master calendar hearing, simply because more procedures demand more of the court's time. Thus, the days where a request for bond could take place in a matter of minutes may be over, as more immigration detainees complain of, and win, a hearing where they truly have an opportunity to be heard.[346]

D. Why the Present Habeas Corpus Fix Does Not Suffice

The present system, in which federal courts review detention through habeas corpus petitions, has significantly improved access to bond hearings (for those subject to mandatory detention) and provided better procedures at bond hearings for many detainees. While this system has benefited many immigration detainees and is the result of much hard work by Article III judges and litigators, it does not go far enough to remedy the systemic problems described in this Article.

First, it is difficult to get in the door to federal court on a habeas corpus challenge. An individual habeas corpus petition is time-consuming, and detainees rarely have court-appointed counsel for such a legal battle.[347] Even

343. *See* 8 C.F.R. § 1003.19(d).

344. Ashfaq, *supra* note 276, at 66.

345. United States v. Martinez-Fuerte, 428 U.S. 543, 575 (1976) (Brennan, J., dissenting).

346. *See, e.g.*, Hechavarria v. Whitaker, 358 F. Supp. 3d 227, 238–41 (W.D.N.Y. 2019) (*Hechavarria II*) (describing a bond hearing that took place pursuant to the court's order granting a prolonged mandatory detainee a bond hearing, but finding that the immigration judge had not applied the correct standard of proof in the hearing).

347. *See* Reid v. Donelan, 819 F.3d 486, 498 (1st Cir. 2016) (reasoning that filing a habeas petition from immigration detention is "complicated and time-consuming, especially for aliens who may not be represented by counsel"); *see also* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 2 (2015) (presenting results from

for detainees who are fortunate enough to have counsel in their deportation case, the attorney may choose not to spend time litigating the habeas challenge when the detainee faces an expedited hearing on the merits of the deportation case.[348] Hours spent preparing a habeas petition are frequently wasted, as federal district courts may not reach a decision on the merits of the detention while the detainee is still fighting the deportation case, thus rendering the habeas petition moot.[349] An amicus curiae brief filed in the Supreme Court in the *Jennings* case noted that, following *Demore*, habeas corpus petitions challenging prolonged mandatory detention lasted a mean time of nineteen months in the Eleventh Circuit, over seven-and-a-half months in the First Circuit, and almost fourteen months in the Seventh Circuit.[350] An amicus brief filed in the First Circuit[351] presented statistics

an empirical study of 1.2 million immigration removal cases over six years, which concluded that detainees were five times less likely to obtain representation than nondetained respondents).

348. *See* Mary Holper, *The Great Writ's Elusive Promise*, CRIMMIGRATION (Jan. 21, 2020, 4:00 AM), http://crimmigration.com/2020/01/21/the-great-writs-elusive-promise/; Mary Holper, *The Unreasonable Seizures of Shadow Deportations*, 86 U. CINN. L. REV. 923, 943 (2018). Similarly, in the early days of federal immigration enforcement in the United States, few immigration detainees on the east coast brought habeas corpus challenges; their efforts and money were better spent on challenging the underlying substantive immigration case. *See* WILSHER, *supra* note 18, at 17.

349. *See* Holper, *The Great Writ's Elusive Promise*, *supra* note 348. For example, several habeas corpus cases challenging the automatic stay regulation have been dismissed as moot because the authority for the detention transferred before the habeas court could reach resolution of the issue. *See supra* Part I.B. Some cases are dismissed because an appeal challenging the detainee's custody is still before the Board, which has jurisdiction to consider statutory challenges and discretionary decisions regarding bond in an interlocutory appeal. 8 C.F.R. § 1003.19(f). Although exhaustion of administrative remedies is not statutorily required, habeas courts cite the doctrine of prudential exhaustion to dismiss habeas petitions where legal challenges to detention are before the Board. *See, e.g.*, Maldonado-Velasquez v. Moniz, Case No. 1:16-cv-11890-RGS, Order Dismissing Case (D. Mass. Nov. 8, 2016). The doctrine of prudential exhaustion should not apply, however, when the habeas petition raises constitutional claims or the agency has predetermined the issue raised in the petition such that exhausting the appeal before the agency would be futile. *See, e.g.*, Khan v. Atty. Gen., 448 F.3d 226, 236 n.8 (3d Cir. 2006) ("[D]ue process claims generally are exempt from [the exhaustion requirement] because the BIA does not have jurisdiction to adjudicate constitutional issues.") (alterations in original); Figueroa v. McDonald, Civ. No. 18-10097-PBS, 2018 WL 2209217, at *3 (D. Mass. May 14, 2018) (holding that an appeal to the BIA of improper burden allocation would be futile because the Board already had decided the issue in a published case, and recognizing that the Board does not have jurisdiction to decide constitutional issues and therefore any constitutional claims need not be exhausted).

350. Brief for Americans for Immigrant Justice, et al. as Amici Curiae Supporting Respondents at 31, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204), https://www.scotusblog.com/wp-content/uploads/2016/10/15-1204_amicus_resp_americans_for_immigrant_justice.pdf.

351. In a case challenging the unlawful burden allocation that a detainee must bear in his immigration bond hearing, the American Immigration Lawyers Association submitted an amicus brief to encourage the court to reach the burden allocation argument, even though the District Court had not reached the issue because it decided the detainee was not prejudiced by the burden allocation. Maldonado-Velasquez v. Moniz, Case No. 17-1918, Brief of Amicus Curiae American Immigration Lawyers Association in Support of Appellant and Reversal (filed Nov. 28, 2017).

from the District of Massachusetts that showed it took an average of 130 days to resolve a habeas petition, with some averaging 408 days; this length of time operated to moot many petitions.[352] Thus, although the current system contemplates a role for Article III judges, their involvement comes too late, or often not at all, to review the important legal questions that immigration detention presents. As we see in many situations, the only successful litigation challenges to immigration detention are for those whose detention is so prolonged that the issues cannot go away. Examples of detainees whose habeas petitions are less likely to become moot are those who are suffering indefinite detention because their countries will not repatriate them,[353] and those who are suffering prolonged detention while they fight their cases (although even in these cases, the litigation strategy only has proven successful when courts extended the removal period to cover those who were fighting their cases at the circuit courts).[354] Otherwise, a prolonged detention habeas petition becomes an invitation to the BIA to hurry up and resolve the issues in the removal case, thus mooting out the habeas petition.[355]

Filing a habeas corpus petition puts the onus on the *detainee*—not the government—to file the necessary paperwork to put their case in front of a judge and to ensure that the legal arguments are properly raised and briefed.[356] No automatic review of the legality of the detainee's custody exists.[357] In other civil detention contexts, courts have found that habeas

352. Ironically, one week prior to the scheduled oral argument in this case, the detention challenge became moot by virtue of the detainee receiving a final order of removal from the BIA. *See* Judgment, Maldonado-Velasquez v. Moniz, Case No. 17-1918 (Mar. 22, 2018).

353. *See* Zadvydas v. Davis, 533 U.S.678, 686, 702 (2001).

354. *See, e.g.*, Casas-Castrillon v. Dep't Homeland Sec., 535 F.3d 942, 947–48 (9th Cir. 2008) (holding that the statute governing detention during the removal period does not begin to govern until a circuit court denies the petition for review and withdraws the stay of removal); Prieto-Romero v. Clark, 534 F.3d 1053, 1059 (9th Cir. 2008) (reasoning that while case is on appeal to a circuit court, the detention is still governed by 8 U.S.C. § 1226(a), the statute governing detention during the removal proceedings, even if the stay of removal is not yet granted by the circuit court).

355. AM. IMMIGR. LAWS. ASS'N, Five-Part Webinar Series on Habeas Corpus, AILA Doc. No. 18031299 (June 5, 2018), https://www.aila.org/publications/videos/fearless-lawyering-videos/five-part-webinar-series-on-habeas-corpus.

356. A good sample case to demonstrate the impact of how one frames the issue is Hamada v. Gillen, 616 F. Supp. 2d 177 (D. Mass 2009). There,the District Court decided that the detainee was merely challenging the judge's discretionary bond denial, an issue over which the court had no jurisdiction due to 8 U.S.C. § 1226(e). *Id.* at 179. However, there certainly were legal defects the detainee could have raised—notably, that he should not have borne the burden of proof, and that he had a constitutional right to be transported to state criminal court to resolve his pending criminal charge (which led the immigration judge to deny his bond). *See* Pensamiento v. McDonald, 315 F. Supp. 3d 684, 686, 691–92.

357. *See* WILSHER, *supra* note 18, at 330–31 (recommending that even where habeas corpus is available, immigration detention should be reviewed in an automatic fashion, and not be left to "the vagaries of individual financial or practical circumstances").

corpus proceedings cannot be a substitute for regular hearings that the government provides.[358] Nor is there a mechanism in place whereby government officials notify pro se detainees about their right to file a habeas corpus petition—it is incumbent upon the detainee to figure out that such a writ exists, where to file it, and what to say in the petition. The government has only notified members of detention class actions, and even there the notification is cryptic.[359]

While many detainees have achieved access to better bond procedures[360] (or, in many cases, a bond hearing)[361] through class actions, class actions present their own challenges, given the 1996 statutes that purport to bar injunctive relief on a classwide basis.[362] While several courts have reasoned that classwide holdings resting on statutory interpretations did not present a bar to relief under the relevant statute,[363] the Supreme Court in its 2018 *Jennings* decision questioned this method of resolving at least one set of constitutional claims for a class of immigration detainees.[364] The Court remanded the case back to the Ninth Circuit, requiring the court to analyze the detainees' claims under the Due Process Clause, and requiring that the Ninth Circuit assess whether a class was the appropriate mechanism to

358. *See, e.g.*, J.R. v. Hansen, 803 F.3d 1315, 1317, 1326 (11th Cir. 2015) (explaining that for involuntary commitment of an intellectually disabled person, "[h]abeas can be at most a backstop—a failsafe mechanism, not the sole process available."); Doe v. Gallinot, 657 F.2d 1017, 1019, 1023 (9th Cir. 1981) (explaining that for involuntary commitment for mental health treatment, "[n]o matter how elaborate and accurate the habeas corpus proceedings . . . may be once undertaken, their protection is illusory when a large segment of the protected class cannot realistically be expected to set the proceedings into motion in the first place.").

359. In Massachusetts, for example, two class actions challenging immigration detention in 2019 resulted in District Court orders that permitted class members to file habeas corpus petitions. *See* Holper, *The Great Writ's Elusive Promise*, *supra* note 348. These class members received one paragraph notices that they were class members. *See* Notice to *Reid* Class Member, Reid v. Donelan, 390 F. Supp. 3d 201 (D. Mass. 2019) (on file with author); Notice to *Brito* Class Member, Brito v. Barr, 415 F. Supp. 3d 258 (D. Mass 2019) (on file with author).

360. *See, e.g.*, Hernandez v. Sessions, 872 F.3d 976, 1000 (9th Cir. 2017); Abdi v. Nielsen, 287 F. Supp. 3d 327, 344–45 (W.D.N.Y. 2018); Brito v. Barr, 415 F. Supp. 3d 258, 271 (D. Mass 2019).

361. *See, e.g.*, Rodriguez v. Robbins, 804 F.3d 1060, 1089–90 (9th Cir. 2015); Lora v. Shanahan, 804 F.3d 601, 616 (2d Cir. 2015), *judgment vacated by* Shanahan v. Lora, 138 S. Ct. 1260 (2018); Reid v. Donelan, 22 F. Supp. 3d 84, 88–89, 93–94 (D. Mass. 2014), *vacated*, Nos. 14-1270, 14-1803, 14-1823, 2018 WL 4000993 (1st Cir. May 11, 2018).

362. *See* 8 U.S.C. § 1252(f)(1) ("Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter [8 U.S.C. §§ 1221 et seq.], as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated."); *see* Jill E. Family, *Threats to the Future of the Immigration Class Action*, 27 WASH. U. J.L. & POL'Y 71, 82–86 (2008).

363. *See* Rodriguez v. Hayes, 591 F.3d 1105, 1119 (9th Cir. 2010); Arevalo v. Ashcroft, 344 F.3d 1, 7 (1st Cir. 2003).

364. *See* Jennings v. Rodriguez, 138 S. Ct. 830, 843–51 (2018).

resolve the notoriously individualized due process claims.[365] District courts, post-*Jennings*, are currently grappling with what, if any, relief the Due Process Clause should provide for classes of detainees whose mandatory immigration detention without a bond hearing has become prolonged.[366]

Second, the current system does not allow a judge to review discretionary bond decisions,[367] so a number of cases are outside of the judges' jurisdiction. Federal courts often have reviewed the legality of immigration detention decisions, notwithstanding Congress' elimination of judicial review over discretionary decisions made by immigration officials regarding detention in 8 U.S.C. § 1226(e).[368] Yet, Section 1226(e) requires courts to grapple with the thorny question of what is and is not a discretionary decision. The Supreme Court recently clarified that statutes barring judicial review of discretionary immigration decisions do not bar review of the application of law to settled facts.[369] However, the notion of settled facts can

365. *See id.* at 851–52 (reasoning that "[d]ue process is flexible" so it "calls for such procedural protections as the particular situation demands" (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972))). On remand, the Ninth Circuit held that no statute bars class actions, and even if injunctive relief is limited, a court could still provide classwide relief as declaratory relief. Rodriguez v. Marin, 909 F.3d 252, 256 (9th Cir. 2018). The court then remanded to the District Court to decide the constitutional issue and whether injunctive relief would be available to the class. *Id.* at 257; *see also* Padilla v. ICE, 953 F.3d 1134, 1149–51 (9th Cir. 2020), *vacated and remanded,* ICE v. Padilla, 141 S. Ct. 1041 (2021) (discussing why the language and legislative history of 8 U.S.C. § 1252(f)(1) do not preclude classwide relief for a class of immigration detainees seeking access to bond hearings and procedural protections at bond hearings).

366. *See, e.g.*, Reid v. Donelan, 390 F. Supp. 3d 201, 227–28 (D. Mass. 2019) (denying classwide relief in the form of automatic bond or "reasonableness hearings" before immigration judges at six months of mandatory detention under 8 U.S.C. § 1226(c) and requiring detainees challenging prolonged mandatory detention to file individual habeas corpus petitions); Sajous v. Decker, No. 18-CV-2447 (AJN), 2018 WL 2357266, at *14 (S.D.N.Y. May 23, 2018) (granting a preliminary injunction to require a bond hearing for a class member and discussing that a motion for class certification for those subject to prolonged mandatory detention is pending).

367. 8 U.S.C. § 1226(e).

368. *See, e.g.*, Hechavarria II, 358 F. Supp. 3d 227, 235–36 (W.D.N.Y. 2019) (reviewing whether an immigration judge applied the correct standard of proof at a bond hearing ordered by the district court); Diaz Ortiz v. Smith, 384 F. Supp. 3d 140, 142–43 (D. Mass. 2019) (holding that the court has jurisdiction to enforce its prior order granting a new bond hearing where the government bore the burden of proof, and that the petitioner must show that either the immigration judge did not place the burden on the government or that "'the evidence itself could not—as a matter of law—have supported' the immigration judge's decision to deny bond," but that the district court may not review the judge's weighing of the evidence because of 8 U.S.C. § 1226(e) (quoting *Hechavarria II*, 358 F. Supp. 3d at 240)).

369. Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062, 1071 (2020). Scholars had been exploring for some years whether mixed questions of law and fact should be subject to judicial review in light of the various immigration statutes intended to limit judicial review of discretionary decisions in immigration law. *See, e.g.*, Rebecca Sharpless, *Fitting the Formula for Judicial Review: The Law-Fact Distinction in Immigration Law*, 5 INTERCULTURAL HUM. RTS. L. REV. 57, 57 (2010); Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the "Rule" of Immigration*

be quite elusive when questions remain about what evidence immigration judges may rely upon to determine such facts. For example, an immigration judge's decision to deny bond because the detainee is a danger often rests on a police report from a dismissed or pending charge, or a report alleging gang involvement.[370] How much weight the immigration judge gives such reports, which often include highly prejudicial hearsay,[371] is exactly the type of question federal courts are precluded from reviewing in light of 8 U.S.C. § 1226(e).[372] In the words of Daniel Kanstroom, discretion becomes the place where "complicated legal questions go to die."[373]

Granting full jurisdiction to federal courts to decide custody issues is somewhat similar to Congress' response after courts routinely exercised judicial review over immigration cases despite congressional attempts to restrict judicial review. For example, Gerald Neuman has carefully outlined the Supreme Court's preservation of the habeas inquiry into the lawfulness of exclusion and deportation orders in the face of congressional efforts between 1891 and 1917 to confer finality upon those orders.[374] Congress responded by accepting the reality—federal courts would continue to review deportation and exclusion orders—and writing such review into the

Law, 51 N.Y. L. SCH. L. REV. 161, 166–72 (2006); Kanstroom, *supra* note 274, at 710–11; Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 611 (2006).

370. *See, e.g.*, Rubio-Suarez v. Hodgson, No. 20-10491-PBS, 2020 WL 1905326, *2–*3 (D. Mass. Apr. 17, 2020) (rejecting the detainee's argument that police reports for pending cases cannot prove dangerousness as a matter of law if the detainee did not object to the report during the bond hearing); *Diaz Ortiz*, 384 F. Supp. 3d. at 143 (reviewing an immigration judge's decision to deny bond because the government presented evidence that the detainee was a gang member, which led the judge to find that the detainee was a danger).

371. *See, e.g.*, Laila Hlass, *The School to Deportation Pipeline*, 34 GA. ST. U. L. REV. 697, 752–53 (2018) (discussing highly unreliable hearsay contained in gang verification reports on which immigration judges rely); Mary Holper, *Confronting Cops in Immigration Court*, 23 WM. & MARY BILL RTS. J. 675, 675, 693–700 (2015) (discussing highly unreliable hearsay contained in police reports on which immigration judges routinely rely).

372. *See, e.g.*, Hachicho v. McAleenan, No. EDCV 19-820-VAP (KK), 2019 WL 5483414, at *6 (C.D. Cal. Oct. 18, 2019); Lopez Reyes v. Bonnar, 362 F. Supp. 3d 762, 772–73 (N.D. Cal. 2019) (holding that a district court "has jurisdiction to review [an] IJ's discretionary bond denial" where the denial "is challenged as legally erroneous or unconstitutional," but courts "must be careful not to encroach upon 'the IJ's discretionary weighing of the evidence'" (quoting Kharis v. Sessions, No. 18-cv-04800-JST, 2018 WL 5809432, at *4–5 (N.D. Cal. Nov. 6, 2018)).

373. *See* KANSTROOM, *supra* note 191, at 240. A good example of this is the Second Circuit's decision in *Carcamo v. DOJ*, in which a noncitizen disputed the contents of the police report, and the court wrote that "'talismanic invocation of the language of due process' is insufficient to confer jurisdiction on this Court" because "[d]ue process does not require that the IJ credit Carcamo's testimony over the evidence contained in the criminal complaint." 498 F.3d 94, 98 (2d Cir. 2007) (quoting Saloum v. U.S. Citizenship & Immigr. Servs., 437 F.3d 238, 243 (2d Cir. 2006)).

374. *See* Neuman, *supra* note 43, at 989, 1007–17.

immigration statute.[375] Courts similarly responded to the 1996 efforts to eliminate judicial review over several types of immigration decisions by maintaining jurisdiction over questions of law and constitutional questions.[376] Congress again relented, amending the immigration statute to provide for review of such questions through petitions for review in the circuit courts.[377]

Statutory codification of judicial intervention in immigration detention cases also has historical precedent. For example, the earliest courts dealing with those who could not be deported frequently held that indefinite detention was unconstitutional.[378] Congress responded in 1952 by legislating a judicial role, granting the statutory right for a detainee to file a habeas corpus petition in federal court upon a showing that the immigration authorities were not acting with "reasonable dispatch" to either reach a deportation order or effectuate that order.[379]

Third, some district courts have discussed the inefficiencies of sending a case back to the immigration judge once the district court has decided a habeas corpus petition.[380] These cases came earlier in the challenges to prolonged mandatory detention following the *Demore* decision,[381] when courts were still trying to sort out the scope of the Supreme Court's decision. Once bond hearings for those suffering prolonged mandatory detentions

375. *See* Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5, 75 Stat. 650, 651–53 (repealed 1996). Kanstroom has described the 1961 reforms as "eliminat[ing] an entire layer of court review" that habeas corpus review had previously provided. KANSTROOM, *supra* note 191, at 185; *see also* Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1624 (2000) ("Congress thought that the combination of district court review of the agency action and court of appeals review of the district court decision was slower and more cumbersome than a one-stop review process in the court of appeals.").

376. *See, e.g.*, Immigr. & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 297–314 (2001) (interpreting one provision of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and three provisions of IIRIRA as not barring habeas corpus jurisdiction questions of law and constitutional questions); Saint Fort v. Ashcroft, 329 F.3d 191, 197–98 (1st Cir. 2003) (interpreting sections of the Foreign Affairs Reform Restructuring Act, AEDPA, and IIRIRA as not barring habeas corpus jurisdiction over questions of law and constitutional questions).

377. *See* REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Title I, 119 Stat. 231, 302 (May 11, 2005) (amending 8 U.S.C. § 1252, which prohibits judicial review of most discretionary decisions in removal cases, although courts may review constitutional questions and questions of law); *see also* KANSTROOM, *supra* note 191, at 326 (referring to this provision as "a response to the *St. Cyr* case").

378. *See* WILSHER, *supra* note 18, at 33–34 (citing Saksagansky v. Weedin, 53 F.2d 13, 16 (9th Cir. 1931); U.S. ex rel. Ross v. Wallis, 279 F. 401, 403–04 (2d Cir. 1922)).

379. *See* 8 U.S.C. §§ 1252(a), (c) (1952).

380. *See, e.g.*, Flores-Powell v. Chadbourne, 677 F. Supp. 2d 455, 464 (D. Mass. 2010); Alli v. Decker, 644 F. Supp. 2d 535, 541–42 (M.D. Pa. 2009), *rev'd in part and vacated in part by* Alli v. Decker, 650 F.3d 1007 (3rd Cir. 2011).

381. Following *Demore*, several detainees challenged whether mandatory detention as applied to their cases, where detention was prolonged, violated their Due Process rights. *See, e.g.*, Sopo v. Att'y Gen., 825 F.3d 1199, 1212–13 (11th Cir. 2016) (collecting cases).

became a regular occurrence, courts may have been less willing to shoulder the burden of so many bond hearings. Also, for the class actions that succeeded in obtaining bond hearings once mandatory detention reached six months, the remedy sought by class counsel was a bond hearing in immigration court,[382] so this effectively ended the practice of district court judges holding their own bond hearings. However, there are still detainees who bring their cases back to a district court after an unsuccessful bond hearing that the district court ordered, effectively putting the custody issue into federal court receivership.[383] The inefficiencies noted by earlier district courts might serve as a reminder to federal courts today: If you want something done correctly, you have to do it yourself.[384] The unworkability of a case-by-case habeas approach is one reason why at least one federal circuit court, deciding whether detainees whose mandatory detention under 8 U.S.C. § 1226(c) had become unreasonably prolonged, suggested that Congress or the executive branch establish a set of procedures for either federal courts or immigration judges to follow.[385]

382. *See, e.g.*, Reid v. Donelan, 22 F. Supp. 3d 84, 93–94 (D. Mass. 2014), *vacated,* Reid v. Donelan, Nos. 14-1270, 14-1803, 14-1823, 2018 WL 4000993 (1st Cir. May 11, 2018); Lora v. Shanahan, 804 F.3d 601, 616 (2d Cir. 2015), *judgment vacated by* Shanahan v. Lora, 138 S. Ct. 1260 (2018) (upholding relief that required bond hearings before immigration court once mandatory detention exceeded six months); Rodriguez III, 804 F.3d 1060, 1089–90 (9th Cir. 2015), *rev'd and remanded by* Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (upholding relief that required bond hearings before immigration court once mandatory detention exceeded six months).

383. *See, e.g.*, Hechavarria II, 358 F. Supp. 3d 227, 235–36 (W.D.N.Y. 2019) (reviewing whether an immigration judge applied the correct standard of proof at the bond hearing ordered by the district court); Diaz Ortiz v. Smith, 384 F. Supp. 3d. 140, 142 (D. Mass. 2019) (reviewing whether an immigration judge applied the correct standard of proof at the bond hearing ordered by the district court); Enoh v. Sessions, No. 16-CV-85(LJV), 2017 WL 2080278, at *8 (W.D.N.Y. May 15, 2017) (reviewing whether an immigration judge applied the correct standard of proof at the bond hearing ordered by the district court).

384. *Cf.* Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1685–86 (2007) ("[I]mmigration courts often must spend additional resources to revisit decisions that have been overturned by appellate courts, and the appellate court opinions themselves can be quite embarrassing to the agency (as many of Judge Posner's are).").

385. *See* Reid v. Donelan, 819 F.3d 486, 502 n.5 (1st Cir. 2016) ("Given the shortcomings of case-by-case habeas review identified above, however, it would be appropriate for the executive (or the legislature, as the case may be) to consider explicitly permitting detainees in the position of the petitioner to seek a reasonableness review before a federal court *or* before an immigration judge more familiar with the intricacies of the case and the particulars of the underlying removal proceedings."). On remand, the District Court in *Reid v. Donelan* allowed plaintiff class members to amend the complaint to propose the alternative relief of a "reasonableness hearing before an immigration judge" once mandatory detention under 8 U.S.C. §1226(c) has become prolonged. Reid v. Donelan, No. 13-30125-PBS, 2018 WL 5269992, at *4, *8 (D. Mass. Oct. 23, 2018). The District Court ultimately did not grant this relief and held that detainees suffering prolonged mandatory detention must file individual habeas corpus petitions. Reid v. Donelan, 390 F. Supp. 3d 201, 227–28 (D. Mass. 2019).

Finally, while it is possible for habeas courts to continue to use their equitable powers to hold their own bond hearings, this may not be the most optimal long-term solution. Because it is not a legislative fix, it lacks the necessary funds to support such an effort. It would be a shame if judges deciding habeas corpus petitions and exercising equitable jurisdiction to hold bond hearings found themselves in the same "habeas corpus mill" that occurred in the late 1800s in San Francisco, drowning under the number of immigration detainee cases to hear without adequate resources to help.[386] Judges who wish to guard the American ideal of physical liberty for immigration detainees should receive resources to adequately address their caseloads. Also, Congress should more honestly look at how it allocates money for immigration enforcement and adjudication.[387] Congress should move money away from the private prison industry that currently warehouses immigration detainees[388] and into a system that provides real adjudication of each detainee's right to liberty. Congress has unofficially passed the buck to the judiciary to police immigration detention;[389] it is time to put detention decisions squarely into the hands of federal courts.

IV. CONCLUSION

Justice Breyer, in his 2001 majority opinion in *Zadvydas*, cautioned against immigration detention where "the sole procedural protections available to the alien are found in administrative proceedings, where the alien bears the burden of proving he is not dangerous, without (in the Government's view) significant later judicial review."[390] He wrote, "the Constitution may well preclude granting 'an administrative body the unreviewable authority to make determinations implicating fundamental

386. *See* Fritz, *supra* note 158; SALYER, *supra* note 158, at 21 (discussing San Francisco federal judge petitioning to Congress in January 1888 to pass more restrictive legislation, acting "primarily out of their despair over their crushing caseload" in Chinese Exclusion Act cases).

387. *See* Sean McElwee, *It's Time to Abolish ICE: A Mass-Deportation Strike Force is Incompatible with Democracy and Human Rights*, NATION MAG. (March 9, 2018), https://www.thenation.com/article/archive/its-time-to-abolish-ice/.

388. *See, e.g.*, Claire Hansen, *Biden's Order Aiming to End Use of Private Prisons Excludes Immigrant Detention Facilities*, U.S. News (Jan. 26, 2021), https://www.usnews.com/news/national-news/articles/2021-01-26/bidens-order-aiming-to-end-use-of-private-prisons-excludes-immigrant-detention-facilities; ALEINIKOFF & KERWIN, *supra* note 9, at 13 (proposing that the Biden administration end the use of private corporations to administer immigration detention centers); Gilman & Romero, *supra* note 10; *see also* Brownell, *supra* note 160, at 3 (discussing the DOJ's policy of reducing detention and closing detention facilities, which "has incidentally resulted in a considerable financial saving to the Government.").

389. *See* Cox, *supra* note 384, at 1686 ("If federal courts are dedicating additional resources to police the immigration courts, Congress might conclude that it is not worth investing its own energy to restructure that system of adjudication.").

390. 533 U.S. 678, 692 (2001).

rights.'"[391] The *Zadvydas* Court considered indefinite immigration detention of those who could not be deported. Yet Justice Breyer's instructive words echoed those of Justice Black in 1952, who considered release on immigration bond during deportation proceedings.[392]

These opinions are a half-century apart yet represent an equally cautionary tale, telling Congress that an immigration detention system wherein administrative officers make key decisions about the right to liberty is unacceptable in the United States. It matters not whether Congress calls the administrative decisionmaker a *judge*; in the immigration context, that judge works for the nation's top prosecutor and can easily be removed for ruling against the government. Immigration judges' independence has long been under threat. The Trump administration took advantage of the systemic flaws to break down any vestiges of immigration judges' independence. Congress therefore should prevent imitation judges from wielding the extraordinary governmental power to take away physical liberty.

391. *Id.* (citing Superintendent, Mass. Correctional Inst. Walpole v. Hill, 472 U.S. 445, 450 (1985); Crowell v. Benson, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting) ("[U]nder certain circumstances, the constitutional requirement of due process is a requirement of judicial process.").

392. Carlson v. Landon, 342 U.S. 524, 555 (1952) (Black, J., dissenting) ("I think that condemning people to jail is a job for the judiciary in accordance with procedural 'due process of law.' To farm out this responsibility to the police and prosecuting attorneys is a judicial abdication in which I will have no part.").