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INTRODUCTION

Every day, immigration judges (IJ) make decisions to grant or deny non-citizens relief from removal. A removal hearing[1] can have serious consequences for the respondent. Removal can separate families and deprive people of "all that makes life worth living."[2] It can also serve as a death sentence for those escaping persecution or a fearing of persecution in their country of origin.[3] For these reasons, among others, it is critical that removal hearings be conducted by impartial and independent adjudicators. However,

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1. Removal hearings are governed by 8 U.S.C. § 1229a. *See* 8 U.S.C. § 1229a. Although removal is the current term used to describe these proceedings, they were previously referred to as deportation hearings. In 1997, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 revised procedures, combining deportation proceedings and exclusion proceedings (used to determine whether a non-citizen can be admitted to the United States) into a single proceeding called a removal proceeding. The term removal now replaces the term deportation and exclusion. *See generally* 8 U.S.C. §§ 1229, 1229(a); *see generally* 8 C.F.R. §§ 1003.12 et seq., 1240.1 et seq. In this paper, both deportation and removal will be used to describe the legal procedure by which non-citizens are removed from the United States.

2. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (describing the risk for respondent in deportation proceedings); *see also* Will Maslow, *Recasting our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 310 (1956) (describing deportation as "tearing" a non-citizen "physically" from their home, job, spouse, and children). Despite these consequences, the Court has held that deportation, although "burdensome and severe," "is not a punishment." *See Mahler v. Eby*, 264 U.S. 32, 39 (1924) (citing *Fong Yue Ting v. U.S.*, 149 U.S. 698, 730 (1893)); *see also Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913) (stating deportation is not a punishment, "it is simply a refusal by the government to harbor persons whom it does not want.").

3. Many of those seeking admission to the United States are applying for asylum relief. Asylum relief is a discretionary form of relief provided to persons within the United States who show they are unable or unwilling to return to their country of origin because of persecution or a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group or political opinion. 8 U.S.C. § 1101 (a)(42) (defining "refugee"); *see also* 8 U.S.C. § 1158 (providing that an applicant must establish persecution based on one of the five protected classes: race, religion, nationality, membership in a particular social group, or political opinion); *see also*, Joel Rose & Marisa Peñaloza, *Denied Asylum, But Terrified To Return Home*, NPR (July 20, 2018), https://www.npr.org/2018/07/20/630877498/denied-asylum-but-terrified-to-return-home (describing the story of one asylum seeker escaping gang violence in Honduras). Yet not all who apply for asylum and meet the definition of refugee are entitled to asylum. *See I.N.S. v. Stevic*, 467 U.S. 407, 430 n.18 (1984) (providing that "[m]eeting the definition of 'refugee,' however, does not entitle the alien to asylum—the decision to grant a particular application rests in the discretion of the Attorney General" under 8 U.S.C. § 208(a)).

judicial impartiality and independence are undermined[4] when there is prosecutorial control[5] of adjudicators.[6] This paper will show how prosecutorial control continues to permeate the United States Immigration Court system, threatens judicial independence and impartiality in immigration cases, and undermines justice through the perception—real or not —that adjudicators are not independent. It will also discuss the role of the United States Constitution's Appointments Clause and how the current method of IJ appointment contributes to prosecutorial control.[7]

Concerns regarding prosecutorial control of adjudicatory functions is not new, and in 1946 the Administrative Procedure Act (APA) was enacted, in part, to address these concerns.[8] Yet, in the Supplemental Appropriation Act of 1951 Congress determined the APA does not apply to removal proceedings.[9] This was reinforced by the Court's ruling in *Marcello v. Bonds*,[10] where the Court not only found the APA inapplicable to deportation

4. "Judicial Independence means that judges are not subject to external pressure and influence and are free to make impartial decisions based solely on fact and law." *For the Rule of Law, An Independent Immigration Court: Hearing Before the Subcomm. on Immigr. & Citizenship of the H. Comm. on the Judiciary*, 117th Cong. (2022) (statement of Karen T. Grisez, Former Chair, American Bar Association). Throughout this paper the term "judicial" will be used in reference to immigration judges and their adjudicatory function within EOIR.

5. Throughout this paper, "prosecutorial control" will be used to describe control by the Attorney General and the law enforcement functions of the Executive Branch.

6. *See* Hon. Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish. An Article I Immigration Court*, 13 BENDER'S IMMIGR. BULL. 3, 16 (2008), https://www.naij-usa.org/images/uploads/publications/Urgent-Priority_1-1-08_1.pdf (describing the need to create an independent Article I Court to separate the Immigration Court from law enforcement); *see also* Harry N. Rosenfield, *Necessary Administrative Reforms in the Immigration and Nationality Act of 1952*, 27 FORDHAM L. REV. 145, 172 (1958) (discussing how an IJ who is appointed and supervised by a law enforcement official may not exercise full judicial independence); see also *Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts: Hearing Before the Subcomm. on Immigr. & Citizenship of the H. Comm. on the Judiciary*, 116th Cong. 3 (2020) (statement of Hon. A. Ashley Tabaddor, President, National Association of Immigration Judges) (discussing the structural flaws and politization of the United States Immigration Court System).

7. The Appointments Clause designates the procedures by which officers, such as IJs, are appointed. *See* U.S. CONST. art. II, § 2, cl. 2.

8. Pub. L. No. 404, 60 Stat. 237; 5 U.S.C. § 1001 et seq.; *see also* Sidney B. Rawitz, *From Wong Yang Sung to Black Robes*, 65 INTERPRETER RELEASES 453, 456 (1988) (explaining that prior to the APA's enactment there was a "strong demand" for reform of agency hearing procedures).

9. Supplemental Appropriation Act of 1951, 64 Stat.1048 (establishing the APA does not apply to deportation proceedings). Through this act Congress amended the law after the Supreme Court's holding in *Sung v. McGrath*. *See Sung v. McGrath*, 339 U.S. 33, 35, 41 (1950) (superseded by statute).

10. *Marcello v. Bonds*, 349 U.S. 302, 311, 315 (1955). Petitioner was a native of Tunis, Africa who was lawfully brought to the United States when he was eight months old and resided there since. He was married to an American citizen and had four American citizen children. He was convicted of a violation of the Marihuana Tax Act and sentenced to one year imprisonment. The conviction was grounds for deportation and his case was heard before a Special Inquiry Officer of the Immigration and Naturalization Service (INS) who was under the control and supervision of an official who participated in investigative and prosecutorial functions. In a writ of habeas corpus,

proceedings, but also found that supervision and control of immigration adjudicators by prosecuting and investigating officials does not call into question the fairness and impartiality of a hearing or violate the Fifth Amendment's Due Process Clause.[11]

At the time of the *Marcello* ruling, IJs were supervised by the Immigration and Naturalization Service (INS), which performed prosecutorial, investigatory, and adjudicatory functions.[12] Today, although IJs are no longer part of the INS, they remain under the control of the Attorney General, the country's chief prosecutor, within the Department of Justice (DOJ).[13]

Part I of this paper will provide background on IJs, their role within the immigration court system, and the current state of prosecutorial control within immigration courts. Part II will analyze whether the current method of IJ appointment is constitutional under the Appointments Clause of the Constitution.[14] It will also discuss the importance of the Appointments Clause and its role in Separation of Powers.[15] Part III will propose a new appointment scheme which is not only constitutional, but also considers the Separation of Powers principle[16] embedded in the Constitution.

petitioner challenged the validity of the deportation order because the hearing did not comply with the APA and violated the Fifth Amendment's Due Process Clause. *Id*.

11. *Id.* at 311 (finding a Special Inquiry Officer who is subject to the supervision and control of officials with investigative and prosecuting functions does not strip a proceeding of "fairness and impartiality as to make [it] violative of due process."). *But see* U.S. CONST. amend. V (Due Process Clause) (stating no person " shall be deprived of life, liberty or property without due process of law."); *see also Matthews v. Eldridge*, 424 U.S. 319, 333 (stating "the fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'") (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *see also Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (describing due process as a "flexible" standard which "calls for such procedural protections as the particular situation demands.") (internal quotation omitted).

12. *Marcello v. Bonds*, 349 U.S. at 311; *see* Rawitz, *supra* note 8, at 458.

13. *See* 28 U.S.C. § 503 (establishing the Attorney General as the head of the Department of Justice); *see also Organizational Chart*, U.S. DEP'T OF JUST. (2018), https://www.justice.gov/agencies/chart [hereinafter *DOJ Organizational Chart*] (providing an illustration of all the agencies within the DOJ, including the Executive Office for Immigration Review which houses IJs). This change was made, in part, to protect IJs from having the same supervisors as INS prosecutors under the INS. *See* Hon. A. Ashley Tabaddor, *supra* note 6, at 3.

14. *See* U.S. CONST. art. II, § 2, cl. 2; *see generally Buckley v. Valeo*, 424 U.S. 1 (1976); *see generally Freytag v. C.I.R.*, 501 U.S. 868 (1991); *see generally Edmond v. U.S.*, 520 U.S. 651 (1997); *see generally Lucia v. S.E.C.*, 138 S. Ct. 2044 (2018); see generally *U.S. v. Arthrex*, 141 S. Ct. 1970 (2021).

15. The Appointments Clause has Separation of Powers principles built into it. Its purpose is not only to designate the procedure that principal and inferior officers are appointed by, but also to ensure a separation of power among the three branches of government. *See Edmond*, 520 U.S. at 660; *see also Buckley*, 424 U.S. at 685 (describing how Separation of Powers is "woven into" the Constitution).

16. The purpose of this principle is to prevent the comingling of judicial, executive, and legislative functions. *See Buckley*, 424 U.S. at 159 (using Montesquieu's "well known maxim" to discuss the purpose of Separation of Powers within the United States Constitution).

PART I: BACKGROUND

A. History of IJs and Their Role Within the Immigration Court System

Although today it may seem inconceivable, people at risk of deportation did not always have a right to a hearing before an IJ. Prior to 1952, the statute governing deportation, the Immigration Act of 1917, did not explicitly require a deportation hearing, allowing non-citizens to be taken into custody and deported at the discretion of the Secretary of Labor.[17] This was despite the Supreme Court's decision in *Yamataya v. Fisher*, also known as *The Japanese Immigrant Case*, which determined that immigrants, even those who entered the United States illegally, could not be deported without an opportunity to be heard as required by the Due Process Clause. [18]

Early deportation hearings were conducted by an "immigrant inspector" who held various roles, including the investigation of cases involving deportable non-citizens.[19] Although an immigrant inspector who had participated in the investigation phase of a case was not allowed to preside over the hearing, the early model of immigration adjudication effectively allowed the "presiding inspector" to participate in both adjudicatory and prosecutorial functions.[20] Respondents were allowed to have counsel present,

17. *See* Immigration Act of 1917, 39 Stat. 874, 889. Until 1933 immigration services were housed within the Department of Labor and the Immigration Act of 1917 allowed for deportation at the discretion of the Secretary of Labor. *Id*. *See also Overview of INS History*, U.S. CITIZENSHIP AND IMMIGR. SERV. 5 (2012), https://www.uscis.gov/sites/default/files/document/fact-sheets/INSHistory.pdf. In 1952, Congress finally provided procedural requirements for deportation hearings, which contained the minimum required due process requirements. *See* 8 U.S.C. § 1252(b) (1995); *see also* 6 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 72.04 (Matthew Bender & Company, Inc., rev. ed. 2022) (stating the statute contains the minimum requirement for due process).

18. *Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903). The petitioner, Yamataya, was a non-English speaking Japanese immigrant who was found to be a public charge and ordered deported. The Court found due process had been satisfied because Yamataya had notice that an investigation about her immigration status was underway and she also had the opportunity to deny the claims made against her and answer questions before the immigration officer. This finding came despite Yamataya being unable to speak English, understand the nature or importance of the questions she was asked, or know that she could be deported. The Court reasoned these concerns were not for the Court to address, but rather was an issue for the immigration officers handling her case. *Id* at 101-02. This case also created a distinction between those at the border seeking admission and non-citizens within the United States, guaranteeing due process rights only to those already within the United States. *See id*. at 100; *see also Reno v. Flores*, 507 U.S. 292, 306 (1993) ("it is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.").

19. *See* 8 U.S.C. § 1229a(a)(1) (providing an IJ conducts deportation proceedings). An IJ was formerly known as an immigrant inspector. *See* Rawitz, *supra* note 8, at 454 (describing the various roles held by immigrant inspectors).

20. *See* Rawitz, *supra* note 8, at 455 ("the presiding inspector combined functions of a prosecutor and judge and at each level the entire file, regardless of the contaminating nature of its

but they were not entitled to have an attorney provided for them. This remains the case today.[21]

In 1946, the APA was enacted to help ensure independence and impartiality by administrative adjudicators and to invalidate the practice of "embodying in one person or agency the duties of prosecutor and judge."[22] The court later reinforced the APA's application to deportation proceedings in *Sung v. McGrath*.[23] There, the Court addressed the need for impartial adjudication that was separate from investigative and prosecutorial functions and found the APA applied to deportation proceedings.[24]

However, the APA's protections were short lived. In the 1951 Supplemental Appropriations Act, Congress stated that exclusion and expulsion were not governed by Sections 5, 7, and 8 [25] of the APA.[26] The Supreme Court later reinforced this principle in *Marcello v. Bonds*, stating

contents, was in the hands of the reviewing authority"). There, Rawitz describes how presiding inspectors "extracted testimony" and "interrogated" non-citizens, reviewed the non-citizen's entire file including "hearsay, 'spite' letters, classified information, or other prejudicial material." *Id.*

21. *Gideon v. Wainwright* held the Sixth Amendment's right to counsel (in criminal cases) was made obligatory on the states by the Fourteenth Amendment. Thus, a defendant who could not afford an attorney was entitled to have counsel appointed for them. 372 U.S. 335, 342 (1963). But because immigration law is considered civil and not criminal law, the Sixth Amendment right to counsel does not apply. *See* U.S. CONST. amend. VI, ("[i]n all criminal prosecutions the accused shall enjoy… assistance of counsel for his defense."); *see also Fong*, 149 U.S. at 730 ("the order of deportation is not a punishment for crime."). However, in *Franco-Gonzalez v. Holder*, the United States District Court for the Central District of California found that immigrant detainees with mental disabilities are entitled to the reasonable accommodation of a qualified representative to assist them in removal and detention proceedings under Section 504 of the Rehabilitation Act. 2013 WL 3674492 at 3 (not reported in F. Supp. 2d). *See also Franco Gonzalez v. Holder*, ACLU (Apr. 24, 2013), https://www.aclu.org/cases/franco-gonzalez-v-holder (explaining that Mr. Franco-Gonzalez filed suit after being detained for almost five years without a hearing or a lawyer). For additional information on the importance of counsel in deportation proceedings, *see generally The Right to Counsel*, ACLU, https://www.aclu.org/sites/default/files/field_document/right_to_counsel_final.pdf (last visited Jan. 20, 2022); *see also Access to Counsel in Immigration Court*, AM. IMMIGR. COUNS., https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court (last visited Jan. 20, 2022).

22. *See Sung v. McGrath*, 339 U.S. 33, 35, 41 (1950) (superseded by statute); *see also* 5 U.S.C. § 554(d)(2) (providing that "an employee or agent engaged in the performance 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.").

23. *Sung*, 339 U.S. at 35, 41. This case addressed a habeas corpus proceeding brought by a native citizen of China who was charged with being in the United States unlawfully. It involved "a single ultimate question − whether administrative hearings in deportation cases must conform to requirements of the Administrative Procedure Act of June 11, 1946." *Id.*

24. *Id.*

25. *See* 5 U.S.C. § 554 (pertaining to adjudications); *see also* 5 U.S.C. § 701-706 (pertaining to judicial review); *see also* 5 U.S.C. §§ 801-900 (pertaining to Congressional review of agency rulemaking).

26. *See* Supplemental Appropriation Act of 1951, *see also Marcello*, 349 U.S. at 306 (finding the APA does not apply to deportation proceedings).

Congress had created an exemption to the APA in deportation proceedings under section 242(b)[27] of the Immigration and Nationality Act (INA).[28]

From 1950 to 1952, officers adjudicating deportation hearings were called hearing examiners.[29] Then, in 1952 the INA designated them "special inquiry officers" (SIOs).[30] Finally, in 1973 SIOs were given the title of immigration judges.[31] In 1983 their positions were removed altogether from the INS, becoming part of the newly created Executive Office for Immigration Review (EOIR), under the DOJ.[32] This change was made in part due to "perceived and actual conflicts of interest" due to IJs and INS prosecutors having the same supervisors under the former INS.[33] This was another attempt to protect the judicial independence of IJs, separating them from INS law enforcement priorities.[34] However, removing IJs from the control of the INS, although well-reasoned, did not serve its intended outcome, as IJs remain under the control of the DOJ—a law enforcement agency—and the Attorney General, the nation's chief prosecutor.[35]

B. DOJ Structure

The Attorney General is the head of the DOJ, which is the main law enforcement agency in the United States.[36] As the head of the DOJ, the Attorney General has the power to appoint and supervise IJs.[37] The Office of the Attorney General's mission is to "supervise and direct the administration

27. *Marcello*, 349 U.S. at 310; *see* Immigration and Nationality Act of 1952, Pub. L. 414, 66 Stat. 163, 209 (setting forth the procedure for proceedings before a special inquiry officer) (codified as amended at 8 U.S.C. § 1252 (b)).

28. *Id*. at 208-09 (providing the procedures for determining deportability by a special inquiry officer); *Marcello*, 349 U.S. at 302. The Plenary Power Doctrine, which is a deferential standard recognizing that "the power to expel or exclude aliens… [is] largely immune from judicial control," may also have played a role in the Court's decision to exclude deportation from APA protections. *See Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953)). The Plenary Power Doctrine also includes the procedures by which to admit or exclude non-citizens. "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

29. *See* Rawitz, *supra* note 8, at 457 (discussing hearing examiners).

30. *See* 8 C.F.R. § 215.5 (pertaining to hearings before a Special Inquiry Officer).

31. *See* Rawitz, *supra* note 8, at 458 (stating that IJs were now also allowed to wear traditional black judge's robes); *see also* 8 C.F.R. § 1003.10(a) (defining IJ).

32. 8 C.F.R. § 1003.0 (a) (describing the organization of the EOIR). *See* also *Evolution of the U.S. Immigration Court System: Pre-1983*, U.S. DEP'T OF JUST. (Apr. 30, 2015), https://www.justice.gov/eoir/evolution-pre-1983 (describing the evolution of the immigration court system).

33. *See* Hon. A. Ashley Tabaddor, *supra* note 6, at 3.

34. *See id*.

35. *See id.*

36. 28 U.S.C. § 503 ("the Attorney General is the head of the Department of Justice."); *see also* 28 U.S.C. § 501 (stating the DOJ is an executive department).

37. *See* 8 C.F.R. § 1003.10(a) (describing appointment of IJs by the Attorney General); *see also* 8 U.S.C. § 1103 (pertaining to powers and duties of the Attorney General).

and operation" of the DOJ, including the Federal Bureau of Investigation, Drug Enforcement Administration, Bureau of Alcohol, Tobacco, Firearms and Explosives, Bureau of Prisons, Office of Justice Programs, United States Attorneys, and the United States Marshall Service, which are all housed within the DOJ.[38]

Because the EOIR is housed within the DOJ, it is especially vulnerable to "executive branch interference."[39] EOIR was created in 1983 and acts under the delegated authority of the Attorney General to adjudicate immigration cases.[40] EOIR is comprised of five parts, three are relevant for our purposes.[41] First is the Office of the Chief Immigration Judge, which manages the immigration courts where removal proceedings are initially heard.[42] It "provides overall program direction and establishes priorities" for more than 500 IJs in 66 immigration courts across the country.[43] Second is the Office of the Chief Administrative Hearing Officer, which primarily adjudicates immigration-related employment cases.[44] And third is the Board of Immigration Appeals (BIA), which is the highest-level administrative body for immigration cases and conducts appellate review of IJ decisions.[45]

38. *Organization, Mission & Functions Manual: Attorney General, Deputy and Associate*, U.S. DEP'T OF JUST. (Oct. 8, 2021), https://www.justice.gov/jmd/organization-mission-and-functions-manual-attorney-general#:~:text=The%20mission%20of%20the%20Office,United%20States%20in%20legal%20matters. *See* 28 U.S.C. §§ 501-530(D) (pertaining to the Office of the Attorney General); *see also* §§ 531-540(C) (pertaining to the Federal Bureau of Investigation within the DOJ); *see also* §§ 541-550 (pertaining to the United States Attorney within the DOJ); *see also* §§ 561-575 (pertaining to the United States Marshall Service within the DOJ); *see also* §§ 599(A)-599(B) (pertaining to the Bureau of Alcohol, Tobacco, Firearms and Explosives within the DOJ); *see also DOJ Organizational Chart*, *supra* note 13.

39. *See AILA and the American Immigration Council Obtain EOIR Hiring Plan via FOIA litigation*, AM. IMMIGR. LAW. ASS'N (May 5, 2020), https://www.aila.org/EOIRHiringPlan. *See also Organization, Mission and Functions Manual: Executive Office for Immigration Review*, U.S. DEP'T OF JUST. (Oct. 5, 2020), https://www.justice.gov/jmd/organization-mission-and-functions-manual-executive-office-immigration-review [hereinafter *Functions Manual EOIR*] (describing EOIR's structure within the DOJ).

40. 6 U.S.C. § 521 ("there is in the Department of Justice the Executive Office for Immigration Review, which shall be subject to the direction and regulation of the Attorney General…"); *see also Functions Manual EOIR*, *supra* note 39.

41. 8 C.F.R. § 1003.0(a) ("EOIR shall include the Board of Immigration Appeals, the Office of the Chief Immigration Judge, the Office of the Chief Administrative Hearing Officer, the Office of Policy, the Office of the General Counsel, and such other components.").

42. *See* 8 C.F.R. § 1003.9(b).

43. *See Office of the Chief Immigration Judge*, U.S. DEP'T OF JUST. (Dec. 7, 2020), https://www.justice.gov/eoir/office-of-the-chief-immigration-judge.

44. *See id*; *see also* 8 C.F.R. § 1003.0(a).

45. 8 C.F.R. § 1003.1 provides the BIA's organization, jurisdiction and powers. The BIA has appellate jurisdiction to review decisions in many different types of cases, including but not limited to, removal and deportation. 8 C.F.R. § 1003.1(b). The BIA does not conduct *de novo* review of facts, using the findings of fact determined by IJs. But the board does complete *de novo* review in questions of law. §1003.1(d)(3)(i), (ii). *See also Functions Manual EOIR*, *supra* note 39 (providing the BIA conducts appellate review of IJ decisions).

Under 8 U.S.C. § 1003.1(g)-(h), IJs apply the law provided to them by the BIA and the Attorney General, and they conduct proceedings consistent with 8 U.S.C. § 1229a, enforcing the Code of Federal Regulations according to precedent, statute, and regulations.[46]

In 2002, INS functions were transferred to the newly created Department of Homeland Security (DHS).[47] The former INS was moved out of the DOJ to provide "EOIR with some degree of independence."[48] But because EOIR was kept within the DOJ, this change did not create the level of independence intended—the Attorney General remains the head of the DOJ.[49] Under this current structure, the IJs' quasi-judicial role is diminished because they are labeled DOJ attorneys, designated by the Attorney General to conduct immigration proceedings under their direction and control.[50] The immigration court structure, as part of the DOJ, is sufficient alone to call into question the perception of impartiality among immigration adjudications.[51] This structure also gives way to the current method of IJ appointment by the Attorney General.[52]

46. The BIA also sets precedent through the publication of selected decisions. 8 C.F.R. § 1003.1(g)(2). 8 U.S.C. § 1229a is the statute governing deportation proceedings.

47. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002). *See also* 68 Fed. Reg. 9824 (2003) (describing the transfer of INS functions to DHS and its three parts: U.S. Citizenship and Immigration Services ("USCIS"), Customs and Border Protection ("CBP"), and U.S. Immigration and Customs Enforcement ("ICE")).

48. *See* Marks, *supra* note 6, at 3.

49. *See* 28 U.S.C. § 503; *see also id*. (stating the change did not create the desired level of independence).

50. See 8 C.F.R. § 1003.10(a) (providing "immigration judges are attorneys whom the Attorney General appoints…").

51. Immigration adjudication has also come under scrutiny from several circuit courts. *See Fiadjoe v. Attorney General of U.S.*, 411 F.3d 135, 154-55 (3rd Cir. 2005) (describing the IJs questioning of respondent as "hostile" and "extraordinarily abusive."); *see also Reyes v. I.N.S.*, 342 F.3d 1001, 1007 (9th Cir. 2003) (stating the IJ departed from their neutral fact finding role by being hostile towards respondent, judging his behavior as being "morally bankrupt."); *see also Huang v. Gonzalez*, 403 F.3d 945, 949 (7th Cir. 2005) (stating the IJ substituted their personal knowledge and beliefs for the record in their decision). The treatment of non-citizens with mental disabilities in deportation proceedings is also a concern. For example, in 2013, a Mexican immigrant with cognitive disabilities, Jose Antonio Franco-Gonzalez, filed a lawsuit after being detained for almost five years without a hearing or a lawyer. *Franco-Gonzalez v. Holder*, ACLU, *supra* note 21; *see also, Franco-Gonzalez v. Holder*, 2013 WL 3674492 (not reported in F. Supp. 2d) (finding plaintiffs are entitled to a reasonable accommodation of a qualified representative to assist them in removal and detention proceedings under Section 504 of the Rehabilitation Act).

52. *See* 8 C.F.R. § 1003.10 (stating immigration judges are appointed by the Attorney General).

C. DOJ Policies

a. The DOJ is a Law Enforcement Agency with Law Enforcement Priorities

The DOJ's mission is "to enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all *Americans*."[53] Although the DOJ lists the fair and impartial administration of justice as one of its priorities, it is hard to imagine how this task can be accomplished when the agency's mission is to prosecute alleged "unlawful behavior." This combination of law enforcement and impartial adjudication within one department or agency is antithetical because it undermines judicial impartiality and independence.

Under the Bush Administration, immigration decisions came under criticism by several federal circuit judges.[54] In response, Deputy Assistant Attorney General, Jonathan Cohn, made the DOJ's law enforcement priorities clear, defending the quality of IJ decisions by reasoning that decisions could not be inadequate because the government had "prevailed in 91.5% of its immigration cases."[55] Under the Obama Administration, Attorney General Eric Holder was criticized for tripling the rate of illegal entry or re-entry deportations[56] and in January 2014, the majority of

53. *About DOJ*, *Our Mission Statement*, U.S. DEP'T OF JUST. (Mar. 9, 2021), https://www.justice.gov/about (emphasis added).

54. *See Benslimane v. Gonzalez*, 430 F.3d 828, 830 (7th Cir. 2005) (explaining that "adjudication of [immigration cases] at the administrative level has fallen below the minimum standards of legal justice.") (citing *Niam v. Ashcroft*, 354 F.3d 652, 654 (7th Cir. 2005); *see also Dawoud v. Gonzalez*, 424 F.3d 608, 610 (7th Cir. 2005) ("the IJs opinion is riddled with inappropriate and extraneous comments."); *see also* Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES (Dec. 26, 2005), https://www.nytimes.com/2005/12/26/us/courts-criticize-judges-handling-of-asylum-cases.html (reporting on the criticism of IJs by circuit court judges).

55. *See Concerning Immigration: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 3 (2006) (testimony of Jonathan Cohn, Deputy Assistant Attorney General, U.S. Department of Justice) (stating that the BIA's reversal rate "in a single circuit court" should not be used as evidence that judges are "doing an inadequate job of deciding cases."); *see also* Liptak, *supra* note 54; *see also Benslimane v. Gonzalez*, 430 F.3d at 830 (providing cases in which several circuit courts criticized IJ decisions).

56. *See Homeland Security Department Oversight Hearin*g, U.S. DEP'T OF HOMELAND SEC. (May 29, 2014), https://www.c-span.org/video/?319614-1/homeland-security-department-oversight-hearing (discussing concerns about the "large number" of people who were being deported for violations related to their undocumented status. "These are people who've lived [in the United States] for years, some for decades…they have jobs and families, including U.S. citizen spouses and children or… other close family who have legal status. Their only offense arises from not being [in the United States] lawfully."); *see also* Lynn Tramonte, *Stop Prosecuting Immigrants*,

prosecutions were those arising under immigration law.[57] This accounted for 52.3 percent of prosecutions, with prosecutions for "drugs-drug trafficking" coming in second at 11.7 percent.[58]

More recently, in 2018, then-Attorney General Jeff Sessions announced the DOJ's immigration priorities under the Trump Administration.[59] He framed immigration as a national security issue, effectively equating immigration policies to the Department's law enforcement policies. This brought immigration within the domain of the Department's mission to police both citizens and non-citizens. Rather than recognizing immigration as a distinct and separate area meriting impartial adjudication, immigration and law enforcement were now formally intertwined.[60] Referring to the changes, Attorney General Sessions remarked,

"our immigration policies…do not promote our national interest, but instead select a vast majority of legal immigrants without any respect to merit… [law enforcement has] had to go into more dangerous situations and confront more criminals—criminals who often shouldn't be allowed in this country in the first place."[61]

Establishing perceived immigrants as criminals, Sessions' message was clear: sweeping immigration enforcement was a top DOJ priority under the Trump Administration.

THE HILL (Apr. 15, 2014), https://thehill.com/blogs/congress-blog/civil-rights/203369-stop-persecuting-immigrants.

57. *Prosecutions for January 2014*, TRAC (Mar. 2014), https://trac.syr.edu/tracreports/bulletins/overall/monthlyjan14/fil/. Although the criminal and immigration law systems are thought of as separate systems, they have a "collaborative relationship." Eagly, Ingrid V., *Prosecuting Immigration*, 104 NW. UNIV. L. REV., no. 4, 2010, 10 UCLA SCH. OF L. RSCH. PAPER 30, 1281, 1288. This allows "criminal prosecutors to take advantage of the resources of the immigration system, which are largely unconstrained by the Constitution. Detention without bond, interrogation without *Miranda*, arrest without probable cause of a crime, and sentencing without probation all become available to the criminal prosecutor in varying degrees as a result." *Id*. An example of this can be seen in large scale prosecution of workers at a meatpacking plant in Postville, IA. For complete analysis of how this case depicts the "collaborative relationship" between the immigration and criminal law systems. *See id*. at 1301-03; *see Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that during custodial interrogations a person "must be warned [they] ha[ve] a right to remain silent, that any statement [they] make may be used as evidence against [them], and that [they] have the right to the presence of an attorney, retained or appointed.").

58. TRAC, *supra* note 57.

59. *See Attorney General Sessions Delivers Remarks on National Security and Immigration Priorities of Administration*, U.S. DEP'T OF JUST. (Jan. 26, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-national-security-and-immigration-priorities.

60. *See id. See also For the Rule of Law, An Independent Immigration Court: Hearing Before the Subcomm. on Immigr. & Citizenship of the H. Comm. on the Judiciary*, 117th Cong. 2 (2022) (statement of Hon. Mimi Tsankov, President, National Association of Immigration Judges) (explaining that the DOJ is a law enforcement agency which "prioritizes its law enforcement functions at the expense of immigration courts.").

61. *See id*.

b. Enormous Caseloads and Case Completion Metrics Infringe on IJ Independence

The enormous IJ caseload has come under scrutiny not only by the media but also by the federal courts.[62] Testimony at the 2006 Senate Judiciary Committee Hearing on Immigration Reform referred to immigration courts as suffering from a "severe lack of resources and manpower at the IJ and BIA levels."[63] At the time, there were 215 IJs, meaning that a single judge needed to "dispose of 1,400 cases a year or nearly twenty-seven cases a week, or more than five each business day, to simply stay abreast of his docket."[64] The staggering number of cases raised an important question: whether IJs could be "expected to make thorough and competent findings of fact and conclusions of law."[65]

In 2020, the backlog of cases reached almost 1.1 million.[66] Citing this backlog, the agency imposed performance requirements based on quotas and deadlines, though little suggests these metrics accurately measure performance.[67] Under these metrics, judges are required to complete 700 cases per year, and no more than 15 percent of their cases can be remanded.[68] The metrics appear arbitrary and there has been no explanation as to how they

62. *See Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Hon. John M. Walker, U.S. Court of Appeals for the Second Circuit). During the Bush Administration, Attorney General Ashcroft implemented administrative policies modifying the structure and review processes of the Bureau of Immigration Appeals (BIA). The number of judges on the BIA was cut from 21 to 11 and cases were increasingly referred for single member review summary. *De novo* review of an IJ's factual findings was also eliminated and grounds for case dismissal were broadened. By limiting opportunities for meaningful review by the BIA, the BIA backlog was reduced, but not without consequence. The burden was simply shifted to the Federal Circuit Courts, with caseloads rising from three percent to fifteen percent of the total caseload for many Courts of Appeals.

63. *See id*. These concerns became even more apparent following the COVID-19 pandemic. While state and federal courts across the country began quickly holding online hearings, it took immigration courts seven months to allow "a handful of judges to conduct remote hearings." The immigration court's software programs, printers, and computers were outdated and there were "too few laptops that [were] capable of letting judges adjudicate cases while on telework. . ." While other state and federal courts have moved to electronic filing and records, the immigration court continues to operate with hardcopy files. Many immigration courts have inadequate space for storing files, which forces staff to share cubicles and use workspaces that are "cramped," "unhealthy" and "unsafe." *See* Hon. Mimi Tsankov, *supra* note 60, at 2-3.

64. *See* Hon. John M. Walker, *supra* note 62.

65. *Id.*

66. Hon. A. Ashley Tabaddor, *supra* note 6, at 4.

67. *See id*. (testifying that case completion metrics cannot accurately measure a judge's performance, because many factors such as the "complexity of a claim, the availability of evidence, the involvement of counsel, and region-specific case law" all play a role in how promptly cases can be decided).

68. *See id*. at 5; *see also EOIR Performance Plan, Adjudicative Employees*, EOIR (Mar. 30, 2018), https://www.aila.org/infonet/eoir-memo-immigration-judge-performance-metrics (outlining IJ performance metrics implemented on Oct. 1, 2018).

were developed.[69] This has raised concerns as to whether the metrics are a pretext to interfere with judicial independence.[70]

These metrics also disproportionately impact the parties. Experienced attorneys acting on behalf of the United States can easily prepare for trial on a "shortened time frame" because they have handled "hundreds, if not thousands of cases."[71] Respondents appearing in immigration court, however, are often not represented by counsel, do not speak English, and have limited knowledge of the law.[72] When these factors are coupled with a judge "who is penalized for slowing down to provide more guidance," respondents are not only on an unequal "playing field" but at a severe disadvantage.[73]

In the past, a number of federal appellate courts have also criticized immigration courts for poor decisions, reflecting a "pattern of biased and incoherent decisions in asylum cases."[74] In those cases, the circuit judges noted that "adjudication… had fallen below the minimum standards of legal justice,"[75] and that there was a pattern of misconduct in which people were

69. Hon. A. Ashley Tabaddor, *supra* note 6, at 6.

70. *See id*. ("This benchmark clearly has no statistical value whatsoever, other than to give management a pretext to interfere with the decisional independence of judges in the guise of evaluating judges' decisions… In the Court system, this is the job of appellate judges, not court managers."). In *Las Americas v. Trump*, an immigration advocacy group challenged, among other things, the performance metrics and quotas imposed by the Trump Administration. This case is still in its early stages, but as of July 2020 the U.S. District Court for the District of Oregon has denied, in part, a motion to dismiss the case. 475 F. Supp. 3d 1194, 1200 (2020). In October of 2021, the Biden Administration also announced suspension of the Trump-era performance metrics in an internal memo to immigration judges. Priscilla Alvarez, *Justice Department eliminated Trump-era case quotas for immigration judges*, CNN (Oct. 20, 2021), https://www.cnn.com/2021/10/20/politics/immigration-judges-quotas/index.html.

71. Hon. A. Ashley Tabaddor, *supra* note 6, at 5.

72. *Id.* at 5.

73. *See id*. Judges who could not meet quotas were subject to negative performance reviews which could result in termination. At the time more than 75% of IJs were on probation. In a hearing before the U.S. House of Representatives, the President of the National Association of Immigration Judges commented "we know it weighed heavily on [judges] as they made decisions on the bench — should I grant a continuation and risk termination?" Hon. Mimi Tsankov, *supra* note 60, at 4.

74. Liptak, *supra* note 54; *see* Jonathan Cohn, *supra* note 55; *see also Dawoud*, 424 F.3d at 610 (stating the "IJs opinion is riddled with inappropriate and extraneous comments, such as references to the IJ's personal experiences with alcohol in Egypt, commentary on the state if the tourism industry there, and speculation about the attractiveness of the United States to asylum seekers in general."); *see also Ssali v. Gonzalez*, 424 F.3d 556, 563 (7th Cir. 2005) (noting the IJ and BIA made a "very significant mistake [that] suggests that the Board was not aware of the most basic facts of Mr. Ssali's case…"); see also *Grupee v. Gonzalez*, 400 F.3d 1026, 1028 (7th Cir. 2005) (stating the IJ's statement "is hard to take seriously."); *see also Wang v. Attorney General*, 423 F.3d 260, 269 (3rd Cir. 2005) (stating "the tone tenor, the disparagement and sarcasm of the [IJ] seem more appropriate to a court television show than a federal court proceeding."); see also, *Chen v. U.S. Dep't of Justice*, 426 F.3d 104, 115 (2d Cir. 2005) (stating the IJs findings were "grounded solely on speculation and conjecture.").

75. *Benslimane*, 430 F.3d at 828.

sent back to countries where they would face persecution.[76] It is hard to imagine how immigration adjudications could be improved by forcing judges to hasten their decision-making process. Rather, it seems more likely that the metrics imposed are a pretext to "incentivize" deportations,[77] supporting the notion that prosecutorial priorities are woven into our current immigration court system.

c. DOJ's Hiring Practices Are Politicized

The DOJ has also come under scrutiny for its politicized hiring of IJs. This is especially concerning because while other administrative adjudicators have the safeguards of the competitive examination process, IJ hiring does not.[78] Adopting merit-based appointment or hiring of IJs would require agencies to consider relevant hiring criteria, helping to limit agency ability to engage in "partisan hiring."[79]

In the immigration court context, there have been concerns regarding politicized hiring throughout various presidential administrations. During the Bush Administration, the DOJ engaged in politicized hiring of immigration judges in which a candidate's "political leanings" were evaluated.[80] During interviews, candidates were asked about their voting record and their views

76. Liptak, *supra* note 54.

77. *See* Hon. A. Ashley Tabaddor, *supra* note 6, at 6 ("This program appears designed to mask its true underlying purpose, which is to incentivize judges to issue more orders of deportation, faster, at the risk of losing their jobs.").

78. *See* Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1695, 1702-3 (2020). Agency adjudications are divided into two categories. The first category of agency adjudication is subject to the APA and is presided over by an Administrative Law Judge ("ALJ"). Until 2018, ALJs were subject to competitive examination process. The second category of adjudications are presided over by non-ALJs whose proceedings are not all subject to the APA. IJs are non-ALJs who are not hired through a competitive examination process and their proceedings are not subject to the APA. *See id*; *see also* Exec. Order No. 13843, 83 Fed. Reg. 32755 (July 10, 2018) (excepting ALJs from the competitive service).

79. *See* Barnett, *supra* note 78, at 1739 (explaining merit-based hiring helps ensure that the only factors considered in hiring are those "germane to the judge's ability to adjudicate fairly, efficiently and competently."). *See also*, Jaya Ramji-Nogales, et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 380 (2007) (providing that IJ candidates "should have to demonstrate [they] are sensitive to cultural differences and likely to treat all parties respectfully; capable of managing a large docket without becoming impatient; predisposed to be very careful in judging the credibility of people who claim to be victims of trauma or torture; and able to produce well-reasoned decisions that take into account all of the evidence and arguments presented by the parties.").

80. Gabriel Pacyniak, *Controversy Reemerges Over Hiring, Review of Immigration Judges*, 22 Geo. IMMIGR. L.J. 805, 807 (2008); *see also* Office of Inspector Gen. & Office of Pro. Resp., *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General*, DEP'T OF JUST. 103 (July 28, 2008), https://oig.justice.gov/sites/default/files/legacy/special/s0807/final.pdf [hereinafter Politicized Hiring by Monica Goodling] (detailing the methods of political screening used to hire IJs).

on immigration and other social issues.[81] Further, EOIR was prohibited from announcing IJ vacancies and candidates were solicited from the White House, who in turn solicited candidates from groups affiliated with the Republican party.[82] Recommendations were then forwarded to EOIR.[83]

By January 2020, three years into the Trump Administration, the DOJ appointed 237 IJs, which is more than the Obama Administration appointed in eight years.[84] As a result, there were concerns over politicized hiring practices, with one IJ applicant attributing withdrawal of a job offer by the Trump Administration to her "political ideology."[85] Senate Democrats also had similar concerns, warning that politicized hiring practices would not only undermine the independence of immigration courts, but also cause "lasting damage to public confidence in the immigration court system."[86]

In May 2020, documents detailing changes the Trump Administration made to the IJ hiring plan were brought to light.[87] Among the changes was a shortening of the hiring timeline, presumably to allow for faster hiring of politically desirable candidates.[88] The shortened timeline raised concerns

81. Pacyniak, *supra* note 80, at 806-7; *see also*, Politicized Hiring by Monica Goodling, *supra* note 80, at 104 (stating candidates were asked who they voted for, their political affiliation, and their views on the death penalty and abortion).

82. *See* Politicized Hiring by Monica Goodling, *supra* note 80, at 102-3. The White House solicited IJ candidates from the Republican National Lawyers Association, Republican National Committeemen, state and local Republican Party officials, the Federalist Society, and prominent Republicans. *See also* Pacyniak, *supra* note 80, at 806-807.

83. *See* Politicized Hiring by Monica Goodling, *supra* note 80, at 104 (reporting candidates were forwarded to EOIR after taking "political considerations into account.").

84. Catherine Kim & Amy Semet, *An Imperial Study of Political Control Over Immigration Adjudication*, 180 GEO. L.J. 579, 584 (2020).

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

86. *See* Sheldon Whitehouse et al., *Letter to Hon. William P. Barr*, U.S. SENATE 1 (Feb. 13, 2020), https://www.whitehouse.senate.gov/imo/media/doc/2020-02-13%20Ltr%20to%20AJ%20Barr%20re%20independence%20of%20immigration%20courts%20(004).pdf (writing to express "deep" concern that "the Trump administration is undermining the independence of immigration courts."); *see also* Joel Rose, *Senate Democrats Accuse Justice Department of Politicizing Immigration Courts*, NPR (Feb. 13, 2020), https://www.npr.org/2020/02/13/805657208/senate-democrats-accuse-justice-department-of-politicizing-immigration-courts (providing news coverage regarding concerns of politicized IJ hiring by the Trump administration).

87. *See* James McHenry III, *Memorandum for Attorney General*, AM. IMMIGRI. LAW. ASS'N 2-22 (Feb. 19, 2020), https://www.aila.org/EOIRHiringPlan (detailing the new IJ and appellate IJ hiring process).

88. *See id*. at 2 (shortening the time an IJ vacancy posting remains active and reducing the time allotted for interviewing candidates). *See also* Tanvi Misra, *DOJ Hiring Changes May Help Trump's Plan to Curb Immigration*, ROLL CALL (May 4, 2020), https://www.rollcall.com/2020/05/04/doj-hiring-changes-may-help-trumps-plan-to-curb-immigration (describing concerns that the new IJ hiring system will favor political hiring).

regarding the "rushing" of "preferred candidates" to create an "expedited, predetermined, ideologically-based, insider hiring" process. [89]

IJs hired under the Trump, Obama, and Bush administrations have also come from similar backgrounds, typically coming from prior employment at the former INS, DHS, or other offices within the DOJ.[90] This matters, in part, because there are great inconsistencies in the outcome of asylum cases,[91] which are just one category of immigration court proceedings with the potential for grave consequences—an incorrect ruling resulting in the denial of a claim and forced removal could send someone back to their country of origin to be tortured or killed.[92] Some of the differences in adjudication outcomes can be attributed to where a judge worked prior to becoming an immigration judge.[93] A study on factors affecting asylum outcomes found that judges who had prior DHS or INS experience only granted asylum 38.9 percent of the time, while those who did not granted asylum claims 48.2 percent of the time.[94] Judges who previously worked in a private firm, a non-profit organization, or had experience in academia also granted asylum at higher rates.[95]

Perhaps of even greater concern is the question of whether IJs impose their own "philosophical attitude" or skepticism about an applicant's testimony to cases under their consideration.[96] This question comes after the "central finding" of a study that found deportation in asylum cases to be "seriously influenced by the spin of a wheel" in that a clerk's random

89. *See* Misra, *supra* note 88.

90. Kim & Semet, *supra* note 84, at 579. Many of the Biden Administration's first seventeen IJ hires, some of which were selected by the Trump Administration, are prosecutors and former ICE attorneys. *See EOIR Announces 17 New Immigration Judges*, EOIR (May 6, 2021), https://www.justice.gov/eoir/file/1392116/download. The Administration also appointed 24 IJs in October 2021 and December 2021. *See EOIR Announces 22 Immigration Judges*, AM. IMMIGRI. LAW. ASS'N (Dec. 17, 2021), https://www.aila.org/infonet/eoir-announces-22-new-immigration-judges; see also *EOIR Announces 24 Immigration Judges*, EOIR (Oct. 27, 2021), https://www.justice.gov/eoir/page/file/1444911/download.

91. *See* Amanda Frost, *Deportation Without Disclosure: Immigration Court Needs Transparency*, BLOOMBERG L. (Feb. 23, 2021), https://news.bloomberglaw.com/us-law-week/deportation-without-disclosure-immigration-courts-need-transparency (highlighting disparities in asylum case outcomes by noting that some judges grant 60 percent of asylum cases while others deny every case they hear).

92. See 8 U.S.C. § 1101(a)(42) (defining "refugee"); *see also* 8 U.S.C. § 1158 (providing that an applicant must establish persecution based on one of the five protected classes: race, religion, nationality, membership in a particular social group, or political opinion); *see also*, Joel Rose & Marisa Peñaloza, *Denied Asylum, But Terrified To Return Home*, NPR (July 20, 2018) https://www.npr.org/2018/07/20/630877498/denied-asylum-but-terrified-to-return-home (describing the story of one asylum seeker escaping gang violence in Honduras).

93. Ramji-Nogales et al., *supra* note 79, at 346.

94. *Id*.

95. *Id*. (providing that judges having worked in nonprofits granted asylum at a rate of 55.4%; judges who worked in private firms granted asylum at a rate of 46.3%; and judges who worked in academia granted asylum at a rate of 52.3%).

96. *See id*. at 378.

assignment of a case to one immigration judge over another influenced whether asylum seekers could remain in the United States.[97] These findings provide support for the importance of a true merit-based hiring system, rather than one which imposes partisan and political hiring. However, because the Attorney General appoints IJs, it is unlikely that this can be achieved under the current system.

D. Political Pressure and Presidential Control

Presidential administrations[98] have also tried to influence immigration decisions both directly and indirectly.[99] In a 2018 news conference, President Trump stated "[w]e have to have a real border, not judges….We don't want judges, we want security at the border."[100] This implies that judges are not important and that case adjudication is not a priority; rather, the priority is having a "real" border to keep immigrants out of the United States.[101] On at

97. *See id*. (citing concerns that "an adjudicator's deviation by more than 50% from the mean rate for similar cases in that adjudicator's own office raises serious questions about whether the adjudicator is imposing his or her own philosophical attitude.").

98. For purposes of this paper, presidential administrations will include both the President and Attorney General. The Attorney General of the United States is chosen by the President and appointed with advice and consent of the Senate. This means that the President specifically choses an Attorney General who can carry out their duties in accordance with the President's policy initiatives.

99. IJs are subordinate to two executive branch officials. IJs are subordinate to the Attorney General, who is subordinate to the President; this makes an IJ indirectly subordinate to the President. *See* 8 C.F.R. § 1003.10(a) (providing IJs are appointed by the Attorney General and "shall act as the Attorney General's delegates in the cases that come before them."); *see also* 28 U.S.C. § 503 (providing that the President appoints the Attorney General through advice and consent of the Senate); *see For the Rule of Law, An Independent Immigration Court: Hearing Before the Subcomm. on Immigr. & Citizenship of the H. Comm. on the Judiciary*, 117th Cong. 4 (2022) (statement of Elizabeth J. Stevens, Member, Federal Bar Association) (stating "political influence means that [IJs] cannot ensure . . . decisions [are] made solely according to law.").

100. *See Breaking News Trump on Potential Judges: "Who Are These People?"*, CNN POLITICS, https://www.cnn.com/videos/politics/2018/06/19/donald-tump-immigration-judges-border-security-sot.cnn (last visited May 16, 2022).

101. *See* Brett Samuels, *Trump rejects calls for more immigration judges: "we have to have a real border, not judges"*, THE HILL (June 19, 2018), https://thehill.com/homenews/administration/393031-trump-rejects-calls-for-additional-immigration-judges-we-have-to-have ("ultimately, we have to have a real border, not judges"). This statement parallels the sentiments held by the Regan Administration in the 1980's regarding Haitian immigrants fleeing violence and persecution. In 1964 Haitian President Fracois Duvalier "declared himself President-for-Life." He controlled the country through "terror" until his son Jean-Claude Duvalier took over. The Duvaliers had one the "Western Hemisphere's worst human rights records." Jean-Claude Duvalier eventually left Haiti in 1986, leaving a "civilian, military junta," the National Council of Government, in control. *See* Carlos O. Miranda, *Haiti and the United States During the 1980s and 1990s: Refugees, Immigration and Foreign Policy*, 32 SAN DIEGO L. REV. 673, 673, n.5, 676, n.11 (1995). During this time, the United States saw an increase in Haitian migrants and entered into an interdiction agreement with Haiti's dictator, allowing the U.S. Coast Guard and former INS to stop and search vessels traveling by sea and check the immigration status of the passengers. Those without proper documentation were sent back to Haiti. "From 1981-1990, 22,940 Haitians were

least two occasions, Attorney General Sessions used authority granted under 8 C.F.R. § 1003.1(h)(1)(i) to refer cases to himself for review.[102] This led to at least one IJ being removed from office, in one case for delaying the deportation of a Guatemalan immigrant.[103] On March 7, 2018 Attorney General Sessions also reversed a ruling granting asylum to a Salvadorean woman who had been physically and emotionally abused by her ex-husband and told IJs that domestic abuse and gang violence were no longer sufficient grounds for asylum.[104] These statements and actions are especially concerning given the results of a study detailing the effect a sitting president can have on immigration adjudication.[105] The study suggests that the president in power at the time an IJ is appointed does not have influence over removal rates, but the president in power at the time an immigration case is adjudicated does.[106] In other words, political pressure by those who supervise IJs may also be a significant factor in removal rates.

Given the current state of the United States Immigration Court system, it is especially important to ensure that IJs are appointed and supervised by people who do not engage in prosecutorial functions. First and foremost, it is important to ensure that IJ appointments adhere to constitutional

interdicted at sea. Of this number, INS considered 11 Haitians qualified to apply for asylum." Ruth Ellen Wasem, *U.S. Immigration Policy on Haitian Migrants*, CONG. RSCH. SERV. 3 (Jan. 15, 2010), https://fas.org/sgp/crs/row/RS21349.pdf.

102. *See Matter of Castro-Tum*, 27 I&N Dec. 271, 272 (A.G. 2018*); see also*, *Matter of A-B*, 28 I&N Dec. 199 (A.G. 2021).

103. *See Matter of Castro-Tum*, *supra* note 102, at 272. The case was decided by Attorney General Sessions on May 17, 2018, through authority granted by 8 C.F.R. § 1003.1(h)(1)(i) after he requested to review the case. The case involved a man who came to the United States as a 17-year-old unaccompanied minor. *Id*. *See also*, Jeff Gummage, *Immigration Judges File Grievance Over Justice Dept.'s Removal of Philly Jurist Who Delayed Man's Deportation*, THE PHILA. INQUIRER (Aug. 8, 2018), https://www.inquirer.com/philly/news/immigration-judges-association-grievance-philadelphia-steven-morley-removal-deportation-case-20180808.html (stating when the judge on the case tried to ensure the non-citizen had been "properly notified" to appear in court, a replacement judge was sent to take over the proceedings ordering the non-citizen deported "without further inquiry." The DOJ also removed approximately 60 cases from the judge's docket.).

104. *See Matter of A-B-*, 27 I&N Dec. 316, 320-21 (A.G. 2018) (vacating the BIA's decision and remanding the case before an IJ); *see also* Jeff Gummage, *Immigration judges accuse DOJ of undermining a Philadelphia judge's authority*, PITT. POST-GAZETTE (Aug. 8, 2018), https://www.post-gazette.com/news/state/2018/08/08/Immigration-judges-accuse-DOJ-undermining-independence-authority-steven-morley-philadelphia/stories/201808080134. In *Matter of A-B-*, Attorney General Sessions also stated that *Matter of A-R-C-G*, which established "married women in Guatemala who are unable to leave their relationship" as a particular social group, was incorrectly decided. *Matter of A-B-*, 27 I&N Dec. at 346. Attorney General Garland has since vacated *Matter of A-B*, directing IJs to follow previous precedent including *Matter of A-R-C-G*. *Matter of A-B,* 28 I &N Dec. 307 (A.G. 2021). *See Matter of A-R-C-G*, 26 I&N Dec. 388 (BIA 204).

105. *See* Kim & Semet, *supra* note 84, at 622-23, 630.

106. *Id*. Explaining that IJ decisions "do not discernably differ based on which President appointed them," but IJs regardless of their appointment were more likely to order deportation during the Trump administration. Although the study cannot confirm what the precise cause of this is, the results suggest that IJs "decided cases differently during different presidential eras." *Id*.

requirements. Yet, it is equally important to ensure that the current method of appointment guarantees hearings are being conducted by impartial adjudicators because justice is undermined by even the perception, real or not, that adjudicators are not impartial.[107]

PART II: THE APPOINTMENTS CLAUSE AND IJ APPOINTMENT

A. The Appointments Clause: Are IJ Appointments by the Attorney General Constitutional?

The Appointments Clause of the U.S. Constitution designates the procedures for appointing two different classes of officers.[108] First, it designates the procedures for appointing principal officers who are selected by the President, with the advice and consent of the senate.[109] Second, it designates the procedures for appointing inferior officers who may be appointed by either the President alone, the Courts of Law, or the Heads of Departments.[110] IJs are appointed by the Attorney General of the United States.[111] If IJs are inferior officers under the Appointments Clause then their appointment by the Attorney General is constitutional.[112] This would mean that the nation's chief prosecutor, who is the head of the DOJ, and is appointed by the President of the United States, can constitutionally appoint IJs.[113]

To determine whether IJs are constitutionally appointed there are two issues to resolve. First, whether IJs are officers (vs. employees[114]), and if so, what type of officers they are (principal or inferior).[115] Second, whether their

107. *See* Rosenfield, *supra* note 6, at 171 ("The fact that all of the quasi-judicial proceedings are conducted by personnel who are subject to appointment by the Attorney General may raise some doubt in the minds of respondents as to the complete impartiality of the hearings…").

108. *See* U.S. CONST. art. II, § 2, cl. 2 (stating "…. and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the [S]upreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: *but the Congress may by Law vest the Appointment of such Inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments*.") (emphasis added).

109. *See id.*; *see also Morrison v. Olson*, 487 U.S. 654, 670 (1988).

110. *See* U.S. CONST. art. II, § 2, cl 2.

111. *See* 8 C.F.R. § 1003.10(a) (describing appointment of IJs by the Attorney General).

112. *See* U.S. CONST. art. II, § 2, cl. 2 (providing the procedure for appointing inferior officers, "Congress may vest the Appointment of …inferior officers… in the President alone, in the Courts of Law, or in the *Heads of Departments*." (emphasis added); *see also* 28 U.S.C. § 503 (providing that "[t]he Attorney General is the head of the Department of Justice.").

113. *See id.*

114. *See Lucia*, 138 S. Ct. at 2051 ("For if that is true, the Appointments Clause cares not a whit about who named them"). Explaining that non-officer employees are not appointed under the Appointments Clause. *See id*.

115. *See Edmond*, 520. U.S. at 660-62.

appointment by the Attorney General of the United States is constitutional.[116] The Supreme Court has decided cases under the Appointments Clause, [117] but it has not specifically addressed whether IJs are officers, what kind of officers they are, or whether they are constitutionally appointed.[118] However, the Ninth Circuit has addressed the issue twice, in *Hurtado v. Barr* and *Ramirez v. Barr*, yielding unpublished opinions in both cases.[119]

a. Officers Under the Appointments Clause

To determine whether someone is an officer of the United States, there are two questions. First, does the appointee hold a continuing or permanent office?[120] Second, does the appointee exercise "significant authority pursuant to the laws of the United States?"[121] If an appointee holds continuing office and exercises significant authority, they must be appointed in a manner consistent with the Appointments Clause.[122]

Although the Court has not explicitly defined "significant authority," it has determined that the Tax Court's Special Trial Judges (STJs) (in *Freytag v. Commissioner*) and the Securities and Exchange Commission's (SEC) Administrative Law Judges (ALJs) (in *Lucia v. SEC*) exercise significant authority.[123] In *Freytag*, the Court found that STJs exercise significant

116. *See id.*

117. For example, *see Morrison*, 487 U.S. at 673 (discussing the appointment of Special Inquiry Officer Alexia Morrison); *see also Buckley*, 424 U.S. at 143 (addressing whether the appointment of FEC members by the heads of the two houses of Congress was constitutional); see also *Freytag*, 501 U.S. at 881 (addressing the appointment of the Tax Court's special trial judges); see also *Lucia*, 138 S. Ct. at 2052 (addressing the appointment of the SEC's administrative trial judges; *see also U.S. v Arthrex, Inc.*, 141 S. Ct. 1970, 1988 (2021) (addressing the appointment of the Patent and Trademark Office's administrative patent judges).

118. In *Arthrex*, the Court in dicta listed IJs as an example of inferior officers who are appointed by heads of departments and are supervised by a principal officer who has discretion to review their decisions. *Arthrex*, 141 S. Ct. at 1984.

119. *Hurtado v. Barr*, 817 F. App'x 310, 313 (9th Cir. 2020), *cert. denied* (discussing whether IJs are constitutionally appointed); *see Ramirez v. Barr*, 814 F. App'x 259, 265 (9th Cir. 2020) (discussing whether IJs are constitutionally appointed).

120. *States v. Germaine*, 99 U.S. 508, 511-12 (1879) (holding civil surgeons were not officers because their duties were occasional or temporary instead of continuing or permanent."); *see also Lucia*, 138 S. Ct. at 2052 (citing *Germaine*).

121. *Buckley*, 424 U.S. at 124, 126 (determining the line between an officer and non-officer is the "exercis[e] of significant authority pursuant to the laws of the United States.").

122. *See id.*

123. *See Freytag*, 501 U.S. at 881-82 (finding the Tax Court's STJ's exercise significant authority); *see also Lucia*, 138 S. Ct. at 2052-56 (finding the SEC's ALJs exercise significant authority); *see also id.* at 2056 (J. Thomas, concurring) ("while precedents like *Freytag* discuss what is sufficient to make someone an officer of the United States, our precedents have never really described what is necessary"). In *Arthrex* the Court does not fully reach the issue of whether administrative patent judges are officers. Instead, the Court notes the parties do not dispute the issue, and the Court agrees they are officers because they exercise significant authority by issuing patent decisions. 141 S. Ct. at 1980.

authority because they take testimony, conduct trials, rule on the admissibility of evidence, have the power to issue final decisions in at least some cases, and have the power to enforce compliance with discovery.[124] More recently in *Lucia*, the court reaffirmed the principles described in *Freytag* by comparing the SEC's ALJs to the Tax Court's STJs, stating that they are "near carbon copies" of each other.[125] In doing so, the majority stated that SEC ALJs exercise significant authority because they take testimony, conduct trials, rule on admissibility of evidence, and enforce discovery orders.[126]

Regarding a judge's power to enforce discovery orders, the *Lucia* Court explicitly states it is not limited to holding parties in contempt or punishment through fines.[127] This elaborates on *Freytag*, which only required "the general power to enforce compliance with discovery orders" and did not require "any particular means of doing so."[128] The majority remarked that "a judge who will, in the end, issue an opinion with factual findings, legal conclusions, and sanctions has substantial informal power to ensure the parties stay in line."[129] This reinforces that the power to enforce discovery orders is broad, and most, if not all, administrative judges wield it in some capacity.[130] Therefore, under the Appointment's Clause, an Officer of the United States is someone who holds a continuing or permanent position and exercises significant authority pursuant to the laws of the United States.

b. Principal and Inferior Officers Under the Appointments Clause

Determining if someone is an Officer of the United States is only the threshold question. The next step is to determine what type of officer they

124. *Freytag*, 501 U.S. at 881. The Court explained that STJs were officers in part because they had the authority to issue final decisions in at least some cases, specifically those arising under 26 U.S.C. § 7443A(b)(1), (2), and (3). Because STJs could issue final decisions in cases arising under those sections, they were inferior officers under the Appointments Clause. *Id*.

125. *Lucia*, 138 S. Ct. at 2052. There are two types of adjudicators that preside over agency proceedings, Administrative Law Judges (ALJs) and non-ALJs adjudicators. Although the standard in *Lucia* specifically focuses on SEC ALJs, it has implications for non-ALJ adjudicators, such as immigration judges, who have similar power and authority to the ALJs at issue in *Lucia*. *See* Judge Michael Devine, Judge Erin Wirth, *ALJ Independence Under the Federal Administrative Procedure Act in the Wake of the Supreme Court's Decision in Lucia v. SEC*, 58 JUDGES' J. no. 2, 6, 8 (2019).

126. *Lucia*, 138 S. Ct. at 2053. The Court explains that in taking testimony, SEC ALJs examine witnesses at hearings and take prehearing depositions. In conducting trials, they administer oaths, rule on motions, determine the course of the hearing and the conduct of parties and counsel. They also have the power to rule on the admissibility of evidence, thus shaping the administrative record and lastly, they have the power to enforce discovery orders. *Id*.

127. *Id*. at 2054. The STJs in Freytag had the power to punish through fines or imprisonment but SEC ALJs had less power to sanction misconduct.

128. *See id*.

129. *Id*.

130. *See id.*

are. In *Edmond v. United States*, the Court examines the difference between inferior and principal officers. There, the Court explains that being an inferior officer "connotes a relationship with some higher-ranking officer and officers below the President" and that "whether one is an inferior officer depends on whether he has a superior."[131] The Court explained that if someone's work is supervised and directed at some level by others who were appointed by a Presidential appointee that was confirmed through the advice and consent of the Senate, then they are considered inferior officers.[132] The court also found it "significant" that the Court of Criminal Appeal Judges discussed in *Edmond* had "no power to render a final decision [in their cases] unless permitted to do so by other Executive officers." [133]

Later, in *United States v. Arthrex*, the Court reaffirmed and elaborated the rule from *Edmond*, explaining that the Director of the Patent and Trademark Office (PTO) who supervises and directs the work of administrative patent judges (APJs) must have the "discretion" to review their decisions. There, the Court addressed the appointment of APJs from the PTO who Congress designated as inferior officers appointed by the Secretary of Commerce.[134] Because they are inferior officers, their appointment by the Secretary of Commerce was constitutional, but the scope of their powers as inferior officers was not because their decisions were insulated from review by their director.[135] The Court found this unconstitutional because the President cannot oversee APJs himself "nor can he attribute the Board's failings to those whom he can oversee."[136] Thus, inferior officers must have their work directed and supervised by a principal officer (appointed by the President with the advice and consent of the Senate) and their decisions must also be reviewable by a principal officer.[137]

131. *Edmond*, 520. U.S. at 653-54, 662, 666. In *Edmond*, the Court addressed whether the Secretary of Transportation could constitutionally appoint civilian members of the Coast Guard Court of Criminal Appeals. Petitioners argued the judge who convicted them was unconstitutionally appointed by the Secretary of Transportation because they were principal officers that must be appointed by the President with advice and consent of the Senate. The Court found the Coast Guard Court of Criminal Appeals judges were inferior officers and therefore their appointment by the Secretary of Transportation was constitutional. *Id*.

132. *Id*. at 663.

133. *Id*. at 665; *see also Arthrex*, 141 S. Ct. at 1981 (citing *Edmond*).

134. *Arthrex*, 141 S. Ct. at 1980.

135. *Id*. at 1981.

136. *Id*. at 1982. *Arthrex* and *Edmond* both recognize the Appointments Clause as a "significant structural safeguard" to preserve political accountability. Political accountability is preserved "through direction and supervision" of subordinates. *Id*.

137. It is important to note that *Arthrex* does not require that all decisions be reviewed, only that there be discretion to review them. *Id*. at 1988.

c. Principal and Inferior Officers Are Appointed Through Separate Procedures

The Appointments Clause provides the procedure for appointing both principal and inferior officers.[138] If someone is a principal officer, they must be appointed by the President, with the advice and consent of the Senate.[139] If someone is an inferior officer, they may be appointed either by the President alone, the Courts of Law, or the Heads of Departments.[140] In *Freytag*, because the STJs were found to be inferior officers, their appointment by the Chief Tax Judge was constitutional because it was considered a Court of Law under the Appointments Clause.[141] Similarly, in *Edmond* the Judge of the Coast Guard Court of Criminal Appeals was found to be an inferior officer who was constitutionally appointed by the Secretary of Transportation.[142] In *Lucia* however, the Court found SEC ALJ appointment offended the Appointments Clause, because as inferior officers SEC ALJs could not be appointed by the commission's staff.[143]

B. IJs are Constitutionally Appointed Inferior Officers

Under 8 C.F.R. § 1003.10, IJs are "attorneys" appointed by the Attorney General as administrative judges in the Office of the Chief Immigration Judge.[144] IJs "conduct specified classes of proceedings, including hearings under section 240 of the [Immigration and Nationality] Act."[145] IJ proceedings include: deportation, exclusion, removal, recission, and bond

138. *See* U.S. CONST. art. II, § 2, cl. 2; *see also Morrison*, 487 U.S. at 670.

139. U.S. CONST. art. II, § 2, cl. 2.

140. *Id*.

141. *Freytag*, 501 U.S. at 890-92. There was a five-to-four split regarding whether the Tax Court as an Article I court and could exercise the appointment power because it was a "Court of Law" or because it was a "Head of Department" under the Appointments Clause. See U.S. CONST. art. II, § 2, cl. 2. The majority found the Tax Court was not an executive department and thus the Chief Tax Judge could not exercise the appointment power as a "Head of Department." *Freytag*, 501 U.S. at 891. The Court explained that "Courts of Law" under the Appointments Clause does not only include Article III courts because the judicial power of the United States can also be exercised by Article I Courts. *Id.* at 889; *American Insurance Co. v. Canter*, 1 Pet. 511, 546 (1828) (stating judicial power can be exercised by legislative courts); *Williams v. U.S.*, 289 U.S. 553, 565-67 (1933) (same). Thus, the Tax Court is considered a "Court of Law" for purposes of the Appointments Clause. *Freytag*, 501 U.S. at 891. The concurring opinion disagreed, noting that the Tax Court was a department within the executive branch and the Chief Judge was its head. *Id*. at 901. (J. Scalia, concurring in part). See, Theodore B. Olson, *Separation of Powers and the Supreme Court: Implications and Possible Trends*, 6 ADMIN. L.J. AM. UNIV. 266, 270 (1992) (discussing the debate among the Court in *Freytag*).

142. *Edmond*, 520 U.S. at 666.

143. *Lucia*, 138 S. Ct. at 2055.

144. 8 C.F.R. § 1003.10(a).

145. *Id*.

hearings.[146] In removal proceedings, IJs determine whether a non-citizen should be allowed to enter the country or whether they should be removed.[147] In doing so, IJs may consider various forms of relief, such as asylum, cancellation of removal, adjustment of status, or voluntary departure.[148] An IJ's powers and duties include exercising independent judgment and discretion, administering oaths, receiving evidence, and interrogating and cross examining non-citizens and witnesses.[149] They may also issue subpoenas for witnesses and evidence.[150] An IJ's decision is administratively final unless it is appealed or certified to the board or review is requested by the Attorney General.[151]

a. IJs Exercise Significant Authority, Serve on an Ongoing Basis, and Are Supervised by a Higher-level Official Who Has the Discretion to Review Their Decisions

First, the Tax Court's STJs in *Freytag* were found to exercise significant authority during the course of their duties because they take testimony, rule on the admissibility of evidence, have the power to issue final decisions in at least some cases, and have the general power to enforce compliance with discovery.[152] In *Lucia*, the Court found that SEC ALJs exercise significant authority because they also take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce discovery orders.[153] The *Lucia* Court also stated that contempt power is not needed in order to meet the requirement of enforcing compliance with discovery orders, because only a general power to do this is needed.[154]

146. *See id.*; *see also* 8 U.S.C. § 1229a (governing removal proceedings); *see also Immigration Judge Job Posting*, EOIR (June 15, 2020), https://www.justice.gov/legal-careers/job/immigration-judge-13 (stating immigration judges preside in "formal, quasi-judicial hearings" which require them to "exercise independent judgement in reaching final decisions.").

147. *See* 8 U.S.C. § 1229a(a)(3) ("a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States, or if the alien has been admitted, removed from the United States."); *see also Functions Manual EOIR*, *supra* note 39.

148. *See* 8 U.S.C. § 1229a(c)(4) (providing the burden of proof the non-citizen must meet to be granted relief); *see also*, *Functions Manual EOIR*, *supra* note 39.

149. 8 C.F.R. § 1003.10(b); 8 U.S.C. § 1229a(b)(1).

150. *Id*.

151. *Functions Manual EOIR*, *supra* note 39; *see also* Marks, *supra* note 6, at 7 (stating in fiscal year 2006, approximately 90% of IJ decisions became final orders); *see also* Hon. Mimi Tsankov, *supra* note 60, at 3 (stating in 2021 94% of IJ decisions were final and unreviewed); *see also* 8 C.F.R. § 1003.1(h)(1)(i) (Providing "the board shall refer to the attorney general for review of its decision all cases that: the attorney general directs the board to refer to him.").

152. *Freytag*, 501 U.S. at 881.

153. *Lucia*, 138 S. Ct. at 2053.

154. *See id.* at 2054 (noting *Freytag* only requires a general power to enforce discovery orders).

In both *Hurtado v. Barr* and *Ramirez v. Barr*, the Ninth Circuit, following the logic in *Freytag*, *Lucia*, and *Edmond*, concluded that IJs are inferior officers who are constitutionally appointed by the Attorney General of the United States.[155] First, the court concluded IJs are officers rather than employees because "they are adjudicative officials who exercise significant authority."[156] Second, the court found that they are inferior rather than principal officers because they are "subject to both judicial and managerial supervision."[157] Third, the court noted that IJ appointments do not offend the Appointments Clause because IJs are appointed by the Attorney General with authority granted by Congress.[158]

Similar to the Tax Court's STJs and the SEC's ALJs in *Freytag* and *Lucia*, respectively, IJs take testimony, conduct trials, rule on the admissibility of evidence, and enforce discovery orders.[159] However, IJs are most similar to *Lucia's* SEC ALJs, who have "less capacious power to sanction misconduct," while their STJ counterparts in *Freytag* could punish contempt through fines and imprisonment.[160] Presently, IJs do not have contempt authority, even though it was mandated by Congress in 1996.[161] But as the majority noted in *Lucia*, all that is needed to exercise significant authority is the general power to enforce discovery orders, and this task is not limited in scope to holding parties in contempt.[162] Thus, IJs exercise significant authority pursuant to the laws of the United States.[163]

Next, IJs are inferior rather than principal officers because they are appointed to a continuing office; judgeships are not temporary as evidenced by the distinction between "temporary IJs" and "IJs" in 8 C.F.R. § 1003.10(a)

155. *Hurtado*, 817 Fed. App'x at 313 (unpublished opinion). *Ramirez*, 814 Fed. App'x at 264 (unpublished opinion).

156. *Hurtado*, 817 Fed. App'x at 313 (unpublished opinion) (citing *Lucia* and *Freytag*). *Ramirez*, 814 Fed. App'x at 264 (unpublished opinion) (citing *Lucia* and *Freytag)*.

157. *Id*. (citing *Edmond* to distinguish between inferior and principal officers).

158. *Hurtado*, 817 Fed. App'x at 313. Both *Hurtado* and *Ramirez* were decided prior to *Arthrex*, but because IJ decisions are subject to review by the Attorney General, it is likely IJs would have been found to act within the scope of permissible power for inferior officers.

159. 8 C.F.R. § 1003.10(b) (providing IJ powers and duties); *see also* 8 U.S.C. § 1229a(b)(1) (providing IJ authority in removal proceedings); *see also Immigration Judge Job Posting*, *supra* note 146 (stating that immigration judges preside in "formal, quasi-judicial hearings" which require them to "exercise independent judgement in reaching final decisions."); *see also Hurtado*, 817 Fed. App'x at 313 (finding IJs are inferior officers); *see also Ramirez*, 814 Fed. App'x at 264 (finding IJs are inferior officers).

160. *See Lucia*, 138 S. Ct. at 2054; *see also Freytag*, 501 U.S. at 891 (stating STJs have the power to punish contempt through fines and imprisonment); *see also* Marks, *supra* note 6, at 10 (stating IJs do not have contempt authority).

161. *See* Marks, *supra* note 6, at 10. *See also* Hon. A. Ashley Tabaddor, *supra* note 6, at 3 (stating DHS has blocked the DOJ from promulgating regulations that would allow IJs to have contempt power even though Congress gave IJs this authority over 20 years ago). Additionally, a bill was recently introduced in the House of Representatives that would give IJs contempt authority. *See* Empowering Immigration Courts Act, H.R. 1121, 117th Cong. (2021).

162. *Lucia*, 138 S. Ct. at 2054.

163. *See id*.

and (e).[164] And finally, IJs have a superior that was appointed by the President.[165] IJs are subject to supervision by the Attorney General of the United States, who may review their decisions, and they act under the Attorney General's delegated authority.[166] The Attorney General is the head of the DOJ, a "Head of Department" under the Appointments Clause.[167] Therefore, because IJs are inferior officers, they are constitutionally appointed by the Attorney General of the United States. [168]

Although the current method of IJ appointment is constitutional, it creates concerns regarding the real and perceived impartiality of IJs. IJs are ultimately subordinate to "prosecuting officials" who appoint, supervise, and rate their performance.[169] This method of appointment implicates more than the Appointments Clause of the Constitution; it implicates the Separation of Powers principal because executive and judicial *functions* are combined within an agency. This exposes impartial adjudication to law enforcement priorities, pressure, and influence.[170]

C. Separation of Powers and the Appointments Clause

The Appointments Clause is "more than a matter of etiquette or protocol,"[171] and must be seen as a "structural safeguard of the constitutional scheme."[172] In drafting the Constitution, the framers knew that a separation

164. *See* 8 C.F.R. § 1003.10(a), (e) (making a distinction between IJs and "temporary immigration judges" who serve in renewable terms that may not exceed six months). In January 2022, testimony before the Subcommittee on Immigration and Citizenship, House Judiciary Committee, explained because IJs do not have a fixed term of office, they can be removed at the discretion of the Attorney General. This undermines public confidence in the impartiality and independence of IJs. Grisez, *supra* note 4, at 2.

165. *See* 8 U.S.C. § 1003.10(a) (stating that immigration judges are administrative judges appointed by the Attorney General); *see also* 28 U.S.C. § 503 (stating the Attorney General is appointed by the President with the advice and consent of the Senate).

166. *See* 8 C.F.R. § 1003.10 (stating IJs "shall act as the Attorney General's delegates in the cases that come before them."). *See also* 8 C.F.R. §1003.1(h)(1)(i) stating cases requested by the Attorney General must be referred to them for review.

167. *See* 28 U.S.C. § 503 (stating Attorney General is the head of the DOJ); *see also* U.S. CONST. art. II, § 2, cl. 2 (providing that inferior officers can be appointed by the Heads of Departments); *see also DOJ Organizational Chart*, *supra* note 13 (providing a visual representation of the DOJ structure with the Attorney General as the Head of the Department).

168. *Hurtado*, 817 F. App'x at 313; *see also* Jennifer L. Cotton, *If Established by Law, Then an Administrative Judge is an Officer*, 53 GA. L. REV. 309, 331 (2018) (arguing that the test for whether a non ALJ adjudicator is an officer should be whether their position is established by law). There, the author notes that IJs are officers under the established by law test because their position is established by law in 8 U.S.C § 1229a(a)(1). *Id*.

169. Rosenfield, *supra* note 6, at 172 ("it is straining at human nature to expect true independence from the special inquiry officer [IJ] whose career and future advancement is still completely in the hands of enforcement officials.").

170. *Id*. at 175.

171. *Edmond*, 520 U.S. at 660.

172. *Id*.

of power among the three branches of government was essential and that the legislative, executive, and judicial functions must be "separate and distinct" from one another.[173] The framers understood that if the power of judging were joined with the legislative power, the judge would become the legislature.[174] Similarly, if the power of judging were joined with the executive power, the judge would become law enforcement.[175]

The Appointments Clause serves a Separation of Powers function because it vests the power to select principal officers exclusively in the President, which prevents congressional encroachment in this task.[176] This keeps the selection of principal officers within the executive branch. Then the Senate, or the legislative branch, is tasked with confirming those principal officers chosen by the President.[177] Inferior officers are appointed by a different process only requiring the President alone, Courts of Law, or Heads of Departments to appoint.[178] The appointment of inferior officers can also serve an important Separation of Powers function by keeping the functions

173. *Buckley*, 424 U.S. at 120 (using Montesquieu's "well known maxim" to discuss the purpose of Separation of Powers within the United States Constitution). *See also* Black's Law Dictionary defining separation of powers as "the division of governmental authority into three branches of government – legislative, executive, and judicial– each with specified duties on which neither of the other branches can encroach." *Separation of Powers*, BLACK'S LAW DICTIONARY (11th ed. 2019). Separation of Power is thought to protect "individual liberty by allocating particular governmental powers to specific branches." Eric M. Freedman, *Habeas Corpus in three dimensions dimension III: Habeas Corpus as an instrument of Checks and Balances*, 8 NE. UNIV. L.J. 251, 253 (2016). *See also* Anthony R. Enriquez, *Structural Due Process in Immigration Detention*, 21 CUNY L. REV. 35, 37 (arguing that the current immigration court system which consolidates "jailer and judge" within the executive branch offends due process requirements in immigration detention cases).

174. *Buckley*, 424 U.S. at 120.

175. *Id.* (quoting Montesquieu "[w]ere the power of judging … to be joined to the executive power, the judge might behave with all the violence of the oppressor."); *see also J.W. Hampton, Jr. & Co. v. U.S.*, 276 U.S. 394, 406 (1928) ("the rule is that in the actual administration of the government, Congress or the Legislature should exercise the legislative power, the President… the executive… and the Courts or the judiciary the judicial power.").

176. *Edmond*, 520 U.S. at 659.

177. *Id.* at 659-60. For the government to function effectively, the branches must also be interdependent. *Buckley*, 424 U.S. at 160 (quoting Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co v. Sawyer*, "while the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."); *see also Buckley*, 424 U.S. at 160 (explaining that to appoint principal officers the executive and legislative branch must work together). The Framers believed the President would be less vulnerable to pressure and favoritism than would a "collective body," but they also acknowledged the dangers of leaving the appointment power unguarded. *Edmond*, 520 U.S. at 660. Thus, The Appointments Clause requires the executive and legislative branches to work together when appointing principal officers. *Id*.

178. *Edmond*, 520 U.S. at 660; *see also* U.S. CONST. art. II, § 2, cl. 2 (detailing the procedure for appointing inferior officers).

of the three branches separate by allowing agency judges, who are inferior officers, to be appointed by "Courts of Law." [179]

The goal of the Separation of Powers principle was to protect against "tyranny," which today might be better understood as a guard against unfairness.[180] Yet administrative agencies do not follow the Separation of Power principal because they combine government functions of the legislative, judicial, and executive branches.[181] The immigration court system and the DOJ encompass both quasi-judicial roles and law enforcement functions, creating overlap between the judicial and executive roles which operate within the agency. The APA was passed to protect against the unfairness that can result when governmental functions are combined.[182] Despite this, Congress and the Supreme Court have said the APA does not apply in deportation proceedings.[183] Without these protections, the appointment power becomes an increasingly important tool to maintain Separation of Powers. IJs should be appointed by a neutral party, such as a separate immigration court system, that can provide a constitutional appointment scheme that is not controlled by a prosecutorial or law enforcement body. To ensure impartial and independent adjudication, IJs should be appointed by a Court of Law, similarly to the Tax Court's STJs in *Freytag*.[184] For this to occur, an Article I Immigration Court, like the United States Tax Court, should be created.

179. *See* Karen M. Sams, *Out of the Hands of One: Toward Independence in Immigration Adjudication*, 5 ADMIN. L. REV. ACCORD 85, 108 (2019) ("[b]ecause the [attorney general] is the head of law enforcement officer tasked with implementing the policies of the President, the position is inherently at odds with the responsibilities of an impartial [and] neutral arbitrator …". See U.S. CONST. art. II § 2, cl. 2 (providing that for inferior officers Congress can vest the appointment power in the President alone, Courts of Law, or Heads of Departments).

180. Suzanne Antley, *The "Appearance of Fairness" Versus "Actual Unfairness": Which Standard Should the Arkansas Courts Apply to Administrative Agencies?*, 16 UNIV. OF ARK. LITTLE ROCK L. REV. 587, 592 (1994).

181. *See id*. at 606 (quoting Representative Oates during a congressional debate over the creation of the Interstate Commerce Agency, "I believe it is absolutely unconstitutional and void, because to my mind it is a blending of the legislative, the judicial, and perhaps the executive powers of the government in the same law."); *see also* Sams, *supra* note 179, at 107-8 (explaining "[a]dministrative law is commonly adjudicated from within an agency precisely because the agency head is a policymaker who can oversee adjudications and ensure that policies of the agency are consistently applied.").

182. *See* 5 U.S.C. § 554(d) ("[a]n employee or agent engaged in the performance 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. . ."); *see also* Antley, *supra* note 180, at 607 (stating the APA was enacted to prevent unfairness in agency adjudications); *see also* Sams, *supra* note 179, at 106 (stating without the protections of the APA judicial independence is rendered optional).

183. Supplemental Appropriation Act of 1951, *supra* note 9 (establishing APA does not apply to deportation proceedings); *see also Marcello*, 349 U.S. at 306 (establishing APA does not apply to deportation proceedings).

184. *See Freytag*, 501 U.S. at 891.

PART III: PROPOSED SOLUTION: ARTICLE I COURT[185]

Creating a separate Article I Immigration Court is the best way to ensure judicial independence and impartiality in immigration adjudication and guarantee a method of appointment that conforms to both the Appointments Clause and the Separation of Powers principal.[186] The new immigration court system should have two parts: an appellate level court[187] and a trial level court.[188] This would allow the Immigration Court to follow an appointment structure similar to the Tax Court with appellate level IJs being appointed by the President with advice and consent of the Senate, just like the Tax Court's judges.[189] IJs operating at the trial level could be appointed like the Tax Court's STJs are − by higher level judges.[190]

185. *See Final Report and Recommendations of the Select Commission on Immigration and Refugee Policy with Supplemental Views by Commissioners*, U.S. IMMIGR. POL'Y AND THE NAT'L INT. 248-50 (Mar. 1, 1981), https://files.eric.ed.gov/fulltext/ED211612.pdf (recommending that an Article I Immigration Court be created). Legislation to establish an Article I immigration Court was also introduced in the House of Representatives in the later 1990s. *See* United States Immigration Court Act of 1999, H.R. 185, 106th Cong. (1999); United States Immigration Court Act of 1998, H.R. 4107, 105th Cong. (1998); United States Immigration Court Act of 1996, H.R. 4258, 104th Cong. (1996). More recently, advocates have also expressed support for an independent Article I immigration Court. *See Advocates Call on Congress to Establish an Independent Immigration Court*, AM. IMMIGR. LAW. ASS'N (Feb. 18, 2020), https://www.aila.org/advo-media/aila-correspondence/2020/advocates-call-on-congress-establish-independent (signed by 54 organizations). *National Association of Immigration Judges Letter to Congresswoman Zoe Lofgren* (Dec. 14, 2020), https://www.naij-usa.org/images/uploads/publications/2020.12.14.00.pdf (signed by 125 organizations).

186. The United States Immigration Court should be modeled after the United States Tax Court. This would ensure that an IJs functions are not combined with prosecutorial functions. Under 26 U.S.C § 7441, "the members of the Tax Court shall be the chief judge and the judges of the Tax Court. The Tax Court is not an agency of and shall be *independent of the Executive Branch* of the Government." (emphasis added). *See* 26 U.S.C. § 7441. *See also* Marks, *supra* note 6, at 15 (recommending a separate Article I Immigration Court instead of an independent agency that would keep the immigration court within the Executive Branch).

187. This would replace what is currently known as the BIA. *See* H.R. 4107, *supra* note 185 (proposing appellate level IJs be appointed by the President, by and with consent of the Senate).

188. *See id*. (proposing a separate immigration court system with an appellate division and trial division).

189. *See* 26 U.S.C. § 7443(b) ("judges of the Tax Court shall be appointed by the President, by and with advice and consent of the Senate). *See also* H.R. 4107, *supra* note 185 (proposing the Chief Immigration Appeals Judge and other immigration appeals judges be appointed by the President by and with advice and consent of the Senate.). *See* Stevens, *supra* note 99, at 8 (proposing that appellate level IJs could be appointed by the President by and with advice and consent of the Senate, and they in turn could appoint trial division judges).

190. *See* 26 U.S.C. § 7443(A)(a) (providing the chief judge appoints STJs); *see also* H.R. 4107, *supra* note 185 (proposing the trial level chief immigration judge and other IJs be appointed by the Chief Immigration Appeals Judge). This method of appointment was found to be constitutional because STJs are inferior officers. Under the framework the Court has provided it is likely that IJs would also be considered inferior officers. *See Freytag*, 501 U.S. at 882 (finding STJs

Some may argue that because the current method of IJ appointment is constitutional, there is no need to change it. This conclusion ignores the purpose of the Appointments Clause. The Framers "embedded" the Separation of Powers principle within the Appointments Clause to avoid the commingling of functions of the legislative branch or the executive branch with the functions of judging.[191] Administrative agencies violate Separation of Powers, which is why the APA was enacted, in part, to ensure fair and impartial agency adjudication. Yet, the APA does not apply to insulate IJs from prosecutorial control in deportation proceedings where the stakes are high, and people can be separated from their families or sent back to their country of origin to face persecution, torture, or death. But IJ appointment by a Chief Appellate Immigration Judge within a separate Article I Immigration Court can ensure that IJs are appointed by other judges, thereby limiting prosecutorial control by way of appointment. [192] It would also conform to the Separation of Powers principle because adjudicatory functions and control of those functions would belong to higher level judges.

Those against a separate Immigration Court system might also argue this method of appointment will not free IJs from political pressure or control. But the goal should not be to limit all political pressure, but rather to insulate IJs within a court system where they are not under prosecutorial control.[193] Appointment under an Article I Court would allow the President to appoint a Chief Appellate Immigration Judge who then in turn would appoint each individual IJ.

An Article I Immigration Court has also been proposed by judges, scholars, non-governmental agencies, and various bar and professional associations to solve a myriad of other immigration court problems.[194] This

are inferior officers); *see also Hurtado*, 817 Fed. App'x at 313 (finding IJs are inferior officers); *see also Ramirez*, 814 F. App'x at 265 (finding IJs are inferior officers).

191. *See Buckley*, 424 U.S. at 159.

192. As a principal officer appointed by the President who supervises and directs the conduct of IJs, the Chief Appellate IJ should also have discretion to review IJ decisions as required by *Arthrex*; *see Arthrex*, 141 S. Ct. at 1988.

193. *See* Maurice A. Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 SAN DIEGO L. REV. 1, 18 (1980) ("the jealously-guarded separation of functions principle makes for a judicial tradition of independence that renders courts less likely than other agencies of government to yield to political pressures.). *See* Stevens, *supra* note 99, at 8 (stating that an Article I Court "would cure the perception that immigration courts and the Board of Immigration Appeals have become so politicized that decisions are not based on the established law but on the changing views of any particular administration.").

194. *AILA Policy Brief: Restoring Independence to America's Immigration Courts*, AM. IMMIGRI. LAW. ASS'N (Jan. 24, 2020), https://www.aila.org/advo-media/aila-policy-briefs/aila-calls-for-independent-immigration-courts; *see also Summary of Proposed "United States Immigration Court Act" (as of 7-16-2019)*, FED. BAR ASS'N, https://www.fedbar.org/wp-content/uploads/2019/10/proposed-Article-I-immigration-ct-summary-of-model-bill-07162019-pdf-1.pdf; *see also* Marks, *supra* note 6; *see also* Roberts, supra note 193; *see also* Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 NOTRE DAME L. 644, 651-55; *see also Letter to Congress Must Establish an Independent Immigration Court* (Feb. 18, 2020),

new immigration court system could improve the credibility of the court, help address issues of due process, and cure prosecutorial influences that do not stem directly from the appointment process.[195] It could also create uniformity in immigration law, helping to ensure consistent outcomes in asylum cases.[196] The methods of politicized hiring seen during the Bush administration would be lessened because appointment of IJs would occur exclusively by higher level judges, and not the Attorney General who favors the DOJ's law enforcement priorities.[197]

CONCLUSION

Removal hearings can have serious consequences, separating people from their homes, jobs, spouses, and children.[198] IJs who hear these cases should not be appointed and supervised by prosecutors, but this is exactly what occurs within our immigration court system today. This method of appointment creates the perception, real or not, that immigration cases are not adjudicated by impartial judges. The United States must consider the interests of both its citizens and non-citizens in receiving fair and impartial adjudication that is not undermined by prosecutorial control and create a separate Article I immigration court with a new constitutional IJ appointment scheme. The issues plaguing immigration courts—unmanageable caseloads, inconsistent rulings, and partiality— have not improved but have instead worsened. It is time we understand that the deficits of the immigration court system cannot be cured by political motivations or arbitrary performance evaluations. For these reasons, it is imperative that an Article I United States Immigration Court be established, finally liberating IJs from appointment and supervision by the Attorney General.

https://www.hrw.org/sites/default/files/supporting_resources/ngo_letter_independent_immigration_court.pdf.

195. *See* Marks, *supra* note 6, at 16. There, Judge Marks discusses how an Article I Immigration Court would ensure due process, credibility in the court would be strengthened, and structural issues could be cured so that the court is "outside the imposing shadow of DHS and law enforcement priorities." *Id*.

196. *See* Levinson, *supra* note 194, at 653.

197. *See Featured issue: Immigration Courts*, AM. IMMIGR. LAW. ASS'N (Apr. 9, 2021), https://www.aila.org/advo-media/issues/all/immigration-courts (suggesting Congress pass legislation creating an Article I Court to help solve problems within the immigration court system, including politicized hiring); *see also* Liptak, *supra* note 54.

198. Maslow, *supra* note 2, at 310 (describing deportation as "tearing" a non-citizen "physically" from their home, job, spouse, and children).

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