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Toward the Creation of an Independent Immigration Court System

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The Current Crisis: An Overview

The U.S. immigration court system is in crisis. By the end of the government's Fiscal Year (FY) 2020 (which ended on September 30, 2019), the active backlog of removal cases in immigration courts nationwide surpassed one million.[1] The number has nearly doubled since President Trump took office—there were approximately 542,000 cases pending in January 2017.[2] More than 300,000 additional cases have been administratively closed—meaning they have been temporarily removed from the court system's active docket—while the foreign nationals in question pursue other paths to lawful status. But if the Attorney General (AG) had his way, those cases would all be re-opened and added back to the active docket, thereby pushing the backlog to more than 1.3 million cases.[3]

If that weren't enough, there are serious questions about the legitimacy and fundamental fairness of a court system that is housed within the Department of Justice (DOJ) and is therefore under the control of the Attorney General, who is a political appointee. Recent efforts by the AG to strip immigration judges (IJs) of the means to control their own dockets, to impose new case quotas and other metrics on IJs, and to overturn decisions rendered by IJs and by the Board of Immigration Appeals (BIA) have further eroded the independence of the immigration courts.

At the same time, the DOJ is seeking to de-certify the IJs' union, on the ground that IJs are "management officials" who should be precluded from forming or joining a labor organization.[4] And yet this is a system where one IJ has reported that judges do not even have the authority to order pencils.[5]

Other recent policy changes have sought to reduce the number of asylum seekers in the United States, but the cost has been denial of due process and untold human suffering. These changes include the practice of "metering" at the U.S.-Mexico border, which limits the numbers of people permitted to approach official ports of entry to ask for asylum. Metering has been blamed for, among other tragedies, the death of a Salvadoran father and his two-year-old daughter in June 2019.[6] The U.S. government's "Migrant Protection Protocols" program[7] (also known colloquially as the "Remain in Mexico" program)—whereby foreign nationals seeking admission to the United States without proper documentation, including legitimate asylum seekers, are returned to Mexico to await their appearance dates in U.S. immigration courts—has also put people in harm's way, as they are often forced to live in the streets for weeks or months at a time in dangerous border cities, making them vulnerable to extortion, assault, kidnapping, rape, and even murder by criminal elements in Mexico.[8]

The DOJ and the Department of Homeland Security (DHS) have also published a joint interim final rule that would categorically deny the right even to apply for asylum to most noncitizens entering the United States at the U.S.-Mexico border if they did not first apply for asylum in Mexico or another third country.[9] The rule was bolstered by agreements the U.S. government signed with the governments of El Salvador, Guatemala, and Honduras, under which the U.S. government can send an asylum seeker (regardless of nationality) back to one of these countries if they happened to be the first country the person entered en

route to the United States.[10] Litigation against the third-country transit regulation is ongoing, but in the meantime, the Supreme Court has allowed the regulation to remain in place.[11]

Only when the immigration courts are independent will IJs have the discretion to adjudicate cases fairly and administer justice according to the rule of law.

All of these developments make it more urgent than ever that serious consideration be given to a longstanding call by immigrant advocates, immigration scholars, and experts in administrative law to take the immigration courts out of the DOJ and make them into full-fledged, independent courts, either within the Executive Branch, or under either Article I or Article III of the U.S. Constitution. Only when the immigration courts are independent will IJs have the discretion to adjudicate cases fairly and administer justice according to the rule of law.

While we break little new ground in this article, we think the time is opportune to sketch out the importance of reforming the immigration court system and offer some new recommendations.

Are Immigration Judges Really Judges?

Merriam-Webster defines the noun "judge" as "one who makes judgments, such as . . . a public official authorized to decide questions brought before a court," and the verb "judge" as "to form an opinion about through careful weighing of evidence and testing of premises."[12]

At first glance, IJs would seem to fit the Merriam-Webster definition. They are certainly public officials, and they make judgments. They are also called "judges"

(although that was not always the case—prior to 1973, they were called "special inquiry officers,"[13] and it was not until 1996 that they were recognized by statute as judges[14]). But on further examination, it is questionable that IJs actually have authority to decide the questions brought before the immigration court, or that the opinions they issue are consistently rendered through the careful weighing of evidence.

The Executive Office for Immigration Review (EOIR), created in January 1983, is the office within the DOJ that manages the adjudication of removal (colloquially known as deportation) cases in the immigration courts and in an administrative appellate tribunal called the Board of Immigration Appeals (BIA). The Director of EOIR reports directly to the Deputy Attorney General.[15]

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In 2018, Attorney General Jefferson Sessions certified a case to himself in order to reverse a prior decision of the BIA. In *In re Castro-Tum*, the AG ruled that IJs and the BIA generally lack the authority to administratively close cases.[16] As explained by the Catholic Legal Immigration Network, Inc. (CLINIC), "[when] a case is administratively closed, no further action is typically required from the respondent until there is some progress or change in the pending event and so long as DHS does not move to re-calendar the case."[17] Administrative closure might be used, for example, when the individual has a petition pending before U.S. Citizenship and Immigration Services (USCIS) for a visa category that will legalize the petitioner's status. This might include, for example, a T

visa (for victims of human trafficking), a U visa (for victims of certain crimes), or permanent residence based on a family-based petition by a U.S. citizen family member or based on qualifying for "Special Immigrant Juvenile" status.

In response to the decision in *Castro-Tum*, many immigration courts established an inactive docket or "status docket" as a way to put certain cases on hold until the foreign national could resolve a pending petition or application with USCIS. While not serving precisely the same purpose as administrative closure, the use of status dockets also helps IJs to clear their docket in favor of active cases.[18] (A federal court overturned *Castro-Tum*, but to our knowledge, only immigration courts in the Fourth Circuit are following it.[19])

The DOJ responded by limiting IJs' use of status dockets. In a memorandum issued in August 2019 from the EOIR director to all immigration court personnel, IJs are expressly limited in the types of cases they can put on a status docket. Notwithstanding the fact that regulations provide that IJs may grant continuances for "good cause shown,"[20] DOJ has also restricted IJs' ability to grant continuances. The AG accomplished this by certifying another case to himself, *In re L-A-B-R-*, and then setting out narrow standards for when continuances may be granted in order to allow the foreign national time to pursue a "collateral" matter (such as an application to USCIS for lawful status).[21]

Furthermore, IJs are being subjected to strict performance metrics "that base immigration judges' evaluations on their ability to meet case quotas, giving them a direct financial interest (keeping their jobs) in finishing cases quickly."[22] IJs are now given one year to decide each case and must decide at least 700 cases each year[23]—a quota only about one-third of IJs are currently on track to meet.[24]

In other words, IJs do not have the discretion to use basic docket administration tools to manage their crushing case load, while simultaneously being saddled with performance metrics that make it virtually impossible to spend the time needed to "to form an opinion . . . through careful weighing of evidence and testing of premises." As IJ Dana Leigh Marks, the President Emerita of the National Association of Immigration Judges (NAIJ), has famously said,

> In essence, we're doing death penalty cases in a traffic court setting. We are already working at light speed, and yet the stakes for the people who are before the courts can be a risk to their very life, particularly if they are fearing persecution or other harm if forced to return to their home countries.[25]

There are other, more fundamental ways in which IJs have been stripped of the discretion to act as independent arbiters of the cases that come before them. The AG has certified other cases to himself that have served to direct IJs how to rule on certain types of asylum claims. For example, in *In re* A-B-,[26] AG Sessions personally intervened and issued a decision that overruled a 2014 precedential decision, *In re* A-R-C-G-,[27] in which the BIA had found that "married women in Guatemala who are unable to leave their relationship" because of domestic violence was a viable "particular social group" (PSG) on the basis of which a person could potentially qualify for asylum. Subsequent decisions had extended that PSG to include women from other countries and women who were unable to leave non-marital domestic relationships. (In dicta, the AG stated that few claims based on domestic violence or gang violence would qualify for asylum.) A federal district court[28] blocked USCIS from applying even narrower standards set forth in a policy memo advising how asylum officers should apply *In re* A-B-,[29] but the new hurdles to qualifying for asylum based on domestic violence or gang violence remain. In another case, *In re* L-E-A-, AG William Barr purported to overrule longstanding precedent that members of an immediate family may constitute a particular social group for asylum purposes.[30] These are just two examples of a trend that has continued under AG Barr, who has also certified a number of cases to himself in order to overturn earlier decisions.[31]

In other words, IJs are even being told by the AG how to rule substantively on specific types of cases, thereby depriving IJs of the independent ability to carefully weigh the evidence and make decisions based on their own analysis of the relevant law.

Are IJs Even Management Officials?

In a petition filed with the Federal Labor Relations Authority (FLRA) on August 13, 2019, the DOJ asked that the NAIJ be decertified on the ground that "IJs are management officials under . . . 5 USC 7103(a)(11). Accordingly, IJs should be precluded from forming or joining a labor organization. This is necessary based on recent developments in the nature of the IJ position."[32] The DOJ filed a similar petition nearly twenty years ago, but the FLRA denied it, ruling that IJs are not managers.[33] Now the DOJ argues that a series of minor legal developments since the year 2000 have transformed IJs into management officials.

The first development is described as "changes to federal regulations that limit the scope of review of certain aspects of IJ decisions by the Board of Immigration Appeals (the Board)." The second development is "the Board's usage of 'affirmance without opinion' decisions in adjudicating appeals, making the IJ decision essentially the final agency decision." The third development is "the Board's usage of 'adopt and affirm' procedures regarding IJ decisions and the concomitant development of federal circuit court case law that effectively reviews the IJ decision as the final agency decision." The fourth development is "an exponential increase in the number of credible fear review and reasonable fear review adjudications by immigration judges, where the IJ decision is not reviewable by the Board." The fifth and final development is "a recent decision by the Supreme Court regarding inferior officers, who 'exercise significant authority pursuant to the laws of the United States.' *Lucia v. SEC*, 585 U.S. __, 138 S. Ct. 2044 (2018)."

Even without addressing each of these flimsy contentions in turn, it is clear that IJs do not function as management officials. As former IJ Jeffrey Chase has written:

> Now as then, immigration judges do not formulate, determine, or influence the policies of the agency. They cannot hire, fire, promote or issue performance reviews for any employees, including their own law clerks and administrative assistants. Immigration judges are not asked for their input or analysis of pending legislation or regulations that impact their work. At present, they are not even allowed to speak at conferences or law schools, because the administration does not consider them qualified to speak on behalf of the agency or its policies. Also, the judges' decisions do not create binding precedent. Such decisions are reviewed on appeal by the Board of Immigration Appeals, and in some instances, by the attorney general.[34]

Judge Ashley Tabbador, the president of the NAIJ—who, as mentioned above, has said that IJs don't even have the authority to order pencils—is reported to have said that "she thinks the petition's intent is to 'disband and destroy the union,' which has publicly pushed for judges to have more independence and sparred with the Justice Department over a quota system it imposed."[35]

Should Immigration Courts Become Article I or Article III Courts?

The immigration courts are not traditional courts under either Article I or Article III of the U.S. Constitution, and thus IJs are neither Article I nor Article III judges. Article I courts, also known as legislative courts, include the U.S. Court of Federal Claims, the U.S. Tax Court, and the courts of U.S. territories.[36] Courts established under Article III—which sets out parameters for the federal judicial branch—include the Supreme Court of the United States, the U.S. courts of appeals, the U.S. district courts, and the U.S. Court of International Trade.[37]

However, IJs are also not administrative law judges (ALJs), who maintain a special form of independence under the Administrative Procedure Act (APA)—including being exempt from supervision "by anyone who performs investigative or prosecuting functions within the agency."[38]

Instead, IJs are DOJ employees who preside over evidentiary hearings to determine whether foreign nationals are subject to removal from the United States. Assuming a person is found removable, the IJ then decides whether the person has any "defense" against removal, such as asylum. Why is the position of IJs within the DOJ problematic in this context? As Wake Forest Law School Professor Margaret H. Taylor has observed:

> Adjudication of cases within an executive branch agency rests on a premise that is inconsistent with the norm of judicial independence embodied in our Article III courts. In most administrative contexts, the adjudicators—those individuals who decide whether to grant or deny a benefit, or to impose a civil penalty under a particular statute—are employees of the very agency whose caseload they adjudicate. They are, in other words, potentially subject to the supervision and control of one of the interested parties.[39]

As we have often seen, IJs are indeed subject to the supervision and control of an interested party—namely, the Department of Justice. Indeed, IJs do not even possess the fundamental attributes of management officials. Although IJs and the government attorneys who prosecute removal cases are no longer part of the same agency—as they were before the legacy Immigration and Naturalization Service was disbanded and its functions reconstituted in three separate sub-agencies

within the newly created Department of Homeland Security in 2002[40]—they are still both part of the Executive Branch. And in recent years, the DOJ has played a newly aggressive role in setting the administration's immigration policy.

There have been a variety of solutions proposed for reforming the immigration court system, none of which adequately addresses how to deal with the staggering backlog of active cases now before the immigration courts. They include the following:[41]

- *Making IJs administrative law judges.* Retaining the existing structure of EOIR but making both IJs and BIA members ALJs would help de-politicize the process. ALJ pay scales are set by the Office of Personnel Management, and ALJs cannot be removed from office absent good cause. That greater level of job security alone might help ensure that IJs could render decisions free of undue influence from the AG.
- *Converting EOIR into an independent tribunal outside the DOJ.* Take EOIR outside the DOJ, but keep it within the Executive Branch. The most feasible short-term solution would seem to be to establish an independent immigration court system that is not part of the DOJ, but still housed in the Executive Branch. This would create a purportedly independent tribunal, free of the influence of a particular government agency. It still raises questions of true independence, but it is the solution championed by the American Immigration Lawyers Association (AILA), the American Bar Association (ABA), NAIJ, and the Federal Bar Association in a letter sent to Congress in July 2019.[42]
- *Creating an Article I Immigration Court with trial and appellate divisions.* Creating an Article I Immigration Court system would take IJs out of the Executive Branch and is consistent with the other Article I courts of specialized jurisdiction. It would function like a federal district court, with review (as now) available in the federal courts of appeals. This solution has been called for by the Federal Bar Association and the ABA.[43]
- *Creating an Article III court staffed by generalist judges.* Stephen Legomsky, the John S. Lehman University Professor Emeritus at Washington University School of Law and the former Chief Counsel of USCIS, has put forth a hybrid proposal. He would first convert current IJs into ALJs—with all the job security that implies—and move them out of the DOJ and into a new, independent Executive Branch tribunal. For

the appellate phase, he would eliminate both the administrative appellate tribunal (the BIA), and the next-level appellate review by the federal courts of appeal, replacing both levels of review with a single round of review by a new Article III court.[44] This would be unprecedented—to create an entirely new Article III trial court with specialized jurisdiction to handle a case load of more than one million pending cases (and with judges appointed with lifetime tenure). However, there are currently no Article III courts with specialized jurisdiction, and the immigration courts' staggering backlog—which would likely dwarf the existing backlog of all existing Article III courts—makes this an unlikely (if intriguing) solution in the current political environment.

Conclusion and Recommendations

In addition to the shortfalls identified in the four solutions outlined above, none of these remedies addresses how to reduce the crippling backlog of cases the immigration court system currently faces. We would like to propose a new solution—one that would combine the efficiencies of the specialized jurisdiction of Article I courts with the independence of Article III courts.

It is clear that we will not have a fair and functional immigration adjudication system until some kind of large-scale reform is undertaken.

Congress should create a corps of Special Immigration Magistrate Judges (SIMJs) that would be deployed along the border, and in each federal judicial district around the country, in new fact-finding courts. Like other federal magistrate judges—who oversee certain preliminary hearings and manage other pretrial matters as directed by the relevant district court—SIMJs would be appointed by a majority vote of the federal district court judges in a particular judicial district

and would serve for renewable eight-year terms.[45] Unlike other federal magistrate judges, the duties of SIMJs would be limited to fact-finding related to persons charged with removability.

It is important to note that the border courts would *not* be equivalent to the so-called port courts that the Trump administration has recently set up near the border. Port courts are temporary "courtrooms" in tents outfitted with large flat-screen television monitors, where individuals waiting in Mexico (pursuant to the "Remain in Mexico" program) for their court hearings are bused across the border to appear via video link before immigration judges who are located in courts in other cities.[46] Instead, these would be real, brick-and-mortar courthouses, where foreign nationals would appear in person in front of Article I SIMJs. New courts would be constructed near the U.S.-Mexico border, while existing immigration courts would be presided over by newly appointed SIMJs.

Border crossers who present a credible fear of persecution in their countries of origin, or undocumented immigrants in the United States who assert asylum as a defense to removal, would be referred out of the courts to an expanded USCIS Asylum Office for interviews with professional asylum officers. This would significantly reduce the current backlog of removal cases and move them into a non-adversarial setting. Asylum officers would also be empowered to make determinations about the related remedies of withholding of removal and relief under the Convention Against Torture.[47]

In lieu of holding asylum-seeking border crossers in detention, attendance at asylum interviews would be ensured through the use of a whole panoply of alternatives to detention, including but not limited to the payment of bonds, the use of parole, regular check-ins, and community support programs that provide case management services and referrals to legal services providers and social services organizations. These types of alternatives to detention have been proven less costly and more humane than detention.[48] And it is worth noting that in FY 2019, 99% of asylum seekers who were not detained showed up for their hearings in immigration court.[49]

Foreign nationals already in the United States who are charged with removability, but who do not present asylum as a defense, would be able to present to SIMJs evidence of their eligibility for cancellation of removal under the Immigration and Nationality Act (INA). SIMJs would also have the authority to

grant continuances or to administratively close cases for undocumented foreign nationals who have other means to legalize their immigration status (for example, through marriage to a U.S. citizen).

For appellate review, we would adopt Professor Legomsky's suggestion to collapse the current appellate review that takes place first at the BIA and, thereafter, at the existing federal courts of appeals, and consolidate appeals with a new Article III appellate court staffed by generalist judges.

Effective reform must include adequate funding, decisional independence, enhanced efficiency, preservation of a generalist check, and fair procedures.

Clearly, any change of this scale must include what Professor Legomsky has called "the five critical elements of any effective reform of immigration adjudication—adequate funding, decisional independence, enhanced efficiency, the preservation of a generalist check, and fair procedures."[50] In our model, the "fair procedures" would include the creation of a statutorily guaranteed right to counsel in all immigration proceedings, which has also been demonstrated to increase efficiency and would therefore help decrease the existing backlog.[51] Funding an adequate quantity and quality of both SIMJs and support staff is also critical to ensuring greater efficiencies in a system of mass adjudications.

These are some preliminary thoughts on what a reformed immigration court system might look like. While it is clear that no such reforms are possible in the current political environment, it is also clear that we will not have a fair and functional immigration adjudication system until some kind of large-scale reform is undertaken. We hope we have provided some food for thought.

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NOTES

1. *See Immigration Court's Active Backlog Surpasses One Million*, Transactional Records Access Clearinghouse [TRAC] (Sept. 18, 2019), https://trac.syr.edu/immigration/reports/574/. The exact number reported is 1,007,155. *See also* TRAC's Immigration Court Backlog Tool, https://trac.syr.edu/phptools/immigration/court_backlog/ (updated through Nov. 2019), showing an updated backlog of 1,071,036 for FY 2020.
2. Michelle Hackman, *U.S. Immigration Courts' Backlog Exceeds One Million Cases*, Wall St. J. (Sept. 18, 2019) (reporting that "[t]he figure has nearly doubled since President Trump took office in January 2017, when about 542,000 cases were pending"), www.wsj.com/articles/u-s-immigration-courts-backlog-exceeds-one-million-cases-11568845885.
3. The exact number of cases that have been administratively closed is reported to be 322,535 as of the end of June 2019. TRAC, *supra* note 1. In a case that former AG Jeff Sessions ordered the BIA to refer to him for review, the AG held that IJs and the BIA generally do not have the authority to administratively close removal proceedings. *See In re* Castro-Tum, 27 I.&N. Dec. 271 (A.G. 2018). However, a federal appeals court later overturned this decision, holding that federal regulations unambiguously authorize both IJs and the BIA to administratively close cases. *See* Romero v. Barr, 937 F.3d 282 (4th Cir. 2019). At least in the Fourth Circuit, therefore, IJs retain the ability to administratively close cases.
4. *See* AILA Doc. No. 19081303, Fed. Lab. Relations Auth. Petition, Case No. WA-RP-19-0067 (Aug. 13, 2019) [hereinafter FLRA Petition], www.aila.org/File/Related/19081303d.pdf.
5. Immigration Judge Ashley Tabbador, the president of the NAIJ, has disputed the notion that IJs are management officials, telling a reporter, "We don't even have the authority to order the procurement of pencils." Matt Zapotosky, *Justice Department Moves to Potentially Decertify Immigration Judges' Union*, Wash. Post (Aug. 9, 2019), www.washingtonpost.com/national-security/justice-department-moves-to-potentially-decertify-immigration-judges-union/2019/08/09/17dc0450-bae4-11e9-a091-6a96e67d9cce_story.html.
6. Reis Thebault, Luis Velarde & Abigail Hauslohner, *The Father and Daughter Who Drowned at the Border Were Desperate for a Better Life, Family Says*, Wash. Post (June 26, 2019), www.washingtonpost.com/world/2019/06/26/father-daughter-who-drowned-border-dove-into-river-desperation/.
7. Press Release, U.S. Dep't of Homeland Security, Migrant Protection Protocols (Jan. 24, 2019), www.dhs.gov/news/2019/01/24/migrant-protection-protocols.
8. *See, e.g.*, Jonathan Blitzer, *How the U.S. Asylum System Is Keeping Migrants at Risk in Mexico*, New Yorker (Oct. 1, 2019), www.newyorker.com/news/dispatch/how-the-us-asylum-system-is-keeping-migrants-at-risk-in-mexico.
9. Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019) (Joint Interim Final Rule, U.S. Dep't of Justice and U.S. Dep't of Homeland Security).
10. *See, e.g.*, Tania Karas, *How Trump's Bilateral Deals with Central America Undermine the US Asylum System*, Pub. Radio Int'l [PRI] (Oct. 2, 2019), www.pri.org/stories/2019-10-02/how-trump-s-bilateral-deals-central-america-undermine-us-asylum-system.

11. A U.S. district court issued a nationwide injunction against the asylum ban in E. Bay Sanctuary Covenant v. Barr, 391 F. Supp. 3d 974 (N.D. Cal. 2019), but the Ninth Circuit limited the injunction to states within the Ninth Circuit. E. Bay Sanctuary v. Barr, 934 F.3d 1026 (9th Cir. 2019). The federal government then sought a stay of the injunction, which the Supreme Court granted. Barr v. E. Bay Sanctuary Covenant, ___ S. Ct. ___, 2019 WL 4292781 (U.S. Sept. 11, 2019).
12. Merriam-Webster, *judge*, www.merriam-webster.com/dictionary/judge (last visited Oct. 15, 2019).
13. 38 Fed. Reg. 8590 (Apr. 4, 1973) (providing that "the term 'immigration judge' means 'special inquiry officer'").
14. Pub. L. No. 104-208, 110 Stat. 3009, § 371(b)(4) (Sept. 30, 1996).
15. *See About the Office*, U.S. Dep't of Justice (Aug. 14, 2018), www.justice.gov/eoir/about-office (for details on the mission, organization, and responsibilities of the Executive Office for Immigration Review). Prior to the creation of the Department of Homeland Security in 2002, both the EOIR (and its immigration courts) and the government attorneys who prosecute removal proceedings were part of the legacy Immigration and Naturalization Service (INS), which itself was part of DOJ. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002). Since 2002, the government is represented by attorneys from DHS's Immigration and Customs Enforcement (ICE) sub-agency in immigration court, while the IJs remain DOJ employees. *See also About DHS*, U.S. Dep't of Homeland Sec. (July 5, 2019), www.dhs.gov/about-dhs.
16. *In re* Castro-Tum, 27 I.&N. Dec. 271 (A.G. 2018) (*see supra* note 3).
17. Catholic Legal Immigration Network, Inc. [CLINIC], Practice Advisory: Status Dockets in Immigration Courts at 3 (Sept. 30, 2019), https://cliniclegal.org/sites/default/files/resources/defending-vulnerable-popluations/Status-docket-memo-practice-pointer-9-30-2019.pdf.
18. Per CLINIC, "While a case is on the status docket, the respondent is required to provide periodic updates to the court about progress with the relevant issue. If the respondent provides updates by the court's deadline and the relevant issue remains unresolved, the court typically will continue the case on the status docket and not require the respondent to attend a hearing in the meantime." *Id*. at 2.
19. *See* Romero v. Barr, 937 F.3d 282 (4th Cir. 2019) (*see supra* note 3).
20. 8 C.F.R. §§ 1003.29, 1240.6.
21. *See In re* L-A-B-R-, 27 I.&N. Dec. 405 (A.G. 2018); *see also* Catholic Legal Immigration Network, Inc., Practice Advisory: Seeking Continuances in Immigration Court in the Wake of the Attorney General's Decision in *Matter of L-A-B-R-* (Dec. 6, 2018) (for more details about continuances and the *L-A-B-R-* decision), https://cliniclegal.org/resources/practice-advisory-matter-l-b-r-27-dec-405-ag-2018.
22. Roger Juan Maldonado & Victoria Neilson, *Department of Justice Seeks to Silence Immigration Judges' Union*, N.Y.L.J. (Sept. 30, 2019), www.law.com/newyorklawjournal/2019/09/30/department-of-justice-seeks-to-silence-immigration-judges-union/.

23. Memorandum from James R. McHenry, III, Dir., EOIR, Case Priorities and Immigration Court Performance Measures (Jan. 17, 2018), www.justice.gov/eoir/page/file/1026721/download.
24. Michelle Hackman, *U.S. Immigration Courts' Backlog Exceeds One Million Cases*, Wall St. J. (Sept. 18, 2019) (citing Ashley Tabaddor, president of the National Association of Immigration Judges), www.wsj.com/articles/u-s-immigration-courts-backlog-exceeds-one-million-cases-11568845885.
25. PBS News Hour, *How a "Dire" Immigration Court Backlog Affects Lives* (Sept. 18, 2017), www.pbs.org/newshour/show/dire-immigration-court-backlog-affects-lives.
26. *In re* A-B-, 27 I.&N. Dec. 316 (A.G. 2018) (providing, in dicta, that gang violence and domestic violence will generally not qualify as harm for asylum purposes).
27. *In re* A-R-C-G-, 26 I.&N. Dec. 388 (BIA 2014).
28. Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C. 2018).
29. USCIS Policy Memo. No. 602-0162, Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-* (July 18, 2018), www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf.
30. *In re* L-E-A-, 27 I.&N. Dec. 581 (A.G. 2019) (family is not a particular social group for asylum purposes, with certain narrow exceptions), overruling a portion of the BIA's decision in *In re* L-E-A-, 27 I.&N. Dec. 40 (BIA 2017). In this case, it was initially Acting AG Matthew Whitaker who certified the BIA decision to himself, but it was AG Barr who ultimately issued the new decision.
31. *See also, e.g.*, *In re* M-S-, 27 I.&N. Dec. 509 (A.G. 2019) (AG Barr overturned a 2005 BIA decision—*In re* X-K-, 23 I.&N. Dec. 731 (BIA May 4, 2005)—and stripped IJs of the authority to grant bond to asylum seekers who entered the United States without being inspected at a port of entry but passed their threshold "credible fear" asylum screening interviews).
32. *See* FLRA Petition, *supra* note 4.
33. *See* Order Denying Application for Review, U.S. Dep't of Justice Exec. Office of Immigration Rev. Office of Chief Immigration Judge & Nat'l Ass'n of Immigration Judges, 56 F.L.R.A. 616 (Sept. 1, 2000).
34. Jeffrey Chase, *DOJ's Latest Effort to Undermine Impartial Immigration Bench*, Law360 (Aug. 22, 2019), www.law360.com/immigration/articles/1191498/doj-s-latest-effort-to-undermine-impartial-immigration-bench.
35. Zapotosky, *supra* note 5.
36. *See Courts: A Brief Overview*, Fed. Judicial Ctr., www.fjc.gov/history/courts/courts-brief-overview (last visited Oct. 15, 2019).
37. *Id.*
38. Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The* Déjà Vu *of Decisional Disparities in Agency Adjudication*, 60 Stan. L. Rev. 475, 485 (2007).
39. *Id.* at 480.
40. Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002).

41. These options are short summaries of much more comprehensive descriptions set out in Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 Duke L.J. 1635 (May 2010).
42. *See* Letter from Am. Bar Ass'n et al. to Members of Congress, *Congress Should Establish an Independent Immigration Court* (July 11, 2019), www.fedbar.org/Image-Library/Immigration-Court-Letter.aspx.
43. *Congress Should Establish an Article I Immigration Court*, Fed. Bar Ass'n, www.fedbar.org/Advocacy/Issues-Agendas/Article-1-Immigration-Court.aspx (last visited Oct. 15, 2019); Am. Bar Ass'n Comm'n on Immigration, 2019 Update Report: Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases (Mar. 2019), www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_2.pdf.
44. *Id*.
45. 28 U.S.C. § 631.
46. *See, e.g.*, Kim Hunter, Katharine Gordon & John Bruning, *Trump's New Border Courts Are Designed to Fail*, The Hill (Oct. 13, 2019), https://thehill.com/opinion/immigration/465594-the-immigration-system-is-designed-to-fail; Manny Fernandez, Miriam Jordon & Caitlin Dickerson, *The Trump Administration's Latest Experiment on the Border: Tent Court*, N.Y. Times (Sept. 12, 2019), www.nytimes.com/2019/09/12/us/border-tent-courts-asylum.html.
47. To qualify for withholding of removal, foreign nationals in removal proceedings must establish that it is more likely than not that their life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion in the proposed country of removal. INA § 241(b)(3), 8 U.S.C. § 1231 (b)(3). To qualify for protection from removal under the Convention Against Torture, foreign nationals in removal proceedings must establish that it is more likely than not that they would be tortured if removed to a specific country. 8 C.F.R. § 201.18.
48. *See, e.g.*, Am. Civil Liberties Union, ACLU Fact Sheet, Alternatives to Immigration Detention: Less Costly and More Humane Than Federal Lock-up, www.aclu.org/other/aclu-fact-sheet-alternatives-immigration-detention-atd (last visited Oct. 15, 2019); Alex Nowrasteh, *Alternatives to Detention Are Cheaper Than Universal Detentio*n, Cato Inst. (June 20, 2018), www.cato.org/blog/alternatives-detention-are-cheaper-indefinite-detention.
49. *See Record Number of Asylum Cases in FY 2019*, TRAC (Jan. 8, 2020), https://trac.syr.edu/immigration/reports/588/ (reporting that "[w]ith rare exception, asylum seekers whose cases were decided in FY 2019 also showed up for every court hearing. This was true even though four out of five immigrants were not detained or had been previously released from ICE custody. In fact, among non-detained asylum seekers, 99 out of 100 (98.7%) attended all their court hearings.").
50. Legomsky, *supra* note 41.
51. *See, e.g.*, Careen Shannon, *Immigration Is Different: Why Congress Should Guarantee Access to Counsel in All Immigration Matters*, 17 Univ. D.C. L. Rev. 165 (Spring 2014).