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# The Case Against Absolute Judicial Immunity for Immigration Judges

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## The Case Against Absolute Judicial Immunity for Immigration Judges

Jacqueline Stevens, Heather Schoenfeld, Elizabeth Meehan<sup>†</sup>

### ABSTRACT

A federal regulation states that immigration hearings shall be open to the public. Courts and scholars also have located a right to observe these proceedings in the First Amendment. And yet immigration judges (IJ) have excluded members of the press and other observers from hearings for no stated legal reasons, thus effectively eliminating public scrutiny of proceedings that affect millions of citizens and non-citizens in the United States. In response to a lawsuit pursuing monetary, injunctive, and declaratory relief after an IJ ordered guards to remove a reporter from a federal building, an Eleventh Circuit panel held IJs have absolute judicial immunity against litigation brought by observers. This Article highlights legal errors in the Panel holding of this case of first impression. The Article analyzes the legislative history of policies on contempt powers and Congress's limits on IJ powers, as well as offers quantitative and qualitative findings on the efficacy of internal agency misconduct complaint investigations. The statutory nature of IJ powers and the absence of any remedy for damages caused by conduct in excess of legal functions suggest a policy and legal case against absolute judicial immunity for IJs.

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<sup>†</sup>. Professor Jacqueline Stevens teaches political theory and is the founding director of the Deportation Research Clinic, Buffett Institute for Global Affairs, Northwestern University; Heather Schoenfeld is an associate professor of sociology and law (by courtesy) at Boston University; Elizabeth Meehan is a PhD student in political science at George Washington University. Her work focuses on the politics of transparency policies in the Europe and the US. The authors wish to thank Northwestern's Political Science Department and Buffett Institute for funding, as well as Charles Clarke, Kristen Campbell, Joseph Rathke and the journal editors for their assistance in preparing this manuscript for publication. We especially want to acknowledge Elaine Komis, a retired public affairs officer, for her efforts assisting those seeking to observe immigration courts.

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[A]lthough I agree that on this record IJ Cassidy is entitled to judicial immunity, I am concerned about the question of Professor Stevens' remedy for his conduct . . . The majority does not address the personal, non-judicial reasons that allegedly motivated IJ Cassidy to remove Professor Stevens from the building and that involved nearly the entire apparatus of the EOIR. Though they acknowledge that 'Plaintiff had published criticisms of deportation proceedings in general and of Immigration Judge William Cassidy's performance in particular,' they fail to mention that based on these criticisms—including a piece that denounced IJ Cassidy for mistakenly deporting an American citizen—IJ Cassidy and EOIR officials monitored and tracked Professor Stevens' visits to courtroom proceedings all over the Southeast. . . . Upon her arrival, the Court Administrator immediately emailed EOIR public relations staff that Professor Stevens "want[s] access to view the court hearing today . . . Please advise!" According to the record, no other individual had ever attracted this kind of attention from EOIR officials. Moreover, about a week after the expulsion giving rise to this lawsuit, an employee in the Department of Justice's Public Affairs Office emailed his colleagues regarding the '[p]ossible banning of blogger from immigration court.' These facts animate the claim that the process available to Professor Stevens was not just 'displeasing' but was arguably inadequate as a check on IJ Cassidy's misconduct. - Judge Kathleen Williams.<sup>1</sup>

## I. Introduction

Ever since state legislatures and Congress first passed laws to remove non-citizens from the United States, those laws and their operation have been the cause of controversy and public concern.<sup>2</sup> At the core of the problem is the irreconcilable contradiction between the United States Constitution's protections of due process rights through judicial review, on the one hand, and the Supreme Court's creation of prerogatives for the so-called sovereign "nation."<sup>3</sup>

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1. *Stevens v. Osuna*, 877 F.3d 1293, 1314–15 (11th Cir. 2017) (Williams, J., concurring) (internal citations omitted).

2. See generally DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* (2007) (discussing the history of immigration in the United States and the complexities of immigration law).

3. The concept of the "nation" in U.S. jurisprudence is a fiction borrowed from ad hoc treatises and British common law and referenced by the Supreme Court to

In 1784, Immanuel Kant wrote: “The problem of establishing a perfect civil constitution depends on the problem of law-governed external relations among nations and cannot be solved unless the latter is.”<sup>4</sup> As long as immigration laws are predicated on status instead of acts, the rule of law applies only to a select few. As a result, when it comes to deportation proceedings, we are a nation of edicts, not laws.<sup>5</sup>

The ‘immigration judge,’ created by a technical revision to agency regulations and post hoc included in U.S. statutes, is in a synecdochical relation to this larger paradox of Constitutional case law and poses legal and even physical obstacles to its undoing.<sup>6</sup> When describing how to distinguish a government under the rule of law from one based on edicts, Lon Fuller’s analysis keeps citizenship front and center.<sup>7</sup> Fuller’s limits are Kantian-based efforts to tie control of law to a non-contradictory exercise of citizenship. There are eight ways in which government rules may fail the rule of law. These eight paths track the conditions citizens need for providing the final determination of the conditions of their self-governance, and are not ad hoc procedural restraints on government power.<sup>8</sup> Indeed, one practical objection to limits on due

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carve out exceptions from judicial review. The case law on this quotes from grand statements about national and foreign policy in early modern treatises, but offers no specific text from the U.S. Constitution that would suggest, much less obligate, the carte blanche latitude the Court granted to Congress over immigration policy. See *Chae Chan Ping v. United States*, 130 U.S. 581, 609–10 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896). See Louis Henkin, *The Constitution and United States Sovereignty: A Century of “Chinese Exclusion” and Its Progeny*, 100 HARV. L. REV. 853, 853–86 (1987).

4. IMMANUEL KANT, *IDEA OF A UNIVERSAL HISTORY WITH COSMOPOLITAN INTENT* 34 (8th Thesis 1784). See also Charles Clarke, *Deportation Law and Political Theory* (2017) (unpublished Ph.D dissertation, Northwestern University) (available on Proquest Dissertations) (analyzing tensions in Kant’s arguments on punishment, sovereignty, and deportation).

5. LON FULLER, *THE MORALITY OF LAW* 42 (Rev. ed. 1969) (stating that Fuller’s eight tripwires for the rule of law are: “1) failure to achieve rules at all . . . ; 2) failure to publicize, or at least make available to the affected party, the rules he is expected to observe; 3) . . . retroactive legislation . . . ; 4) failure to make rules understandable; 5) . . . contradictory rules; 6) rules that require conduct beyond the powers of the affected party; 7) . . . frequent changes in the rules [so] that the subject cannot orient his action by them; and 8) failure of congruence between the rules as announced and their actual administration.”).

6. See *infra* Part IV.

7. FULLER, *supra* note 5, at 39–42.

8. FULLER, *supra* note 5, at 39–42.

process based on so-called alienage is the false positives: without the benefit of thorough reviews and legal counsel, the government's ability to easily deport non-citizens facilitates the wrongful deportation of citizens as well.<sup>9</sup>

When U.S. citizens are detained and deported as aliens, it is commonly understood as an ad hoc error.<sup>10</sup> In fact, these cases are symptoms of a series of Supreme Court decisions that define citizenship using the passive criterion of national identity and not capacities of self-governance.<sup>11</sup> If U.S. citizens are brought under the scope of edicts for reporting to Congress and other citizens on how the operations of our immigration system are inherently at odds with the rule of law, we begin to see how the authoritarian character of the deportation machine is controlling our entire political decision-making apparatus.<sup>12</sup>

This is not an abstract problem. The low quality and quantity of information about immigration and deportation going back decades—there is scant research on these government operations even in universities—has turned citizens into pawns of a complex political game among various corporate interests, law enforcement agencies, and politicians.<sup>13</sup> Journalists and other observers have

9. Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 647–48 (2011); Rachel E. Rosenbloom, *From the Outside Looking in: U.S. Passports in the Borderlands*, in CITIZENSHIP IN QUESTION: EVIDENTIARY BIRTHRIGHT AND STATELESSNESS 132 (Benjamin N. Lawrance & Jacqueline Stevens eds., 2017); Jacqueline Stevens, *The Alien Who Is a Citizen*, in CITIZENSHIP IN QUESTION: EVIDENTIARY BIRTHRIGHT AND STATELESSNESS 217 (Benjamin N. Lawrance & Jacqueline Stevens eds., 2017).

10. Stevens, *Deporting U.S. Citizens as Aliens*, *supra* note 9, at 629 (quoting Rep. Steve King (R-Iowa): "There is a huge human haystack of humanity that crosses our border every night that has piled up here in the United States . . . . To deal with all of that without a single mistake would be asking too much of a mortal.").

11. Stevens, *Deporting U.S. Citizens as Aliens*, *supra* note 9, at 635–38 (detailing how citizenship is defined).

12. The deference to edicts in some U.S. immigration case law is at odds with other case law and statutes that have provided non-citizens protections of the rule of law. *See, e.g.*, *Pyle v. Doe*, 457 U.S. 202, 212 (1982) (striking down a Texas statute denying funding to school districts that enroll in K-12 schools students not legally admitted to the United States; *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("The contention that persons within the territorial jurisdiction of this republic might be beyond the protection of the law was heard with pain on the argument at the bar -- in face of the great constitutional amendment which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws."); Alien Tort Claims Act, 28 U.S.C. § 1350 (1948) (allowing foreign citizens to seek remedies through civil tort claims in U.S. courts).

13. *See, e.g.*, Jacqueline Stevens, *One Dollar Per Day: The Slaving Wages of Immigration Jail, from 1943 to Present*, 29 GEO. IMMIGR. L.J. 391 (2015) (evaluating

complained for years about IJs preventing them from attending hearings with no legal basis, despite a regulation mandating public access to hearings with rare exceptions.<sup>14</sup> In a public letter to the Director of the Executive Office of Immigration Review (EOIR), attorneys noted that the agency and IJs obstructed efforts to observe hearings:

Student observers faced some difficulty completing the full number of sessions during the observation period because IJs unexpectedly cancelled sessions or prohibited observers from attending them. First, several IJs routinely failed to hold calendared hearings or cancelled them, sometimes without notification to the Court Clerk. Over the course of seven weeks, observers were unable to attend 14 of the 45 sessions listed on the Court calendar provided to the local bar.<sup>15</sup>

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the legality and the genesis of the one dollar per day wages paid to those in custody under immigration laws).

14. See Darwin BondGraham, *I Was Kicked out of Federal Immigration Court — Because I’m a Journalist*, EAST BAY EXPRESS (Feb. 17, 2017), <https://www.eastbayexpress.com/SevenDays/archives/2017/02/17/i-was-kicked-out-of-federal-immigration-court-because-im-a-journalist>; *The Slow Crisis in Immigration Courts*, ON THE MEDIA (Aug. 10, 2017), <https://www.wnyc.org/story/crisis-americas-immigration-courts/> (describing “challenges [journalist Julia Preston] faces accessing courtrooms”); Michelle Garcia, *Texas Reporters Shut Out of Immigration Court*, COLUM. JOURNALISM REV. (Aug 13, 2014), [https://archives.cjr.org/united\\_states\\_project/as\\_deportations\\_speed\\_up\\_reporters\\_are\\_shut\\_out\\_of\\_immigration\\_hearings.php](https://archives.cjr.org/united_states_project/as_deportations_speed_up_reporters_are_shut_out_of_immigration_hearings.php) (describing access problems due to installation of immigration courts in detention facilities not accessible to the public); Jacob Weindling, *This Is How ICE Stops Journalists from Reporting on Detained Immigrants*, PASTE (July 18, 2018), <https://www.pastemagazine.com/articles/2018/07/this-is-how-ice-stops-journalists-from-reporting-o.html> (“Yesterday the Department of Justice sent a document to all Immigration Review courts around McAllen banning unauthorized sketching and threatening federal penalties to artists who didn’t comply . . . Harlingen Immigration Court [which is open to the public] refused to allow me in to take notes until they had called a public affairs officer at the Department of Justice.”); Chava Gourarie, *Reporting Around ICE*, COLUM. JOURNALISM REV. (Aug. 10, 2018), [https://www.cjr.org/covering\\_trump/reporting-around-ice.php](https://www.cjr.org/covering_trump/reporting-around-ice.php) (describing Intercept reporter, Debbie Nathan’s experience: “When the court took a break, a bailiff approached her and said that the judge wanted to know what she was up to. ‘That’s none of your business,’ she recalls saying. ‘This is an open court proceeding.’ She tells CJR that he replied, ‘We don’t like your attitude,’ and several armed officers began to surround her.”). The public access regulation is 8 C.F.R. § 1003.27 (2018); see also *infra* Part IV.

15. Letter from Hallie Ludsin, Professor, Emory Law School, Lisa Graybill, Deputy Legal Dir., S. Poverty Law Ctr., & Eunice Cho, Staff Attorney, S. Poverty Law Ctr., to Juan Osuna, Dir., Exec. Office of Immigration Review, Observations of Atlanta Immigration Court 1, 5 (Mar. 2, 2017), [https://www.splcenter.org/sites/default/files/2017-atl\\_complaint\\_letter\\_final.pdf](https://www.splcenter.org/sites/default/files/2017-atl_complaint_letter_final.pdf) (“IJ Cassidy expressed dismay about ‘reporters who write all sorts of things about me.’ He continued: ‘I just follow the law. When you have an uninvited guest in your home, what do you do? You have to tell them to leave.’”).

Complaints from journalists and students suggest an absence of redress for a pattern and practice of IJs obstructing the public from observing immigration hearings. The loose procedural protections afforded to immigrants based on intuitions imputed to common law for a status denoted by birth gives free reign to an agency that is prohibiting by edict citizens from interrogating the conditions of their self-governance.<sup>16</sup>

This Article is part of a broader argument about the need to eliminate the tension Kant identified between the rule of law and the “nation.” In particular, we argue that “citizenship” should be construed as self-governance that promotes the rule of law, and not status based on birth, either in a particular territory or to particular parents.<sup>17</sup> One bulwark against tyranny is the exposure of government proceedings to the citizens. The “failure to publicize, or at least make available to the affected party, the rules he is expected to observe”<sup>18</sup> implies a corollary obligation to avoid arbitrary and unintended outcomes by providing decision-makers with accurate information about the law’s implementation. The sovereign, be it a dictator or a plebiscite, has as much need for accurate information about the administration of law as those affected. Absent this, rules

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16. Judges, civil rights attorneys, law professors, community professionals and other concerned citizens have expressed outrage over the anti-American brutality of deportations since the government first began to abuse those who were foreign-born, with and without government authority. *See, e.g.*, Reuben Oppenheimer, *Report on the Enforcement of the Deportation Laws of the United States*, in 5 NAT’L COMM’N ON LAW OBSERVANCE & ENFORCEMENT, U.S. WICKERSHAM COMMISSION REPORTS 43–45 (1931); Jack Wasserman, *Some Defects in the Administration of Our Immigration Laws*, 21 L. & CONTEMP. PROBS. 376, 377 (1956) (“Then there is the case of Michael Spinella, who was kidnapped by our immigration officials while on a visit to Washington, D.C. He was denied an opportunity to phone his attorney, to seek judicial review of his deportation order, to bid farewell to his family, or to gather his personal belongings prior to his deportation to Italy. Nor are these gestapo-like tactics but isolated instances of administrative superefficiency.”). Wasserman was the attorney who represented Wong Yang Sung before the Supreme Court and won a habeas order overturning a deportation order based on his argument that the immigration hearings failed to comply with the Administrative Procedures Act. *See infra* Part IV.C.

17. JACQUELINE STEVENS, STATES WITHOUT NATIONS: CITIZENSHIP FOR MORTALS (2009) (providing political, theoretical and policy arguments for eliminating birthright citizenship). The new project, of which this essay is a part, ties these ideas to the U.S. Constitution and is indebted to work by Daniel Morales, especially *Undocumented Migrants as New (and Peaceful) Revolutionaries*, 12 DUKE J. CONST. L. PUB. POL’Y 135 (2016) and *Illegal Migration Is Speech*, 92 IND. L.J. 735 (2017).

18. FULLER, *supra* note 5, at 39.



are solipsistic projections unmoored from their purpose of regulating behavior—thus, they are not laws.<sup>19</sup>

The nature of immigration hearings is to stage both the government's broad authority to pursue foreign policy and the life altering and even deadly effects of these prerogatives on individuals.<sup>20</sup> The prejudices animating the Court's mythical construction of a fictional "nation" are tied to treatises on hereditary monarchies and bereft of roots in the text of the Constitution.<sup>21</sup> As such, the dramas that unfold in deportation hearings are those to which a democratic republic requires extensive exposure.<sup>22</sup> "Democrac[ies] die in darkness,"<sup>23</sup> not just from hidden corruption, but also because citizens remain ignorant of the scope and impact of policies they self-legislate.<sup>24</sup> The chief obstacle to hearing access is the IJ ordering force against third parties.<sup>25</sup>

19. There are numerous other potential benefits of publicity integral to the U.S. Constitutional democracy, such as thwarting corruption, retaliation, and stupidity. But without accurate information of a law's implementation good, honest, intelligent people will be unable to craft a policy rather than a random guess born of ignorance. Letter XIII in PLATO, COLLECTED DIALOGUES OF PLATO, INCLUDING THE LETTERS 1562 (1961) ("Those who on any occasion bring you information are unwilling to inform you of anything that they suppose involves expense . . . You must yourself be acquainted every detail as far as you can and be your own judge, and not avoid such acquaintance with details, since nothing could be more advantageous for you in your government.").

20. Julia Preston, *Lawyers Back Creating New Immigration Courts*, N.Y. TIMES (Feb. 9, 2010), <http://www.nytimes.com/2010/02/09/us/09immig.html> (statement of Dana Marks, President, National Association of Immigration Judges) (arguing asylum cases resemble "holding death penalty cases in traffic court.").

21. *Supra* text accompanying note 3.

22. *Supra* text accompanying note 3.

23. Paul Farhi, *The Washington Post's New Slogan Turns Out to be an Old Saying*, WASH. POST (Feb. 24, 2017), [https://www.washingtonpost.com/lifestyle/style/the-washington-posts-new-slogan-turns-out-to-be-an-old-saying/2017/02/23/cb199cda-fa02-11e6-be05-1a3817ac21a5\\_story.html?utm\\_term=.58645c31148a](https://www.washingtonpost.com/lifestyle/style/the-washington-posts-new-slogan-turns-out-to-be-an-old-saying/2017/02/23/cb199cda-fa02-11e6-be05-1a3817ac21a5_story.html?utm_term=.58645c31148a).

24. Perhaps if IJs were held accountable for blocking access to hearing rooms, families who voted to elect Donald Trump as their president would not have been "ashamed" when a relative was deported, and perhaps members of Congress who support limited government would catch the contradiction between their endorsement of free market and "Customs and Border Protection." Harriet Agerholm, *Trump Voter 'Ashamed' to Be American After Daughter-in-law is Deported*, INDEPENDENT (July 24, 2018, 11:28 AM), <https://www.independent.co.uk/news/world/americas/trump-voter-deportations-ashamed-daughter-letty-stegall-illegal-immigration-a8461111.html>; Alex Nowrasteh, *The 14 Most Common Arguments Against Immigration and Why They're Wrong*, CATO INSTITUTE (May 2, 2018 11:10 AM), <https://www.cato.org/blog/14-most-common-arguments-against-immigration-why-theyre-wrong>.

25. *See infra* Part II.

The case against absolute judicial immunity for immigration hearing officers accused of law-breaking conduct toward third parties is based on the administrative organization of immigration courts,<sup>26</sup> the statutory limits of IJ contempt authority,<sup>27</sup> case law limiting contempt authority to power authorized by legislatures (including Congress),<sup>28</sup> and the documented absence of any effective oversight available through the agency's own misconduct investigations. In a recent case, however, the Eleventh Circuit held that an IJ ordering guards to force an observer from a federal building was entitled to immunity from suit for injunctive and declaratory relief and from damages.<sup>29</sup> To explain its decision, the Eleventh Circuit stated:

[E]ven if Judge Cassidy lacked express statutory or regulatory authority to order Plaintiff removed from the court building, Judge Cassidy acted in no 'clear absence of all jurisdiction' in doing so. Immigration Judges do have express authority to 'regulate the course' of removal hearings. *See* 8 C.F.R. §§ 1240.1(c), 1240.9. This authority triggers obligation. Based on this authority, the EOIR has recognized 'that at times an Immigration Judge must be firm and decisive to maintain courtroom control.'<sup>30</sup>

The Eleventh Circuit panel held that IJs should be afforded absolute judicial immunity because their functions appeared to track those of Article III judges and because prior case law had afforded judicial immunity to administrative law judges governed by the Administrative Procedures Act to thwart the inconvenience of litigation. The lack of transparency and accountability enabled by this analysis, coupled with protocols that operate daily in immigration courts across the country, demonstrate precisely the problems anticipated by the Framers of the U.S. Constitution and

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26. Federal judges by statute have criminal contempt powers. *See* 18 U.S.C. § 401. IJs do not have statutory or any other legal authority over building guards or security protocols other than those created by the Eleventh Circuit in *Stevens v. Osuna*, 877 F.3d 1293 (11th Cir. 2017).

27. 8 U.S.C. § 1229a(b)(1). *See infra* Part III.

28. *Nye v. United States*, 313 U.S. 33, 48–51 (1941). *See infra* Part IV.

29. *Stevens v. Osuna*, 877 F.3d 1293, 1307 (11th Cir. 2017) (finding Judge Cassidy was entitled to absolute immunity because the plaintiff failed to adequately allege that Judge Cassidy acted "in the clear absence of all jurisdiction."). *See also* *Bloodworth v. United States*, No. 5:13-CV-112, 2014 WL 1813374, at \*1 (M.D. Ga. May 7, 2014) (concluding Judge Cassidy was entitled to absolute immunity) (citing *Stevens v. Holder*, 950 F. Supp. 2d 1282, 1291 (N.D. Ga. 2013)).

30. *Stevens*, 877 F.3d at 1307. The analysis will be reviewed in detail below. *See infra* Part IV.

their English Whig counterparts: a bureaucratic backwater in which cronyism breeds corruption, incompetence, and vengeance, and chokes out justice behind closed doors.<sup>31</sup>

In this Article, we first review the political and legal theory the Eleventh Circuit overlooked in their mechanistic invocation of absolute judicial immunity on behalf of IJ Cassidy. In particular, we highlight the larger project of the rule of law pursued by three great liberals in conversation across generations—Edward Coke, John Locke, and Thomas Jefferson—to explain how absolute judicial immunity was instrumental to their pre-eminent project of legislative supremacy in service of “a government of the people, by the people, [and] for the people,” not an end in itself.<sup>32</sup> Second, we review current case law on administrative judge absolute immunity. Third, we highlight legal similarities between IJs and other administrators assessing immigration claims through historical immigration court statutes and regulations. Fourth, we show that the case law on contempt authority demands judicial deference to statutory limits of a contempt power that would disallow inferring that managing access to the court is a ‘judicial function’ of an IJ. Finally, we analyze the misconduct investigation protocols of the agency and provide quantitative and qualitative analyses of 768 misconduct complaints and investigations conducted between 2004 and 2016. This section explains how the agency’s organization not only fails to prevent IJ misconduct, but may incentivize it, thus providing concrete policy grounds for allowing civil suits against IJs who deny access to immigration courts in violation of constitutional rights.<sup>33</sup>

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31. As observed by law school students who were denied access to hearings at the Atlanta Immigration Court. See Ludsin et al., *supra* note 15. See also *infra* Part V, note 347.

32. Abraham Lincoln, Gettysburg Address (1863) (transcript available in the Cornell University Library).

33. One co-author of this Article (Stevens) was a plaintiff who filed *pro se* the first complaint and the first response to the motion to dismiss in a case before the Eleventh Circuit. Thereafter, attorneys drafted an amended complaint and motions with more emphasis on broad principles of Constitutional law and less on the statutory authority of immigration judges. See Court Docket, Stevens, 877 F.3d 1293 (No. 16-12007). The fact pattern of this case is similar to those of other observers. See *supra*, notes 14 and 15 and accompanying text. The purpose of the suit and this Article is to use these experiences to further elucidate the curious departures of U.S. immigration courts from the Constitution. Jacqueline Stevens, *Forensic Intelligence and the Deportation Research Clinic: Toward a New Paradigm*, 13 PERSPECTIVES ON POL. 722, 722–38 (2015) (explaining a research agenda that iteratively exposes injustice through a dialectical engagement of scholarship, litigation, and publicity);

## II. History and Political Theory for Absolute Judicial Immunity

Any analysis of government official immunity—especially one based on claims untethered to any specific passage of the Constitution, statute, or regulation—must be grounded in a government’s foundational principles. One figure whose jurisprudence, political causes and career, and scholarship looms large over judicial review and the centrality of courts to the rule of law and many other questions is Sir Edward Coke. Coke was a judge and Attorney General under Queen Elizabeth; Chief Justice of the Common Pleas and the Kings Bench under James I; and a member of Parliament after James I disregarded Coke’s arguments that a judge could apply the law and rule so as to restrain monarchical authority.<sup>34</sup> In 1625, to thwart Coke’s consistent attempts to elevate Acts of Parliament over the monarch’s unilateral orders, taxation, and conscription, King Charles appointed Coke Sheriff of Buckinghamshire. As Sheriff, Coke was legally compelled him to remain in his county and thus could not attend Parliament.<sup>35</sup> On top of his political career, Coke single-handedly compiled thirteen volumes of English case law, including many of his own opinions.<sup>36</sup>

Coke’s commitment above all else was to the rule of law through Parliamentary supremacy checked by the rights of the people, not deference to the monarch (or executive).<sup>37</sup> His arguments

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see also Deportation Research Clinic, *Clinic in the News*, BUFFET INST. FOR GLOB. STUDIES, <https://buffett.northwestern.edu/programs/deportationresearch/clinic-in-the-news.html>.

34. STEVE SHEPHERD, *SELECTED WRITINGS OF SIR EDWARD COKE*, vol. I, *Introduction*, at xxiii (2003).

35. *Id.* at lxii.

36. *Id.*

37. SIR EDWARD COKE, *CONFERENCE BEFORE THE KING (1607)* reprinted in *SELECTED WRITINGS OF SIR EDWARD COKE*, vol. I, 478–82 (2003) (stating that Coke participated in a conference of judges and “informed the King that he does not have the privilege to personally decide a Case at Law. . . And the Judges informed the King, that no King after the conquest assumed to himself to give any Judgment in any cause whatsoever, which concerned the administration of Justice within this Realm, but these were solely determined in the Courts of Justice. And the King cannot arrest any man, as the book is in 1 Hen. 7.4, for the party cannot have remedy against the King; so if the King give any Judgment, what remedy can the party have, *vide* 39 Ed. 3.”). Coke noted that “no man shall be put to answer without presentment before the Justices, matter of Record, or by due process, or by writ Originall, according to the ancient Law of the Land: And if any thing be done against it, it shall be void in Law and held for Error.” *Id.* Upon “receipt of these findings, ‘the King was greatly offended, and said, that then he should be under the Law, which was Treason

for judicial discretion and immunity were intended to relieve the people of unfair penalties and protect them from the government—substantive objectives of justice, not abstract proceduralism. This helps orient us to the values and priorities proper for assessing contemporary questions of absolute judicial immunity in general and the contexts in which it may be afforded to administrative judges.<sup>38</sup>

In brief, Coke endorsed judges expressing intuitions favoring the people against the elites or King, and favored positive law passed by legislatures over edicts of a monarch or a magistrate.<sup>39</sup> These priorities are compromised by a jurisprudence in which judges can create absolute judicial immunity for administrative judges who order the use of force against critics to prevent access to a public hearing in violation of their statutory boundaries.<sup>40</sup>

IJ Cassidy, after being repeatedly embarrassed by the reporting on his official conduct, ordered guards to use force to remove Stevens from a federal building lobby as part of a plan for her “[p]ossible banning” from immigration hearings.<sup>41</sup> This

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to affirm. . . To which I said, that Bracton saith, Quod Rex non debet esse sub homine, sed sub Deo et Lege [The king ought not to be under any man, but under God and the Law.]” *Id.*

38. Margaret Z. Johns, *A Black Robe Is Not a Big Tent: The Improper Expansion of Absolute Judicial Immunity to Non-Judges in Civil-Rights Cases*, 59 SMU L. REV. 265, 270 n.30 (2006) (“With respect to judicial immunity, it is not at all clear that the common law granted judges absolute immunity in 1871. Nor is it clear that Congress intended to insulate judges from civil-rights liability. Indeed, to the extent that there is legislative history on the point, it suggests that Congress intended to impose liability on judges under the Civil Rights Act of 1866.”) (internal citations omitted). Johns analyzes the deference of the Court to an imagined common law tradition granting absolute judicial immunity to judges in influential cases, including *Buckley v. Fitzsimmons*, 509 U.S. 259, 268–69 (1993); *Burns v. Reed*, 500 U.S. 478, 484–85 (1991). See *Stump v. Sparkman*, 435 U.S. 349, 356 (1978); *Tenney v. Brandhove*, 341 U.S. 367, 382–83 (1951) (Douglas, J., dissenting). See also Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001) (explaining why sovereign immunities should and will be eliminated).

39. See SIR EDWARD COKE, FLOYD AND BARKER (1607) reprinted in STEVE SHEPHERD, *SELECTED WRITINGS OF SIR EDWARD COKE*, vol. I, 427–32 (2003) (discussing judicial immunity).

40. See *supra* note 14 and accompanying text.

41. *Stevens v. Osuna*, 877 F.3d 1293, 1315 n.3 (11th Cir. 2017). In July 2018, EOIR issued a press release revising its protocols for access to immigration hearings. It authorized IJs to close hearings without allowing the observers a chance to state the case for open hearings, weighing the First Amendment or other equities of potential observers, stating a reason for the closure in the presence of the observers, or even providing a record of the closure. EOIR, Fact Sheet: Observing Immigration Court Hearings, (July 2018), <https://www.justice.gov/eoir/page/file/1079306/download>

incident is part of a pattern of court administrators and IJs across the country summarily closing hearing rooms to observers absent any evidence, much less formal findings of disorderly conduct or other grounds for summary contempt orders against them. Congress has not authorized this power for IJs.<sup>42</sup>

Nor does this power come from values at common law. Although Coke noted that judges “cannot be charged for Conspiracy, for that which he did openly in Court,”<sup>43</sup> if they do so “out of Court, this is extrajudicial.”<sup>44</sup> Coke likewise explained it is a judicial function to inquire through testimony, but contrasted this with a judge or prosecutor who may pursue “false and malicious Persecutions, out of Court, to such whom he knowes will be Indictors, to find any guilty, &c. amounts to an unlawful Conspiracy.”<sup>45</sup> Coke’s framework prevented judges from being brought before the Star Chamber “for this would tend to the scandall and subversion of all Justice,”<sup>46</sup> and also sought to prevent infinite litigation about litigation.<sup>47</sup> Nonetheless, Coke believed judges’ conduct was constrained “by the authority which the King hath committed to him.”<sup>48</sup> For conduct beyond this, judges could be held accountable for abusing their official position.<sup>49</sup> In sum, Coke carefully laid out the importance of independent scrutiny of conduct without authority, pursued for private ends, and as part of an unlawful conspiracy for which no immunities are available.

John Locke, another important influence on the framers of the U.S. Constitution,<sup>50</sup> also viewed the Parliament as the supreme and exclusive law-making body.<sup>51</sup> Indeed, Locke identified the

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42. See *supra* note 14 (journalists prohibited from observing immigration hearings) and *infra* Part V (IJs have no summary contempt powers).

43. SIR EDWARD COKE, FLOYD AND BARKER, *supra* note 39, at 429.

44. SIR EDWARD COKE, FLOYD AND BARKER, *supra* note 39, at 429.

45. SIR EDWARD COKE, FLOYD AND BARKER, *supra* note 39, at 429–30.

46. SIR EDWARD COKE, FLOYD AND BARKER, *supra* note 39, at 431.

47. SIR EDWARD COKE, FLOYD AND BARKER, *supra* note 39, at 431.

48. SIR EDWARD COKE, FLOYD AND BARKER, *supra* note 39, at 431.

49. SIR EDWARD COKE, FLOYD AND BARKER, *supra* note 39, at 431.

50. See generally Isaac Kramnick, *The ‘Great National Discussion’: The Discourse of Politics in 1787*, 45 WM. & MARY Q. 3 (describing Locke’s influence on federalists and anti-federalists).

51. See generally WILLMOORE KENDALL, JOHN LOCKE AND THE DOCTRINE OF MAJORITY RULE (2nd ed. 1959) (providing a historical investigation into the doctrine of majority rule). For an elaboration of the political context behind Locke’s and Coke’s preference of the House of Commons over other English legal bodies, see Jacqueline

legislature with majoritarianism and thus claimed unworkable the ability of the House of Lords to veto bills from the House of Commons.<sup>52</sup> Locke wrote:

The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said, We will submit to rules, and be governed by laws made by such men, and in such forms, no body else can say other men shall make laws for them; nor can the people be bound by any laws, but such as are enacted by those whom they have chosen, and authorized to make laws for them. The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it other hands.<sup>53</sup>

Here and in many other passages, Locke offered pragmatic, political arguments on the legitimacy of majority rule and the illegitimacy of hereditary monarchical authority or obligations imposed by force based on the orders of any other minoritarian body, including a judiciary that crafts decisions independent of positive law.<sup>54</sup>

The debates about parliamentary supremacy during the last decades of the Stuarts, before and after the English Civil War, resonated in the ideas and doctrines of those who pursued the American Revolution.<sup>55</sup> These earlier struggles with the arbitrary power of the English monarchy were well recognized by their compatriots in the colonies.<sup>56</sup> Thomas Jefferson's notable emphasis of the jurisprudence of Coke over that of the common law canonized by the more conservative William Blackstone in his *Commentaries* is relevant to the question of whether the judiciary can indeed

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Stevens, *The Reasonableness of John Locke's Majority: Property Rights, Consent, and Resistance in the Second Treatise*, 24 POL. THEORY 423 (1996).

52. This veto power was a compromise between the officers and soldiers of the Parliamentary army imposed in 1649 in the wake of their victory against Charles I in the English Civil War. PURITANISM AND LIBERTY: BEING THE ARMY DEBATES (1647-9) FROM THE CLARKE MANUSCRIPTS WITH SUPPLEMENTARY DOCUMENTS (2d ed. 1974).

53. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, XI. § 141 (1690).

54. *Id.* See also JEREMY WALDRON, LAW AND DISAGREEMENT (1999) (arguing that Constitutional judicial review of statutes is arbitrary and favors elites).

55. Julian S. Waterman, *Thomas Jefferson and Blackstone's Commentaries*, 27 ILL. L. REV. 629, 640-41 (1933).

56. *Id.*

create absolute judicial immunity absent any express statutory authority.<sup>57</sup>

In an 1812 letter to Judge John Tyler, Jefferson expressed his views that Blackstone's jurisprudence favoring judicial edicts over positive law "perverted" the law and created a "degeneracy of legal science," in contrast with the doctrine tying jurisprudence to the legislature found in the "deep and rich mines of Coke Littleton."<sup>58</sup> An 1826 letter to James Madison discussing the appointment of a law professor at the recently opened University of Virginia, further reveals Jefferson's concern with a legal education that fails to stress the importance of judges abiding by legislative acts:

In the selection of our Law Professor, we must be rigorously attentive to his political principles. You will recollect that before the Revolution, Coke Littleton [sic] was the universal elementary book of law students, and a sounder whig never wrote, nor of profounder learning in the orthodox doctrines of the British constitution, or in what were called English liberties. You remember also that our lawyers were then all whigs. But when his black-letter text and uncouth but cunning learning got out of fashion, and the honied Mansfieldism of Blackstone became the student's horn-book, from that moment, that profession (the nursery of our Congress) began to slide into toryism, and nearly all the young brood of lawyers now are of that hue. They suppose themselves, indeed to be whigs, because they no longer know what whigism or republicanism means. It is in our seminary that that vestal flame is to be kept alive; it is thence it is to spread anew over our own and the sister States.<sup>59</sup>

Mansfield, Blackstone's patron, was Chief Justice of England from 1756 to 1778 as well as a "legal adviser to the group which was

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57. *Id.* at 634 ("The distinction between [those who rely on Blackstone], and those who have drawn their stores from the deep and rich mines of Coke Littleton, [sic] seems well understood even by the unlettered common people, who apply the appellation of Blackstone lawyers to these ephemeral insects of the law.") (quoting Jefferson "Writings" (ed. Washington) Vol. VI pp. 65–66). Waterman notes: "This letter of June 17, 1812, was in reply to one of Judge Tyler, Federal District Judge in Virginia, of May 17, 1812, who sat with Marshall in *Livingston v. Jefferson* (1811) 1 Brock. 203, Fed. Cas. No. 8411. Jefferson was asked to express his view on 'common law rights' as set forth by Marshall [1 LYON GARDINER TYLER, LETTERS AND TIMES OF THE TYLERS 263-64 (1884)]."

58. Waterman, *supra* note 55, at 634.

59. Waterman, *supra* note 55, at 635.



determining England's colonial policy."<sup>60</sup> Mansfieldism was an insidious attack on democratic self-rule.

Julian Waterman observes, "[a]s early as 1788 Jefferson expressed fear of the 'sly poison' of Mansfield's legal innovations."<sup>61</sup> Of particular concern were bench trials allowing for the "judicial freedom of decision' which chancery judges practiced," and other artifices of judicial authority unmoored from popular rule, the cure for which Jefferson found in juries.<sup>62</sup> Coke urged following precedent so as to codify the meaning of positive law across judges and circuits, whereas Blackstone's jurisprudence invited judges to speak among themselves and create law across generations. Jefferson believed that judges in the United States under the sway of Blackstone had been "adopting a body of law of questionable merit to govern the people, when it ought to have been left for the legislative branch to enact it in such part and of such a period as it saw fit."<sup>63</sup> In sum, Jefferson abhorred judicial review based on case law unmoored from statute and also was distrustful of verdicts by single judges and not juries.

### III. Current Precedent on IJ Absolute Judicial Immunity

There is little precedent directly addressing the question of whether IJs have absolute judicial immunity from suits for injunctive and declaratory relief for closing hearings, or from personal liability for torts. Nevertheless, the 2017 Eleventh Circuit appellate panel ruling affording absolute judicial immunity from remedial, injunctive, and declaratory relief to IJ orders closing hearings takes a sharp departure from similar cases.<sup>64</sup>

#### A. *Pechter v. Lyons* (1977)

In *Pechter*, defendant IJ Francis Lyons allowed the media to observe the deportation hearings of an accused Nazi war criminal, but closed the hearings to the public.<sup>65</sup> Led by Bonnie Pechter,

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60. Waterman, *supra* note 55, at 642.

61. Waterman, *supra* note 55, at 642.

62. Waterman, *supra* note 55, at 643.

63. Waterman, *supra* note 55, at 634–44.

64. Compare *Stevens v. Osuna*, 877 F.3d 1293 (11th Cir. 2017), with *Pechter v. Lyons*, 441 F. Supp. 115 (S.D.N.Y. 1977), *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 948 (E.D. Mich. 2002), and *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002).

65. *Pechter*, 441 F. Supp. at 117.

several citizens filed a motion in federal district court requesting preliminary injunctive relief.<sup>66</sup> Instead of defending the IJ's order, the Immigration and Naturalization Service joined Pechter in objecting to the order.<sup>67</sup> Defendant IJ Lyons also appeared before the federal district court judge and urged an independent review of his agency's decision to overturn his order.<sup>68</sup>

The plaintiffs prevailed.<sup>69</sup> Although this is but one decision in one federal district court, its analysis is on point for the central claims in this Article and bears careful review. The regulation discussed in *Pechter* provided IJs discretion to close hearings to the public identical to that afforded in the contemporary regulation on public access to immigration hearings.<sup>70</sup> The order in *Pechter* quoted the regulation on public access to hearings:

This regulation is but one of countless manifestations of a public policy centuries old that judicial proceedings, especially those in which the life or liberty of an individual is at stake, should be subject to public scrutiny, not only for the protection

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66. *Id.* at 115–16.

67. *Id.* at 117.

68. *Id.*

69. *Id.* at 120.

70. Compare 8 C.F.R. § 246.16(a) (“Deportation hearings shall be open to the public, except that the special inquiry officer may, in his discretion and for the purpose of protecting witnesses, respondents, or the public interest, direct that the general public or particular individuals shall be excluded from the hearing in any specific case. Depending upon physical facilities, reasonable limitation may be placed upon the number in attendance at any one time, with priority being given to the press over the general public.”), with 8 C.F.R. § 1003.27 (2018) (“Public access to hearings. All hearings, other than exclusion hearings, shall be open to the public except that:

(a) Depending upon physical facilities, the Immigration Judge may place reasonable limitations upon the number in attendance at any one time with priority being given to the press over the general public;

(b) For the purpose of protecting witnesses, parties, or the public interest, the Immigration Judge may limit attendance or hold a closed hearing.

(c) In any proceeding before an Immigration Judge concerning an abused alien spouse, the hearing and the Record of Proceeding shall be closed to the public unless the abused spouse agrees that the hearing and the Record of Proceeding shall be open to the public. In any proceeding before an Immigration Judge concerning an abused alien child, the hearing and the Record of Proceeding shall be closed to the public.

(d) Proceedings before an Immigration Judge shall be closed to the public if information subject to a protective order under § 1003.46, which has been filed under seal pursuant to § 1003.31(d), may be considered.”), and Public Access to Hearings, 52 Fed. Reg. 2936, 2938 (Jan. 29, 1987), amended by Public Access to Hearings, 57 Fed. Reg. 11571, 11572 (Apr. 6, 1992); Public Access to Hearings, 62 Fed. Reg. 10334 (Mar. 6, 1997); Public Access to Hearings, 67 Fed. Reg. 36802 (May 28, 2002).

of the individual from unwarranted and arbitrary conviction, but also to protect the public from lax prosecution. Unless members of the general public have standing to assert their rights under this regulation, its purpose could conceivably be defeated by a secret collusive hearing or arbitrary prosecution.<sup>71</sup>

Pechter is not accusing IJ Lyons of impropriety, but the rationale of standing for the public's right to sue for injunctive relief is on point. If IJ Lyons has absolute judicial immunity, then, according to *Stevens*, discussed below, the public cannot sue in district court even for injunctive relief.<sup>72</sup>

In *Pechter*, the district court judge provided a long list of precedent in support of the public's right to observe immigration hearings.<sup>73</sup> The order did not consider the question of absolute judicial immunity as a bar to litigation:

Even the sixth amendment to the United States Constitution, although clearly designed primarily for the benefit of the defendant, has been construed to have a broader purpose as well. As was stated in *Lewis v. Peyton*, 352 F.2d 791, 792 (4th Cir. 1965): "The right to a public trial is not only to protect the accused but to protect as much the public's right to know what goes on when men's lives and liberty are at stake, for a secret trial can result in favor to as well as unjust prosecution of a defendant." In *United States v. Kobi*, 172 F.2d 919, 924 (3d Cir. 1949), the court stated: "[T]he right . . . accorded to members of the public to be present at a criminal trial as mere spectators . . . has been imbedded in our Constitution as an important safeguard not only to the accused but to the public generally."<sup>74</sup>

After pointing out the public's standing to sue for access to immigration hearings, the judge turned to whether there was an administrative remedy.<sup>75</sup> The analysis anticipated the problems raised in the Eleventh Circuit order and highlighted by the Concurring opinion quoted at the beginning of this Article:

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71. *Pechter v. Lyons*, 441 F. Supp. 115, 117–18 (S.D.N.Y. 1977). In a footnote, the judge added: "In 1641, the General Court of Massachusetts Bay Colony enacted 'The Massachusetts Body of Liberties,' including the following passage: Every man whether Inhabitant or forreiner, free or not free shall have libertie to come to any publique Court, Councell, or Towne meeting." *Id.* at 118 n.2 (internal citations omitted).

72. *Stevens v. Osuna*, 877 F.3d 1293, 1308 (11th Cir. 2017) ("Absolute immunity protects Judge Cassidy both from Plaintiff's *Bivens* claim seeking money damages and also the claim for injunctive relief.").

73. *Pechter*, 441 F. Supp. at 119–20.

74. *Id.* at 118.

75. *Id.*

Next, it is necessary to briefly consider whether the plaintiffs may have an administrative remedy that should be pursued before resorting to the district court. Upon scrutiny, it appears that they do not. They cannot intervene in the deportation proceeding, since they assert no interest in its outcome—their interest is solely in monitoring the process by which the outcome is determined. Indeed the hearing structure of INS is designed only to deal with questions that arise in the context of regular administrative proceedings. Its regulations provide no mechanism whatsoever for dealing with claims of strangers to a proceeding. Moreover, there appears to be no procedure for interlocutory appeals within the agency for the regulations provide for appeals from “decisions,” not from interlocutory orders, of the hearing officer. Obviously, by the time agency review of the order closing the hearing could be obtained, the issue would be moot. Thus, the plaintiffs having no administrative remedy, it is entirely proper for them to address their claim to this court.<sup>76</sup>

Having decided that he had jurisdiction, the judge then established that the standard for evaluating Lyon’s decision would be “whether Judge Lyons abused *his* discretion.”<sup>77</sup>

After a review of additional case law on public access to hearings, he found Lyons had done just that:

Here, although Judge Lyons has before him a respondent of some notoriety, whose life or person may indeed be in some danger, I cannot but conclude that it is possible to assure appropriate security within the courtroom itself—that is, orderly spectators without weapons—thereby protecting the respondent without sacrificing the openness that is so fundamental to our system . . . The only possible purpose in closing the hearing, therefore, is to protect him from harm *within* the courtroom. Given the fact that INS has assured this court that it can employ the same protective measures to guard the deportation hearing room as are used in federal courts in cases where there is reason to anticipate violence in the courtroom, there is no rational basis for concluding that closing the hearing room to the public will offer significant additional protection to the respondent. It necessarily follows that Judge Lyons, in barring the public from the courtroom under these circumstances, abused his discretion.<sup>78</sup>

No party raised the possibility that the action was not reviewable, or that IJs had absolute judicial immunity. The order was not appealed.

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76. *Id.* at 119 (internal citations omitted).

77. *Pechter v. Lyons*, 441 F. Supp. 115, 119 (S.D.N.Y. 1977) (emphasis added).

78. *Id.* at 120.

*B. Post-9/11 National Security Hearing Closures*

The next cases about whether the public could be barred from observing immigration proceedings took a different posture.<sup>79</sup> In *Pechter*, the question was whether the IJ abused his discretion in closing the hearing, a policy at odds with the preferences of the INS.<sup>80</sup> In *Detroit Free Press v. Ashcroft*<sup>81</sup> and *North Jersey Media Group v. Ashcroft*<sup>82</sup> the IJs closed hearings for national security grounds at the direction of the Office of the Chief Immigration Judge.<sup>83</sup> In both cases, media groups sued under the First Amendment and requested injunctive relief.<sup>84</sup> In its response to the first case, the government moved to dismiss by alleging that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) precluded judicial review: “The Government interprets the INA as affording judicial review *only* in the court of appeals and *only* after a final order of removal has been issued.”<sup>85</sup> Neither the Sixth Circuit nor the Third Circuit found the motions to dismiss based on IIRIRA persuasive, and both courts reviewed the petitions for injunctive relief.<sup>86</sup> The Sixth Circuit held the order closing the hearing violated the First Amendment.<sup>87</sup> The Third Circuit focused on the Government’s national security argument and found that the equities outweighed North Jersey Media Group’s First Amendment claim.<sup>88</sup> At no point did the respective defenses or

79. For a review of cases that protect the First Amendment right to observe immigration hearings, see Heidi Kitrosser, *Secrecy in the Immigration Courts and Beyond: Considering the Right to Know in the Administrative State*, 39 HARV. C.R.-C.L.L. REV. 95 (2004).

80. *Pechter*, 441 F. Supp. at 119.

81. 195 F. Supp. 2d 948 (E.D. Mich. 2002).

82. 308 F.3d 198, 199 (3d Cir. 2002).

83. *Detroit Free Press*, 195 F. Supp. 2d at 950–51 (“Chief Immigration Judge Michael Creppy issued a directive to all United States Immigration Judges mandating that they close immigration proceedings to the press and public (including family members of the deportee) in certain ‘special interest’ cases identified by the Office of the Chief Immigration Judge (‘the Creppy directive’).”).

84. *Detroit Free Press*, 195 F. Supp. 2d at 951; *North Jersey Media Group*, 308 F.3d at 198.

85. *Detroit Free Press*, 195 F. Supp. 2d at 950.

86. *Id.* at 948; *North Jersey Media Group*, 308 F.3d at 198.

87. *Detroit Free Press*, 195 F. Supp. 2d at 951.

88. *N. Jersey Media Group*, 308 F.3d at 217 (“In this case the Government presented substantial evidence that open deportation hearings would threaten national security.”). The order includes a caveat confining it to the context of hearings ordered closed for reasons of national security. *Id.* at 220 (“We do not decide that there is no right to attend administrative proceedings, or even that there is no

decisions contemplate absolute judicial immunity for an IJ who ordered a closed hearing, much less the use of force without statutory authority.<sup>89</sup>

*C. Bloodworth v. United States (2014)*

The next case reviewing a claim for exclusion from a hearing was brought by a man whose wife was detained and in removal proceedings.<sup>90</sup> Edward Bloodworth, *pro se*, filed a lawsuit against employees at the federal building housing Atlanta's immigration court, including the IJ.<sup>91</sup> In an order granting the government's motion for summary judgment, the federal district court judge found that among the many allegations, "the only claim Bloodworth arguably raised was a denial of access to [Cassidy's] immigration court."<sup>92</sup> The court noted that Bloodworth had failed to establish a right to appear in an immigration court as a witness in support of his detained wife's petition for legal permanent residency.<sup>93</sup> The order included no discussion of absolute judicial immunity.

*D. Stevens v. Attorney General (2012-2017)*

In the third case, a political scientist reporting on IJ misconduct on her blog and the Nation magazine<sup>94</sup> filed an

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right to attend any immigration proceeding.”).

89. For a close reading of these cases, see Kitrosser, *supra* note 79.

90. Bloodworth v. United States, No. 5:13-CV-112 (MTT), 2014 WL 1813374, at \*1 (M.D. Ga. May 7, 2014). It is important to note that the factual record is based exclusively on the record submitted by the government. *Id.* at \*9 n.19 (“Bloodworth failed to respond to the Government’s statement of undisputed facts and thus those facts are admitted.”).

91. *Id.* at \*1.

92. *Id.* at \*7.

93. *Id.* at \*9 (“Further, Bloodworth has not shown he had an unequivocal right to be present for his wife’s immigration proceedings. There is no doubt that the United States citizen spouse, or other qualifying relative, of an illegal alien who is applying for a waiver while in removal proceedings is a vital witness. Judges Cassidy and Pelletier expressed the importance of Bloodworth’s presence for the 601 hearings, and the transcript of Cho’s immigration proceedings clearly shows Judge Cassidy attempted to instruct Cho’s various attorneys what steps to take to ensure Bloodworth was present or could at least testify through some means. However, Bloodworth has cited no authority showing he had an unqualified right to be present at the hearing in light of his disruptive actions.”).

94. Jacqueline Stevens, STATES WITHOUT NATIONS, <http://stateswithoutnations.blogspot.com> (drawing attention, on several occasions, to actions by IJ Cassidy that resulted in the prolonged detention or deportation of U.S. citizens as aliens, and commenting on the unlawful nature of these actions) (last visited May 5, 2019). See also Jacqueline Stevens, *Secret Courts Exploit Immigrants*, NATION (June 29,

administrative complaint and then a lawsuit against the Attorney General. She alleged that top EOIR officials were conspiring with IJ William Cassidy and guards and court staff in Georgia to prevent her from observing immigration hearings.<sup>95</sup> The case involved numerous occurrences over the course of ten months in 2009-10, including court administrators not posting dockets,<sup>96</sup> guards not allowing entrance to public hearings,<sup>97</sup> and guards forcing Stevens from the immigration court lobby and out of the building more than fifteen minutes after she “asked Cassidy if the respondent had asked for a closed hearing.”<sup>98</sup> Stevens filed an administrative misconduct complaint, and Cassidy denied ordering the removal to the supervisor investigating the case.<sup>99</sup> A transcript of the guard calling in an incident report subsequently obtained from the Federal Protective Services noted that Cassidy not only had ordered this removal but that it was part of a plan to ban Stevens from the building.<sup>100</sup>

In contrast to its position in *Pechter*, here the government asserted that IJs had absolute judicial immunity from damages and injunctive and declaratory relief in performing judicial functions.<sup>101</sup> The government cited to *Butz v. Economou*,<sup>102</sup> a case affording absolute judicial immunity to administrative law judges for work

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2009), <http://www.thenation.com/article/secret-courts-exploit-immigrants>; Jacqueline Stevens, *Lawless Courts*, NATION (Nov. 8, 2010), <http://www.thenation.com/article/155497/lawless-courts>. Stevens is one of the authors of this Article.

95. See Jacqueline Stevens, *Atlanta Immigration Judge Sics Guards on Professor/Writer Who Revealed Improprieties*, STATES WITHOUT NATIONS (Apr. 25, 2010), <https://stateswithoutnations.blogspot.com/2010/04/atlanta-immigration-judge-sics-guards.html> (providing a contemporaneous account of the attempt to observe immigration hearings).

96. Brief for Appellant at 4, *Stevens v. Lynch*, No. 1:12-CV-1352-ODE, 2016 WL 10950435 (N.D. Ga. Feb. 29, 2016) (No. 16-12007-DD).

97. *Id.* at \*18.

98. *Id.* at \*9.

99. *Id.* at \*10.

100. *Id.* (“Guard Hayes that afternoon reported the event to the Federal Protective Service’s Battle Creek Mega Center Operator and stated that he had no idea why Cassidy ordered him to remove Stevens and he was later told ‘they are trying to ban her from the building.’”) (internal citations omitted). FOIA Case NPPD 10F202 (Sept. 27, 2011), <https://deportationresearchclinic.org/NPPD-FOIA-10F202MegaCenter.pdf>.

101. Brief for Appellees at \*19, *Stevens v. Osuna*, 877 F.3d 1293 (11th Cir. 2017) (No. 16-12007-DD) (“The district court correctly held that maintaining control of the decorum, sanctity, and security of the courtroom constitutes a function normally performed by a judge.”) (internal citations omitted).

102. 438 U.S. 478, 512–13 (1978).

that is part of their judicial functions.<sup>103</sup> Picking up on a point made *sua sponte* by the district court judge,<sup>104</sup> the government argued that ordering people removed from a courthouse was a “function normally performed by a judge” and that “the removal here came in the context of Appellant ‘deal[ing] with the judge in his judicial capacity.’”<sup>105</sup>

A majority of the three-judge panel of the Eleventh Circuit held that “Immigration Judges are judges entitled to absolute immunity for their judicial acts, without regard to the motive with which those acts are allegedly performed.”<sup>106</sup> The panel then established that the standard for evaluating the facts was whether Cassidy “acted in the ‘clear absence of all jurisdiction.’”<sup>107</sup> Because IJs “have an obligation to maintain control over the courthouse and over the conduct of persons in the courthouse; the issuance of an order removing persons from the courthouse in the interest of maintaining such control is an ordinary function performed by judges . . . .”<sup>108</sup> The court further held that “immunity bars

103. Brief for Appellees at \*13–14, *Stevens*, 877 F.3d 1293 (No. 16-12007-DD) (“Citing to *Butz*, 483 U.S. at 512–13, the district court correctly held that, because the Supreme Court has unequivocally determined that ‘those who participate in [adjudication within a federal administrative agency] should also be immune from suits for damages,’ absolute judicial immunity extends to Appellee IJ Cassidy as an adjudicator within a federal administrative agency.”) (internal citation omitted); *id.* at \*19 (“Assuming *arguendo*, as the district court did, that any removal of Appellant from the building actually occurred, it stemmed from Appellant’s previous interaction with Appellee IJ Cassidy inside his courtroom as part of Appellant’s effort to observe a case on Cassidy’s docket. As such, IJ Cassidy acted in his judicial capacity and within his jurisdiction.”) (internal citations omitted). The administrative law judge (ALJ) referenced in *Butz* is a creature of the Administrative Procedures Act, in contrast with the “administrative judge” (AJ).

104. *Stevens v. Lynch*, No. 1:12-CV-1352-ODE, 2016 WL 10950435, at \*4 (N.D. Ga. Feb. 29, 2016) (“Judge Cassidy was judicially immune from Plaintiff’s suit for injunctive relief because he was acting within his judicial capacity when he ordered her to be removed from the courtroom and the Atlanta Immigration Court building.”) (internal citation omitted).

105. Brief for Appellees at \*19, *Stevens*, 877 F.3d 1293 (No. 16-12007-DD) (quoting *Stump v. Sparkman*, 435 U.S. 349, 362 (1978)).

106. *Stevens*, 877 F.3d at 1304.

107. *Id.*

108. *Id.* at 1305. To support its analysis, the court cited “*Sheppard v. Maxwell*, 384 U.S. 333, 358 (1966) (‘the courtroom and courthouse premises are subject to the control of the court’); *United States v. Smith*, 426 F.3d 567, 569, 576 (2d Cir. 2005) (stressing the importance that the judiciary -- not the Marshals Service -- play the primary role in controlling access to federal buildings containing courtrooms); *United States v. Ulan*, 421 F.2d 787, 788 (2d Cir. 1970) (appeal from a conviction for assaulting and interfering with a U.S. Deputy Marshal, which arose after a district court judge ordered the Marshals to clear the courtroom and to escort all



injunctive relief against Immigration Judges”<sup>109</sup> and stressed the inconvenience to the IJs of having to defend their actions in federal court and the “chilling” effect this might have on their conduct.<sup>110</sup>

The order focused on a portion of a regulation authorizing IJs to rule on the admission of evidence, rule on objections, and control the hearing and failed to engage Plaintiff’s arguments on the express statutory limits on the contempt authority of IJs.<sup>111</sup> Nor did the order address the factual disputes about the circumstances of Cassidy closing the hearings,<sup>112</sup> previous occasions in which the plaintiff was barred because of hearings being cancelled or dockets not posted, or the Eleventh Circuit precedent cited in the appeal

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demonstrators outside the courthouse); *Richman v. Sheahan*, 512 F.3d 876, 880 (7th Cir. 2008) (a state court judge ordered the son of a woman contesting a traffic ticket to leave the court building and, when he refused, ordered court security officers to arrest the man for contempt); *United States v. Brugnara*, 856 F.3d 1198, 1205 (9th Cir. 2017) (district court judge ordered a belligerent juror removed from the building); *State v. Bush*, 714 P.2d 818, 823 (Ariz. 1986) (‘the trial judge has the primary responsibility for controlling the conduct of spectators in the courtroom and the courthouse’ and, if necessary, ‘may clear the courtroom and the courthouse of those who may be intimidating witnesses or other court personnel.’)” *Id.* at 1305–06.

109. *Stevens v. Osuna*, 877 F.3d 1293, 1308 (11th Cir. 2017).

110. *Id.* at 1308–09 (“Litigation puts the weight of time, trouble, and expense on the attacked judge whether the plaintiff seeks damages or an injunction at the end of the action. To be entangled in litigation is a distraction and more. Also, if a plaintiff wins an injunction, the judge faces the threat of more time, trouble, and expense of defending against accusations that the judge is later in violation of the injunction and faces the threat of contempt punishments, including incarceration maybe. We stress that it is the threat of private parties instituting actions and proceedings (and not just the possibility that the judge will be a losing party in those actions/proceedings) that carries with it the chilling potential for judges as they work.”).

111. Brief for Appellant, *Stevens v. Lynch*, No. 16-12007-DD (11th Cir. Jul. 20, 2016), 2016 WL 3964938, at \*19 (“Congress has not granted immigration judges any general authority to maintain the dignity of courtrooms or other federal facilities. Crucially, unlike federal or state judges, immigration judges’ contempt authority is limited to monetary sanctions, and does not extend to physical control over individuals. 8 U.S.C. § 1229a (b)(1). An immigration judge has far less statutory authority than a U.S. Magistrate, and even a U.S. Magistrate’s contempt authority would not extend to expelling a citizen from public building. 28 U.S.C. § 636(e)(2) (magistrate contempt authority limited to controlling ‘misbehavior of any person in the magistrate judge’s presence so as to obstruct the administration of justice.’)”). A regulation that authorizes IJs to rule on objections and the substantive content of proceedings cannot be used to override express statutory restrictions on IJ authority to order force against third parties, if one adheres to the judicial philosophy of Coke, Locke, and Jefferson.

112. *Id.* at \*9 (“Stevens asked Cassidy if the respondent had asked for a closed hearing. Cassidy responded: ‘No -- the respondent is pro se.’”).

obligating a third party to object to an order for a closed hearing in real-time in order to preserve the right to pursue injunctive relief.<sup>113</sup> This obligation conflicts with the rationale for Cassidy's order to remove Stevens from the building, which was based on the inference that questioning the basis for a closed hearing threatened the sanctity of court proceedings.<sup>114</sup>

Judge Kathleen Williams concurred in the result because "according to Professor Stevens' own allegations, she was removed from the building after she did not immediately comply with IJ Cassidy's order to exit his courtroom so a sealed matter could proceed."<sup>115</sup> However, she "disagree[d] with the blanket assertion that for judicial immunity purposes, ordering persons removed from the courthouse is an obligation for judges and an ordinary function performed by judges."<sup>116</sup> She was concerned that "the facts of this case amply demonstrate that the Atlanta Immigration Court's administrative procedures did not provide an avenue for meaningful review to safeguard Professor Stevens' rights, especially in light of her history with IJ Cassidy and the Executive Office for Immigration Review."<sup>117</sup> The "majority's analysis of IJ Cassidy's entitlement to judicial immunity has the potential to

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113. Reply Brief of Appellant, *Stevens v. Lynch*, No. 16-12007-DD (11th Cir. Oct. 17, 2016), 2016 WL 8470209, at \*19 n.11 (citing *United States v. Valenti*, 987 F.2d 708, 713 (11th Cir. 1993)). The reply motion did not quote from *Valenti*. The pro se petition for en banc review states: "Her request for a legal reason for Cassidy asking her to leave the courtroom, far from being grounds for him ordering force, is a question the Eleventh Circuit requires to preserve standing for injunctive relief." *Stevens v. Sessions*, Petition for En Banc Review, 16-12007, at 9 (Jan. 29, 2018) (citing *United States v. Valenti*, 987 F.2d 708, 713 (11th Cir. 1993)) ("The opportunity for the press and the public to be heard on the question of their exclusion 'extends no farther than the persons actually present at the time the motion for closure is made, for the alternative would require substantial delays in trial and pretrial proceedings while notice was given to the public.'") (internal citations omitted).

114. Reply Brief of Appellant, *Stevens*, No. 16-12007-DD, at \*19 n.11.

115. *Stevens*, 877 F.3d at 1314. The plaintiff disputed that there was any "sealed matter." See *Stevens*, Brief for Appellant at \*38, *supra* note 96. ("The District Court's non-committal factual finding ('likely complied') is further abuse of discretion: even giving the District Court the benefit of the doubt, and treating its 'dismissal' as if it were a granting of a motion of summary judgment, the District Court should have viewed the evidence in a light most favorable to Stevens, in which case it would have found that Cassidy had habitually failed to state on the record his reasons for the closure of proceedings."). In its Answer, the Government "admits that at no point did Plaintiff indicate she would refuse Cassidy's request." *Stevens v. Sessions*, Petition for En Banc Review, 16-12007, at 9 (Jan. 29, 2018) (internal quotation omitted).

116. *Stevens*, 877 F.3d at 1313.

117. *Id.* at 1315.

undermine the constitutional right of open access to public proceedings.”<sup>118</sup> The analysis in the 2017 Eleventh Circuit panel decision represents a sharp attack on the constitutional right of access to immigration hearings and a departure from prior cases. An explanation of the specific problems with the Eleventh Circuit’s analysis will be reviewed in Part V, following an extensive review in Parts IV and V of the relevant underlying legislative and case law.

#### **IV. Legislative, Regulatory, and Case Law Relevant to Claims of Absolute Judicial Immunity for Immigration Judges**

Federal statutes and the Federal Rules of Civil Procedure grant judges summary contempt powers in modern jurisprudence.<sup>119</sup> Numerous state and federal statutes further elaborate the contempt orders courts have available for penalizing or punishing people without the protections of a jury trial.<sup>120</sup> Congress has expressly confined IJ contempt authority to civil fines.<sup>121</sup> As detailed in Part V, the Supreme Court has ruled that courts cannot expand judicial contempt powers beyond those specified by Congress and has provided pain-staking detail on the legislative history behind this limitation.<sup>122</sup> The legislative record discussed below indicates that Congress paid close attention to questions of contempt powers and reveals that Congress refused to pass legislation authorizing IJs to order force against third parties despite multiple opportunities to do so.<sup>123</sup> The Eleventh Circuit’s order thus grants an authority to IJs in direct opposition to legislative intent.

The plain meaning of the sections empowering IJs circumscribes their contempt authority, in contrast with the powers granted to other Article I or Article II judges. Removal proceedings are governed by section 1229a of Title 8 of the U.S. Code.<sup>124</sup> Section 1229a(b)(1), “Authority of Immigration Judge,” gives the IJ

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118. *Id.*

119. *See infra* Part V.B.2.a.

120. *See infra* Part V.B.2.a.

121. *See* 8 U.S.C. § 1229a(b)(1).

122. *See infra* Part V.

123. *See infra* Part V.

124. 8 U.S.C. § 1229a (2019).

“authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge’s proper exercise of authority under this chapter.”<sup>125</sup> The Attorney General has not issued regulations pursuant to 8 U.S.C. § 1229a(b).

In contrast with 8 U.S.C. § 1229a(b)(1), 18 U.S.C. § 401, “Power of Court,” states that “[a] court of the United States [under Article III] shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other as, 1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice . . . .”<sup>126</sup> Congress has provided broader contempt authorities to other courts as well, including the Court of Veteran Appeals, further evidence that Congress is perfectly capable of extending these powers to IJs and yet has withheld them.<sup>127</sup> That Congress has provided summary contempt powers to other courts and neglected to do so here is indicative of Congress’ intent to prohibit IJs from exercising the same authority.<sup>128</sup>

The Eleventh Circuit order in *Stevens* cited numerous cases of judges ordering force against third parties pursuant to their contempt powers.<sup>129</sup> In the petition for *en banc* review, the plaintiff noted the panel’s failure to consider that the precedent refers to contempt powers created by legislatures, not the judiciary.<sup>130</sup>

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125. § 1229a(b)(1).

126. 18 U.S.C. § 401 (2019). 18 U.S.C. § 401 also allows judges to punish by their contempt powers: “(2) Misbehavior of any of its officers in their official transactions; (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.”

127. 38 U.S.C. § 7265 (2019) (“Contempt authority; assistance to the Court (a) The Court shall have power to punish by fine or imprisonment such contempt of its authority as—(1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice . . . .”).

128. *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000) (a statute “specifying who may use § 506(c) -- ‘the trustee’” is sufficient to exclude others from claiming that prerogative). 8 U.S.C. § 1229a(b)(1), by expressly allowing civil contempt authority, reciprocally prohibits the summary criminal contempt powers Congress has granted to other judges.

129. *See Stevens v. Osuna*, 877 F.3d 1293, 1305 (11th Cir. 2017).

130. *Petition for En Banc Review*, *supra* note 113, at 8 n.5 (“*Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938) (There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States.) (internal quotations omitted); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) (Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such

Further, Congress has not expressly denied these powers to judges, though it has placed limits on the contempt powers of IJs.<sup>131</sup> The petition for *en banc* review pointed out that in *Gregory v. Thompson*,<sup>132</sup> the sentence immediately following the one the panel quoted in support of its position is: “A judge’s criminal contempt power provides him with the judicial muscle to cope with such situations, and the exercise of that power, clearly judicial in character, falls within the scope of the immunity doctrine.”<sup>133</sup> The petitioner’s brief argued that in withholding this power from IJs, Congress also was withholding any shield of immunity for actions resembling those of bona fide judges who do hold summary contempt powers by statute or otherwise.<sup>134</sup> The petition for *en banc* review was denied on April 11, 2018.<sup>135</sup>

#### *A. Immigration Hearings and Courts: Congressional and Administrative History*

The gulf between the plain language of the law limiting IJs from the corporal powers over third parties and the Eleventh

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jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution.”); *United States v. Welch*, 154 F.2d 705, 706 (3d Cir. 1946) (“Section 268 of the Judicial Code limits the power of district courts to punish for contempt.”); Blackstone, Commentaries, Vol. 4, p. 284–85 (“To this head, of summary proceedings, may also be referred the method, immemorially used by superior courts of justice, of punishing contempts by attachment, and the subsequent proceedings thereon. The contempts that are punished, are either direct, which openly insult or resist the powers of the courts, or the persons of the judges who preside there . . . .Some of these contempts may arise in the face of the court; as by rude and contumelious behavior; by obstinacy, perverseness, or prevarication; by breach of the peace, or by any wilful disturbance whatever . . . .”).

131. Petition for En Banc Review, *supra* note 113, at 7–8 (“Whatever may have been the earlier expressions of doubt as to the constitutional authority of Congress to curtail this ‘inherent’ contempt power of the courts, it is now well-settled that the district court could not go beyond the statutory boundaries of 18 U.S.C. § 401 in imposing summary punishment for a criminal contempt.”) (quoting *Farese v. United States*, 209 F.2d 312, 315 (1st Cir. 1954)).

132. 500 F.2d 59 (9th Cir. 1974).

133. *Id.* at 64 (emphasis added) (internal citation omitted).

134. Petition for En Banc Review, *supra* note 113, at 6–9.

135. *Stevens v. Sessions*, Docket No. 16-12007 (11th Cir. Apr. 11, 2018) (“[N]o Judge in regular active service on the Court having requested that the Court be polled, the Petition(s) for Rehearing En Banc” were denied). It is not known whether Judge Kathleen Williams, sitting by designation, who wrote the concurring opinion highlighting the absence of a remedy, was polled for the petition. See *Stevens v. Osuna*, 877 F.3d 1293, 1314–15 (11th Cir. 2017).

Circuit order prompts some head-scratching. One explanation for the panel's confusion is the vast discrepancy between the law and legislative history that created immigration courts, immigration "judges," hearing room optics, and agency nomenclature. Props and titles from judicial bodies have been superimposed on an administrative agency that is part of a law enforcement agency. This has the Orwellian effect of implying judicial functions that far exceed those the law itself affords. IJs have a great deal of discretion to make findings of fact and issue orders of removal or adjustments to immigration status.<sup>136</sup> But this discretion is not at all unique to this position. U.S. Citizenship and Immigration Services (USCIS) and State Department agents employ adjudicator attorneys who exercise discretion on the basis of case law to make decisions that allow or prohibit entrance to the United States.<sup>137</sup> There is a great deal of discretion and thus variation in their final decisions,<sup>138</sup> applicants have a right to be accompanied by an attorney,<sup>139</sup> and the outcomes of the USCIS decisions are subject to review, just like the decisions of IJs.<sup>140</sup>

The contemporary immigration court reviewing an asylum denial is much closer to the office desk of the nineteenth century hearing officer than many realize. If one focuses on case law and statutes, and ignores the props of the dais and the robe, the IJ in downtown New York City in 2019 looks a lot more like an

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136. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208; 8 U.S.C. § 1158(b)(1) (1996); 8 U.S.C. § 1103 (2009). IJs are administrative agents acting on behalf of the Attorney General, exercising discretion on behalf of the Attorney General.

137. *Adjudicator's Field Manual*, USCIS.GOV, <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1.html> (last visited Apr. 2, 2019); *State, Foreign Affairs Manual and Foreign Affairs Handbook*, U.S. DEPT. OF STATE, <https://fam.state.gov/> (last visited Apr. 2, 2019).

138. See generally JAYA RAMJI-NOGALES, ANDREW IAN SCHOENHOLTZ & PHILIP G. SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM (2009) (showing substantial variation among USCIS officers and EOIR attorneys in rates of granting asylum after controlling for several variables of applicant demographics).

139. *Asylum Interviews FAQ*, USCIS.GOV, <https://www.uscis.gov/faq-page/asylum-interviews-faq#t12833n40057> ("You have the right to bring an attorney or representative. The attorney or representative must have filed or bring with him a Form G-28, which states that he or she is your attorney.") (last visited Apr. 2, 2019).

140. *Types of Asylum Decisions*, USCIS.GOV, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/types-asylum-decisions> ("If we cannot approve an asylum claim, we will send you a letter of explanation and a Form I-862, Notice to Appear, indicating the date and time you are scheduled to appear in court.") (last visited Apr. 2, 2019).

immigration officer at Ellis Island in 1919 than a federal district court judge, or even a traffic court judge. Case law has allowed Congress and the agencies implementing immigration policy broad and even unreviewable latitude to effect 'national sovereignty.'<sup>141</sup> The purpose was to ensure that the final court of review for immigration policies would be no court at all, but rather agencies under the direction of leaders appointed by the President.<sup>142</sup> In the last 125 years, Congress and the agencies have tinkered with the nomenclature of the functions and the titles, producing an overlay of what seems like judicial discretion for IJs, but this authority remains tethered firmly to the prerogatives of the Attorney General.<sup>143</sup>

As passages from historical statutes make clear, broad discretion approved by the judiciary for hearings at ports of entry have become institutionalized in federal buildings in the interior. Of special note is that the procedures Congress crafted in the late nineteenth century and thereafter track the nomenclature of the 1789 Judiciary Act, including contempt powers.<sup>144</sup> A legislative

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141. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. Law No. 104-208 (codified at 8 U.S.C. § 1158(b)(1)) (1996).

142. *Id.*

143. *Id.* Attorney General orders certifying selected immigration cases for review tied to specific policy objectives of the Trump administration have outraged immigration attorneys and scholars under the Trump administration, but in fact goes back to a practice that was always available by statute and made use of by A.G. Michael Mukasey in 2008. Laura S. Trice, *Adjudication by Fiat: The Need for Procedural Safeguards in Attorney General Review of Board of Immigration Appeals Decisions*, 85 N.Y.U. L. Rev. 1766, 1767 (2010) ("Exercising his power to review decisions of the Board of Immigration Appeals (BIA), the Attorney General used a brief, unpublished BIA decision, *Silva-Trevino*, as a vehicle to completely rewrite longstanding precedent governing "crimes involving moral turpitude.") (internal citation omitted). See also Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy through the Attorney General's Review Authority*, 101 Iowa L. Rev. 841, 922 (2016); Catherine Y. Kim, *The President's Immigration Courts*, 68 Emory L.J. 1, 48 (2018); Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control Over Immigration Adjudication*, GEO. L.J. (forthcoming 2019), <https://ssrn.com/abstract=3348681>.

144. See An Act to Establish the Judicial Courts of the United States, ch. 20, § 13, 17 1 Stat. 73, 80–83 (1789) ("Sec. 17. And be it further enacted, That all the said courts of the United States shall have power to grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law; and shall have power to impose and administer all necessary oaths or affirmations, and to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same; and to make and establish all necessary rules for the orderly conducting of business in the said courts, provided such rules are not repugnant to the laws of the United States.").

record exists and judges can compare side-by-side the authorities Congress afforded to Article III judges with those Congress denied IJs and other administrative judges.<sup>145</sup> The string of cases that ignore these statutes and rely on vague ideas about how ‘courts function and the prerogatives inferred implicitly or explicitly from ‘inherent judicial powers,’ impute Article III powers to other courts or officials. They therefore substitute the preferences, biases, and beliefs of sitting judges for laws Congress passed.

Especially important is that these departures from positive law are not based on findings that the laws are unconstitutional or absurd. Nor do these decisions rely on statutes for their findings, as to whether a defendant’s actions are part of their official functions.<sup>146</sup> The black letter history of immigration review below exposes the distinction between the appearance of a judicial context and the true nature of immigration proceedings.<sup>147</sup> The discretion of immigration officials described below is in service of the immigration priorities of the Executive Branch, an obscure policy path that has become more visible in recent months under the Trump administration.

#### *B. Immigration Office and Inspection Powers, 1875 to 1917*

The earliest administrative measures to screen those arriving at ports of entry focused on shipping ports and were enforced by the “director of the port at which [the vessel] arrives.”<sup>148</sup> The 1875 statute prohibited “any alien” from leaving an arriving vessel until after it had been inspected, and gave federal courts jurisdiction to hear challenges.<sup>149</sup> The early procedures authorized a single agent to make an evidentiary finding of exclusion and provided for appeals of these findings in federal courts.<sup>150</sup> In 1882, Congress continued

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145. See generally Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501 (2010) (discussing the differences between executive branch IJs and Article III federal judges).

146. See *infra* Part V.

147. See *infra* Part IV.B–C, V.

148. Act of Mar. 3, 1875, ch. 141, 43 Stat. 477 (1875).

149. *Id.* at 478 (“If any person shall feel aggrieved by the certificate of such inspecting officer stating him or her to be within either of the classes whose immigration is forbidden by this section, and shall apply for release or other remedy to any proper court or judge, then it shall be the duty of the collector at said port of entry to detain said vessel until a hearing and determination of the matter are had . . .”).

150. *Id.*



to charge the Secretary of the Treasury with “supervision over the business of immigration to the United States.”<sup>151</sup> In 1885, Congress first mandated a procedure for the deportation of noncitizens that had been determined to arrive in violation of immigration laws, but the procedure for this was not specified.<sup>152</sup>

In 1887, Congress charged the Secretary of the Treasury with establishing rules and regulations for implementing the immigration law. This included “furnish[ing] instructions to the board, commission, or persons charged with the execution of the provisions of this section as to the time of procedure in respect thereto . . .”<sup>153</sup> In 1888, Congress passed “an act to prohibit the coming of Chinese laborers to the United States,” and established that the only authority to review adverse admissions decisions would be employees of the Treasury Department: “[T]he collector shall in person decide all questions in dispute with regard to the right of any Chinese passenger to enter the United States, and his decision shall be subject to review by the Secretary of the Treasury, and not otherwise.”<sup>154</sup> However, those targeted for removal after they had been residing in the United States could be deported only

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151. 1882 Immigration Act, ch. 376, 22 Stat. 214, 214 (1882). The courts in this initial time frame were using their jurisdiction to affirm Congress’s prerogative to pass legislation affecting non-citizens in furtherance of ‘national sovereignty,’ and to give broad berth to the findings of the executive branch, regardless of putative due process rights asserted by those adversely affected by such legislation and its implementation. *See Chae Chan Ping v. United States*, 130 U.S. 581, 603 (“Public opinion thus enlightened, brought to bear upon legislation, will do more than all other causes to prevent abuses; but the province of the courts is to pass upon the validity of laws, not to make them, and, when their validity is established, to declare their meaning and apply their provisions.”). Congress had not assigned final jurisdiction to immigration commissions, and courts still had jurisdiction to review these claims.

152. Amendment to the Alien Contract-Labor Law Contained in the Deficiency Bill, 25 Stat. 565 (1888) *in* U.S. TREAS. DEP’T, Doc. No. 1945, IMMIGRATION LAWS AND REGULATIONS, at 11 (May 22, 1895) (“[T]o authorize the Secretary of Treasury, in case that he shall be satisfied that an immigrant has been allowed to land contrary to the prohibition of that law, to cause such immigrant, within the period of one year after landing or entry, to be taken into custody and returned to the country from whence he came . . .”). The one-year limit recognized that immigration authority to exclude was tied to an admissions process. After one year, the individual was *de facto* and thus *de jure* admitted.

153. Act to Prohibit Importation and Immigration of Foreigners and Aliens under Contract or Agreement to Perform Labor in the United States, the Territories, and the District of Columbia, Stat. 414, ch. 220, § 8 (Feb. 23, 1887) *in* U.S. TREAS. DEP’T, Doc. No. 1945, IMMIGRATION LAWS AND REGULATIONS, at 4 (May 22, 1895).

154. An Act to Prohibit the Coming of Chinese Laborers to the United States, Stat. 476, ch. 1017, § 12 (Sept. 13, 1888).

after a warrant sworn under oath and a hearing before a judge or commissioner of a federal court.<sup>155</sup>

The 1891 act “Supervision over the business of immigration to the United States,” established for the first time the office of “superintendent of immigration” within the Department of the Treasury.<sup>156</sup> It also established hearing-like powers and procedures for officials reviewing arriving aliens, including the “power to administer oaths, and to take and consider testimony touching the right of any such aliens to enter the United States,” and required this “shall be entered of record.”<sup>157</sup> Congress stated that the decisions made by the inspectors “shall be final,” but also provided appeal to the superintendent of immigration, whose decisions were in turn “subject to review by the Secretary of Treasury.”<sup>158</sup> Ultimately, circuit and district courts of the United States had “full and concurrent jurisdiction of all causes, civil and criminal, arising under any of the provisions of this act.”<sup>159</sup> In 1892, Congress revised the Chinese exclusion law and allowed cases of those entering or arrived to be “tried” before a “justice, judge, or commissioner” and, in a departure from the 1888 law, did not specify that the commissioner needed to belong to a state or federal court.<sup>160</sup>

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155. An Act to Prohibit the Coming of Chinese Laborers to the United States, Stat. 476, ch. 1017, § 13 (Sept. 13, 1888) (“That any Chinese person, or person, of Chinese descent, found unlawfully in the United States, or its Territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court, or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came.”).

156. U.S. TREAS. DEP’T Doc. No. 1945, IMMIGRATION LAWS AND REGULATIONS, at 4 (May 22, 1895).

157. Act of Mar. 3, 1891, ch. 551, §§ 7–8, 51 Stat. 1084 (1891).

158. Act of Mar. 3, 1891, ch. 551, §§ 7–8, 51 Stat. 1084 (1891).

159. Act of Mar. 3, 1891, ch. 551, § 13, 51 Stat. 1086 (1891).

160. The Geary Act of 1892 ch. 60, § 2, 27 Stat. 25 (“That any Chinese person or person of Chinese descent, when convicted and adjudged under any of said laws to be not lawfully entitled to be or remain in the United States, shall be removed from the United States to China, unless he or they shall make it appear to the justice, judge, or commissioner before whom he or they are tried that lie or they are subjects or citizens of some other country, in which case he or they shall be removed from the United States to such country.”) (emphasis added). *See also* Fong Yue Ting v. United States, 149 U.S. 698, 723 (claiming to paraphrase *Chae Chan Ping v. United States*, 130 U.S. 581, 582 (1889) in finding a Chinese laborer “might be refused readmission into the United States, without judicial trial or hearing, and simply by reason of another act of congress, passed during his absence . . .”). The Court did not cite to any specific passage in the opinion and the inference seems incorrect. In fact, *Chae*

In 1893, Congress further specified that “at least three” inspectors must approve those whose legal status is in doubt.<sup>161</sup> Treasury then issued rules providing that a “special inquiry required by statute will be separate from the public, but any immigrant who is refused permission to land, or pending an appeal in his case, will be permitted to confer with friends or counsel in such manner as the commissioner may deem proper.”<sup>162</sup> This second 1893 regulation clarified the procedure for an appeal of the decision rendered by the three inspection officers, allowing both the dissenting inspector and the immigrant to appeal in writing “with all the evidence in the case and his views thereon.”<sup>163</sup> The deportation was stayed pending review of the appeal.<sup>164</sup> Though there was no time frame for either filing the appeal or for a decision, rules issued several months later stated that “[t]hose detained for special inquiry shall have a speedy hearing and be either discharged or ordered deported. If an appeal is prayed the record of the

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Chan Ping’s petition for a writ for habeas corpus was granted by the Northern District of California. *Chae Chan Ping*, 130 U.S. at 582 (“[C]ommanding [the master of the ship] to have the body of the appellant, with the cause of his detention, before the court at time and place designated . . .”). The *Chae Chan Ping* Court affirmed that, as a conclusion of law, Ping was “not entitled to enter the United States, and was not unlawfully restrained of his liberty . . .” *Id.* The record discussed only Congress’s prerogative to reverse its treaty by virtue a new law, and whether the previous treaty afforded Ping property or contract rights. *Id.* (“The objection that the act is in conflict with the treaties was earnestly pressed in the court below, and the answer to it constitutes the principal part of its opinion. Here the objection made is that the act of 1888 impairs a right vested under the treaty of 1880, as a law of the United States, and the statutes of 1882 and of 1884 passed in execution of it. It must be conceded that the act of 1888 is in contravention of express stipulations of the treaty of 1868, and of the supplemental treaty of 1880, but it is not on that account invalid, or to be restricted in its enforcement. The treaties were of no greater legal obligation than the act of congress. By the constitution, laws made in pursuance thereof, and treaties made under the authority of the United States, are both declared to be the supreme law of the land, and no paramount authority is given to one over the other.”) (internal citations omitted). Ping did not complain that he was turned back without a trial, but that the criteria for his admission had changed unlawfully. *Id.* The Court invoked the Constitution only to declare Congress can supersede treaties and was silent on the question of whether in doing so the substance of the law violated Ping’s Sixth or Seventh Amendment rights. *Id.*

161. Act of Mar. 3, 1893, ch. 206, § 5, 27 Stat. 569 (1893) (“[N]o immigrant shall be admitted on special inquiry except after a favorable decision made by at least three of said inspectors; and any decision to admit shall be subject to appeal by any dissenting inspector to the Superintendent of Immigration . . .”).

162. U.S. TREAS. DEP’T, REGULATION OF IMMIGRATION, Art. 4, at 4 (Apr. 25, 1893).

163. U.S. TREAS. DEP’T, REGULATION OF IMMIGRATION, Art. 6–7, at 4.

164. U.S. TREAS. DEP’T, REGULATION OF IMMIGRATION, Art. 6–7, at 4.

proceedings shall at once be transmitted to the Superintendent of Immigration at Washington.”<sup>165</sup>

By 1913, Congress had empowered immigration officers to formally administer oaths and moved jurisdiction over immigration to the Commissioner General of Immigration within the Department of Labor.<sup>166</sup> Hearings to determine “whether an alien who has been duly held shall be allowed to land or shall be deported” were to take place in ports of arrival before local boards of three members comprised of immigration inspectors.<sup>167</sup> Dissent by a third inspector or the noncitizen could be appealed to the newly established Secretary of Labor, whose decision would be “final.” Section 27 specified the jurisdiction of federal courts over appeals of the agency decision based on violations of due process or other rights provided by the Constitution.<sup>168</sup>

Congress required initial hearings be held in secret, and the sole mechanism of accountability was a documentary record of proceedings: “All hearings before boards shall be separate and apart from the public, but the said boards shall keep a complete permanent record of their proceedings and of all such testimony as may be produced before them . . . .”<sup>169</sup> The Department of Labor continued to abide by rules from 1907 for providing more formal hearings, including an “oath of office” for those appointed to a board, and a prompt, mandatory hearing with “due regard being had to the

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165. U.S. TREAS. DEP’T, BUR. OF IMMIGRATION, MAINTENANCE AND DEPORTATION OF ALIEN IMMIGRANTS, at 19–20, Rule 2 (Nov. 29, 1893).

166. U.S. DEP’T. OF LABOR, REGULATIONS OF DEPARTMENT OF LABOR §§ 24–25, 34 Stat. 898 (Feb. 20, 1907) (amended by Acts of Mar. 26, 1910, 36 Stat. 263 and Mar. 4, 1913).

167. U.S. DEP’T. OF LABOR, REGULATIONS OF DEPARTMENT OF LABOR § 25, 34 Stat. 898 (Feb. 20, 1907) (“Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner General of Immigration, with the approval of the Secretary of Labor, shall from time to time designate as qualified to serve on such boards: *Provided*, That at ports where there are fewer than three immigrant inspectors, the Secretary of Labor, upon the recommendation of the Commissioner General of Immigration, may designate other United States officials for service on such boards of special inquiry.”).

168. U.S. DEP’T. OF LABOR, REGULATIONS OF DEPARTMENT OF LABOR § 27, 34 Stat. 898 (Feb. 20, 1907) (“That no suit or proceeding for a violation of the provisions of this act shall be settled, compromised, or discontinued without the consent of the court in which it is pending, entered of record, with the reasons therefor.”).

169. U.S. TREAS. DEP’T, REGULATION OF IMMIGRATION, Rule 17, subd. 7, at 35 (Nov. 15, 1911) (“*Forwarding appeal record* – The complete appeal record shall be forwarded promptly to the bureau with the views in writing of the immigration officer in charge.”) (emphasis in original).

necessity of giving the alien a fair hearing” (a reference to the prerogative of providing time for the securing of documents and witnesses in advance of the formal hearing).<sup>170</sup>

In 1917, Congress passed omnibus immigration legislation governing agencies that would remain largely intact until 1952.<sup>171</sup> There were small changes to the protocols for hearings of those arriving and under review for deportation.<sup>172</sup> Instead of three inspectors, each arriving immigrant would be reviewed by “at least two immigrant inspectors at the discretion of the Secretary of Labor and under such regulations as he may prescribe.”<sup>173</sup> The inspectors were again authorized to administer oaths and to “take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States, and, where such action may be necessary, to make a written record of such evidence . . . .”<sup>174</sup> The 1917 Act empowered “[a]ny commissioner of immigration or inspector in charge” to subpoena witnesses and compel testimony

of witnesses before said inspectors and the production of books, papers, and documents touching the right of any alien to enter, reenter, reside in, or pass through the United States, and to that end may invoke the aid of any court of the United States . . . and any failure to obey such order of the court may be punished by the court as a contempt thereof.<sup>175</sup>

As is the case today, the officials holding hearings could enlist the assistance of courts and their punitive contempt powers, but Congress did not bestow these powers on the inspectors.<sup>176</sup>

To provide a check on the arrivals of those unqualified and to allow those refused admission an appeal, Congress authorized the

170. U.S. TREAS. DEP'T, REGULATION OF IMMIGRATION, at 21 (Nov. 15, 1911) (“Immigration Rules of November 15, 1911. The act entitled ‘An act to regulate the immigration of aliens into the United States,’ approved February 20, 1907, is the immigration act or law referred to in the following (revised) rules. All numbered sections mentioned in the rules refer to those of said act unless stated to the contrary. These rules apply to aliens seeking admission to each and every portion of the United States except the Philippine Islands, in which territory the immigration laws are administered by officers of the general government of those islands.”); U.S. TREAS. DEP'T, REGULATION OF IMMIGRATION, Rule 15, subd. 1–3, at 33.

171. An Act to Regulate the Immigration of Aliens to, and the Residence of Aliens in the United States, Pub. L. No. 301 (1917); Immigration Act of Feb. 5, 1917, 39 Stat. 874, 898 (overriding the veto of President Woodrow Wilson).

172. Immigration Act of Feb. 5, 1917, 39 Stat. 874.

173. Immigration Act of Feb. 5, 1917, ch. 29, § 16, 39 Stat. 874, 886.

174. Immigration Act of Feb. 5, 1917, ch. 29, § 16, 39 Stat. 874, 886.

175. Immigration Act of Feb. 5, 1917, ch. 29, § 16, 39 Stat. 874, 886.

176. Immigration Act of Feb. 5, 1917, ch. 29, § 16, 39 Stat. 874, 886.

detention of arriving immigrants and established a board of special inquiry that also was not contemplated as a court:

In the event of rejection by the board of special inquiry, in all cases where an appeal to the Secretary of Labor is permitted by this Act, the alien shall be so informed and shall have the right to be represented by counsel or other adviser on such appeal. The decision of an immigrant inspector, if favorable to the admission of any alien, shall be subject to challenge by any other immigrant inspector, and such challenge shall operate to take the alien whose right to land is so challenged before a board of special inquiry for its investigation.<sup>177</sup>

These boards were to provide “prompt determination of all cases of immigrants detained at such ports under the provisions of the law” and were to “consist of three members . . . selected from such of the immigrant officials in the service as the Commissioner General of Immigration, with the approval of the Secretary of Labor, shall from time to time designate as qualified to serve on such boards.”<sup>178</sup> They had the power to decide on which arriving immigrants could land and which would be deported.<sup>179</sup>

Congress reiterated with small changes its previous language requiring the hearings to be non-public and that an immigrant could be accompanied by someone of their choosing.<sup>180</sup> The 1917 Act also specified that duties of those implementing the law were of an “administrative character”<sup>181</sup> and, for the first time, Congress referred to these inquiries as a “proceeding.”<sup>182</sup>

177. Immigration Act of Feb. 5, 1917, ch. 29, § 16, 39 Stat. 874, 886–87.

178. Immigration Act of Feb. 5, 1917, ch. 29, § 17, 39 Stat. 874, 887.

179. Immigration Act of Feb. 5, 1917, ch. 29, § 17, 39 Stat. 874, 887.

180. Immigration Act of Feb. 5, 1917, ch. 29, § 17, 39 Stat. 874, 887 (“All hearings before such boards shall be separate and apart from the public, but the immigrant may have one friend or relative present under such regulations as may be prescribed by the Secretary of Labor.”).

181. Immigration Act of Feb. 5, 1917, ch. 29, § 22, 39 Stat. 874, 892 (“The duties of commissioners of immigration and other immigration officials in charge of districts, ports, or stations shall be of an administrative character, to be prescribed in detail by regulations prepared under the direction or with the approval of the Secretary of Labor”). Section 25 again affirmed that federal district courts had “full jurisdiction” over cases arising from the Act and additionally stated, “That no suit or proceeding for a violation of the provisions of this Act shall be settled, compromised, or discontinued without the consent of the court in which it is pending, entered of record, with the reasons therefor.” Immigration Act of Feb. 5, 1917, ch. 29, § 25, 39 Stat. 874, 893.

182. Immigration Act of Feb. 5, 1917, ch. 29, § 25, 39 Stat. 874, 893 (“Such boards shall keep a complete permanent record of their proceedings and of all such testimony as may be produced before them . . .”).

*C. Immigration Office and Inspection Powers, 1917–1952*

The most significant legislative measure passed in this time frame that affected the due process rights of those in deportation proceedings was the 1951 Appropriations Act,<sup>183</sup> which slipped through Congress in the wake of a 1950 Supreme Court case granting a habeas petition and overturning a deportation order.<sup>184</sup> The Court held that the failure of the Immigration and Naturalization Service (INS) to organize its proceedings in compliance with the Administrative Procedures Act (APA)<sup>185</sup> violated the respondent's right to due process:

But if hearings are to be had before employees whose responsibility and authority derives from a lesser source, they must be examiners whose independence and tenure are so guarded by the Act as to give the assurances of neutrality which Congress thought would guarantee the impartiality of the administrative process. We find no basis in the purposes, history or text of this Act for judicially declaring an exemption in favor of deportation proceedings from the procedural safeguards enacted for general application to administrative agencies. We hold that deportation proceedings must conform to the requirements of the Administrative Procedure Act if resulting orders are to have validity. Since the proceeding in the case before us did not comply with these requirements, we sustain the writ of *habeas corpus* and direct release of the prisoner.<sup>186</sup>

The Court noted discrepancies between the protocols of deportation hearings and the due process protections of the APA sufficient to overturn a deportation order. The Eleventh Circuit panel in *Stevens* found otherwise. It held that the “structure of immigration proceedings contains many safeguards—similar (although not always identical) to those discussed in *Butz* in the context of administrative hearings—that tend to reduce the risk of unchecked unconstitutional conduct by Immigration Judges.”<sup>187</sup> The Eleventh Circuit panel made no mention of *Wong Yang Sung*, nor did it

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183. An Act Making Supplemental Appropriations for the Fiscal Year Ending June 30, 1951, and for Other Purposes, Pub. L. No. 81-843, 64 Stat. 1044 (Sept. 27, 1950).

184. *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

185. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended 5 U.S.C. § 500).

186. *Wong Yang Sung*, 339 U.S. at 52–53.

187. *Stevens v. Osuna*, 877 F.3d 1293, 1302 (11th Cir. 2017).

evaluate the points in *Butz* that emphasized the protections specific to the APA.<sup>188</sup>

The APA created a due process right to a hearing in claims governed by the APA. The DOJ could have followed the Court's order in *Wong Yang Sung* and created administrative law judges as provided for in the APA. If the DOJ had needed additional funds to do so, it could have gone to Congress and, pointing to the Court's ruling, requested additional monies from the next appropriations bill.

Rather than comply with the Court order to bring deportation hearings in line with the APA, the DOJ, expressly asked Congress to exempt deportation hearings from the APA in the next appropriations hearing. Senator McCarran noted that "Sung invalidated the system previously used by the Immigration Service" and asked about the effect of the decision.<sup>189</sup> Mr. Miller of the DOJ called the requirement a "very perplexing phase,"<sup>190</sup> and estimated a future cost \$150,000,000 due to the increase in immigration from Mexico:

Probably in 10 years we could give hearings to a half million applicants, we will say. But we will possibly have a million next year and following years. That problem is increasing from a trickle of 10,000 in the last 10 years to this figure that I have just given you.<sup>191</sup>

There was no further substantive discussion.

On September 27, 1950, as part of the Public Law on Appropriations, Congress passed two measures under the heading "General Provisions—Department of Justice."<sup>192</sup> One included supplemental funding to pay for 200 additional passenger vehicles

188. See Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643 (2016) (arguing proceedings conducted by administrative judges lack due process, with special criticisms of IJs).

189. *Making Appropriations for the Departments of State, Justice, Commerce, and the Judiciary for the Fiscal Year Ending June 30, 1951: Hearing Before the Subcomm. on S. Comm. on Appropriations*, 81st Cong. 988 (1950).

190. *Making Appropriations for the Departments of State, Justice, Commerce, and the Judiciary for the Fiscal Year Ending June 30, 1951: Hearing Before the Subcomm. on S. Comm. on Appropriations*, 81st Cong. 988 (1950).

191. *Making Appropriations for the Departments of State, Justice, Commerce, and the Judiciary for the Fiscal Year Ending June 30, 1951: Hearing Before the Subcomm. on S. Comm. on Appropriations*, 81st Cong. 988 (1950).

192. An Act Making Supplemental Appropriations for the Fiscal Year Ending June 30, 1951, and for Other Purposes, Pub. L. No. 81-843, 64 Stat. 1044 (Sept. 27, 1950).



for the Federal Bureau of Investigation.<sup>193</sup> The second stated: “Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7, and 8 of the Administrative Procedure Act (5 U.S.C. 1004, 1006, 1007).”<sup>194</sup> Since that decision, there have been a number of changes in the rules for immigration hearings. In 1987, the agency removed the Federal Rules of Civil Procedure deposition requirements from its rules of evidence.<sup>195</sup> This change allows the government to introduce third party statements by ICE agents with few protections of authentication or review, a special problem for *pro se* respondents.

Reiterating the Court’s analysis in *Wong Yang Sung*, law professors, attorneys, and IJs have been decrying the lack of independence of immigration courts in contrast with Article III courts and those governed by the Administrative Procedures Act for decades.<sup>196</sup> According to law professor Peter Levinson,

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193. An Act Making Supplemental Appropriations for the Fiscal Year Ending June 30, 1951, and for Other Purposes, Pub. L. No. 81-843, 64 Stat. 1048 (Sept. 27, 1950).

194. An Act Making Supplemental Appropriations for the Fiscal Year Ending June 30, 1951, and for Other Purposes, Pub. L. No. 81-843, 64 Stat. 1048 (Sept. 27, 1950).

195. *Compare Evidence*, 22 Fed. Reg. 9797 (Dec. 6, 1957) (codified at 8 C.F.R. 242.14(e) (“The Federal Rules of Civil Procedure shall be used as a guide to the extent practicable.”) with 52 Fed. Reg. 2934 (Jan. 29, 1987) (explaining the removal of certain protections: “To conform to the new rule, § 242.14(e) is deleted and replaced with a condensed regulation authorizing the taking of depositions in accordance with new rule 8 C.F.R. 3.33. This rule will provide adequate guidelines to the parties and preserve fundamental fairness in the hearing process without the complexity of its predecessor. Commentators suggested that in connection with depositions, discovery is desirable in these proceedings to narrow issues and gather evidence. In our view, this is unnecessary for proper consideration of the issues, and would unduly complicate these proceedings and open up a possible area of abuse and delay.”).

196. *See, e.g.*, *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005) (“... adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice.”); KANSTROOM, *supra* note 2, at 2 (“One wonders how those who experienced the Palmer Raids would react if they could have foreseen that, nearly a century later, over 325,000 people would face removal proceedings in a single year, many under mandatory detention, unprotected from unreasonable searches and selective prosecution, only a third represented by counsel and none with the right to appointed counsel.”); Jason Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TULANE L. REV. 1, 3 (2014) (“[T]he United States Supreme Court’s extreme deference to legislative and executive policy decisions in the immigration context renders selective prosecution challenges nearly nonjusticiable.”); Adam Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1671 (2016) (“The history of immigration jurisprudence is a history of obsession with judicial deference.”); Harvard Law Review Ass’n, *Immigration Law—*

commissioners supervising immigration courts in 1980 leaned toward providing a modicum of protections in immigration hearings: “The need for economy and efficiency in the delivery of public service dictates a review of the statutory basis, if any, for the costly and inefficient system of so-called ‘Immigration Courts’ and ‘Immigration Judges’ that seems to have been dictated by the cry for due process . . . .”<sup>197</sup> At the same time the agency objected to the IJ denying access to the public, the Select Commission on Immigration and Refugee Policy stated its mission was administrative, not judicial.<sup>198</sup> A 1977 memorandum by an official supervising immigration hearings seemed bemused that officials who, by statute were “special inquiry officers,” had begun wearing robes, describing them as “the black nightgowns they frequently wear when conducting hearings.”<sup>199</sup> In his 1980 report to the Select Commission on Immigration and Refugee Policy, Levinson noted the problems with the ad hoc hiring procedures and chain of command and advised “[c]hanging the position of immigration judge to that of administrative law judge” and hiring IJs through the Office of Personnel Management. This would have put the proceedings under the Administrative Procedure Act, while keeping the courts within the Department of Justice but separate from the INS.<sup>200</sup>

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*Administrative Adjudication— Third and Seventh Circuits Condemn Pattern of Error in Immigration Courts*, 119 HARV. L. REV. 2596, 2599 (2006) (“Immigration judges face too many challenges with too few resources, and so they are bound to make mistakes.”); Stephen Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 380 (2006) (reviewing “gaping exceptions to the availability of judicial review”); Peter Levinson, *Specialized Court for Immigration Hearings and Appeals*, 56 NOTRE DAME L. 644, 644 (1981) (“The United States immigration adjudication system is beset with crippling problems.”); Wasserman, *supra* note 16, at 376 (“ . . . the exercise of these discretionary powers [in deportation proceedings] has produced excesses of bureaucratic zeal that can only be categorized as a national disgrace.”).

197. Levinson, *supra* note 196, at 646 n.17 (quoting Memorandum re Association of Immigration Directors’ Conference with Commissioner Castillo (Dec. 14, 1977) (copy in Select Commission files)).

198. Levinson, *supra* note 196, at 646 n.17 (quoting Memorandum, *supra* note 197).

199. Levinson, *supra* note 196, at 646 n.17.

200. Levinson, *supra* note 196, at 647–48 (citing Executive Summary, Consultation on *Quasi-Judicial Quandaries: Over Due Process*, in SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, 2D SEMIANNUAL REPORT TO CONGRESS, 96th Cong., 2d Sess., 196, 197–98 (Oct. 1980)).

*D. Statute on Immigration Judge Powers, 1996*

The law authorizing IJs to compel civil fines was added to the immigration code in 1996 in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).<sup>201</sup> The plain text, legislative history, and purpose of the Act discourage an inference that IJs have criminal contempt powers necessary for a summary order to use of force against observers.<sup>202</sup> First, the text clearly limits contempt powers to issuance of civil fines, with no mention of the authority to order force, much less custody of third parties.<sup>203</sup> There is extensive caselaw that Congress's failure to permit the use of physical force or other criminal contempt authority indicates its intent to exclude those powers.<sup>204</sup> The plain meaning of the text and canons of statutory interpretation precludes IJs from ordering force on any parties other than respondents in immigration court.

Second, a review of the legislative history reveals no discussion of either problems faced by IJs in controlling their hearings or any need to enhance their powers in a committee hearing, floor statement, congressional report, or agency.<sup>205</sup> Even the civil

201. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 240(b)(1) (codified at 8 U.S.C. § 1229(b)(1)) (1996).

202. LARRY EIG, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS, REPT. CONGRESSIONAL RESEARCH SERVICE, CONGRESSIONAL RESEARCH SERVICE REPORT 97-589, 1–2 (2014) (“textualism may be the primary approach toward interpreting statutes . . .”).

203. *Id.*

204. *Id.* at 16 (“[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”). The Court cited this maxim when Congress restricted direct access by Guantanamo detainees to the courts but did not expressly restrict access in pending cases through petitions for writs of habeas corpus: ‘A familiar principle of statutory construction . . . is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.’ In an earlier case on the availability of habeas review by a convicted murderer, the Court referred to the history of the provision that treated habeas relief and other access to the courts differently: ‘[N]egative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted.’ (internal citations omitted).

205. In introducing the legislation on March 19, 1996, Rep. David Dreier (R-CA) noted the upcoming general election of 1996. 142 Cong. Rec. H2362 (Mar. 19, 1996). (“Mr. Speaker, illegal immigration has reached crisis proportions in my State of California. We deal daily with a flood of illegal immigrants who are coming across the border seeking government services, job opportunities, and family members. There is simply no question that the President, for all his rhetoric, has failed to make this a top priority. He opposed California’s proposition 187. He vetoed legislation

contempt authority of IJs on which Congress eventually voted was not recorded or discussed in any Congressional record associated with Pub. L. 104-208.<sup>206</sup>

The first time any Congressional document referenced this new power is the House bill “Immigration in the National Interest Act of 1995.”<sup>207</sup> The language providing the new authority amends Section 301 of the Immigration and Nationality Act of 1952.<sup>208</sup> In addition to adding the authority to issue civil fines, the bill adds a new section changing the title from “special inquiry officers” to “immigration judges.”<sup>209</sup> Although the changes in immigration law were extensive, the 104th Congress held relatively few hearings on the bill.<sup>210</sup> None of the hearings included any discussion of a new authority for IJs and there is no reference in the record to the views of the agencies affected.<sup>211</sup> In fact, the Senate bill, first introduced

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establishing that illegal immigrants are not entitled to Federal and State welfare services. He vetoed reimbursement to the States for the cost of incarcerating illegal immigrant felons, and his Justice Department has been woefully slow in disbursing to States the meager incarceration funds that were appropriated back in 1994. Mr. Speaker, as Members well know, California will never support a President that is soft on illegal immigration. Illegal immigration might just be taking center stage in Washington today, but the issue is like an overnight sensation in Hollywood.”); Adam Nagourney, *Dole Unleashes His Tough Talk on Immigration*, N.Y. TIMES (Oct. 18, 1996), <https://www.nytimes.com/1996/10/18/us/dole-unleashes-his-tough-talk-on-immigration.html> (“We take California away from Clinton, he can’t win,” said Mr. Dole’s campaign manager, Scott Reed . . . Immigration was one of a number of socially disputatious issues raised by Mr. Dole today, and in doing so he followed the advice of Gov. Pete Wilson, who rode the issue to re-election in 1994 . . . ‘Why are you paying millions in taxpayer dollars to provide drug rehabilitation for illegal immigrants?’ Mr. Dole said to cheers here. ‘And worse, why are thousands of Californians the victims of violent crimes committed by people who should have been stopped at the border before they so much as stepped foot in the United States of America.’”).

206. See, e.g., 142 Cong. Rec. H2321–2467 (Mar. 19, 1996).

207. H.R. 1915, 104th Cong. (June 22, 1995); H.R. 2204, 104th Cong. (1995).

208. H.R. 1915, 104th Cong. (June 22, 1995); H.R. 2204, 104th Cong. (1995).

209. Both versions include the same amendment to Title III, Subtitle D, § 352 (“Sec. 352. Use of Term “Immigration Judge”).

210. See, e.g., H.R. REP. NO. 104-469, pt. 1–4 (1995); H.R. REP. NO. 104-828 (1996) (Conf. Rep.). None of the related hearings and actions discuss immigration judge contempt authority. See, e.g., *H.R. 2202—Immigration Control and Financial Responsibility Act of 1996*, CONGRESS.GOV, <https://www.congress.gov/bill/104th-congress/house-bill/2202/> (last visited Apr. 13, 2019). Presumably these sections were passed on to House members or staff through unofficial channels and they added it to the bill.

211. *H. Rept. 104-469—Immigration in the National Interest Act of 1995* CONGRESS.GOV, <https://www.congress.gov/congressional-report/104th-congress/house-report/469/> (“The Administration has not provided a statement of its views regarding H.R. 2202 as reported by the Committee on October 24, 1996. The

as the “Immigrant Control and Financial Responsibility Act of 1995” omits entirely the House language on the changes of function and definition of IJs.<sup>212</sup> The bill was amended in the Senate Judiciary Committee and reported out by Senator Orrin Hatch on April 10, 1996 as part of Judiciary Committee Report.<sup>213</sup> The final SB 1664 - Immigration Control and Financial Responsibility Act of 1996 included no additional reference to the duties and title of special inquiry officers (IJs) or their authority that became 8 U.S.C. §§ 1229a and 1401.<sup>214</sup>

The first time senators had a chance to review the new IJ authority was in the omnibus bill that emerged from the conference committee on September 24, 1996 and was subject to the Senate for a cloture vote on September 26, 1996.<sup>215</sup> IJs accused of overreaching their statutory authority in ordering the use of force against observers can scour the legislative history of the INA and find nothing to suggest Congress was the least bit concerned about decorum during immigration hearings or disposed toward giving them criminal contempt powers.

Finally, it is worth noting that on five occasions, Rep. Bill McCollum (R-FL) introduced a bill that would remove the immigration courts from the Department of Justice and establish them as Article I courts with criminal contempt powers on par with those available to federal district court judges.<sup>216</sup> The 1996 bill had

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following is a statement of views received from the Attorney General regarding H.R. 2202 as introduced on August 4, 1995.” (last visited May 5, 2019).

212. Immigrant Control and Financial Responsibility Act of 1995, S. 269, 104th Cong. (1995); S. REP. NO. 104-249, at 1 (1996) (amending bill in the Judiciary Committee and reporting out by Senator Orrin Hatch on April 10, 1996 as part of Judiciary Committee Report to accompany S. 1664). This bill was first introduced by Robert J. Dole (R-Kan.) on behalf of Alan K. Simpson (R-Wyo.).

213. S. REP. NO. 104-249, at 1 (1996).

214. Immigration Control and Financial Responsibility Act of 1996, S. 1664, 104th Cong. (1996).

215. The House Report and the Senate Conference Report of Sept. 24, 1996 are both silent on IJ contempt authority. H.R. REP. NO. 104-828 (1996) (Conf. Rep. (accompanying H.R. 2202); *S.1664-Immigration Control and Financial Responsibility Act of 1996*, CONGRESS.GOV, <https://www.congress.gov/bill/104th-congress/senate-bill/1664/related-bills> (last visited May 5, 2019).

216. United States Immigration Court Act of 1996, H.R. 4258, 104th Cong. (1996) (proposing that immigration courts have the following powers: “(c) Contempt of Court.—Each division of the Immigration Court shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—(1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice, (2) misbehavior of any of its officers in their official transactions, or (3) disobedience or resistance to its lawful writ, process,

no co-sponsors, and saw no committee action even after being referred from the House Committee on the Judiciary to the Subcommittee on Immigration and Claims.<sup>217</sup> Rep. McCollum introduced similar measures in two Congresses before the 1996 bill and two after it.<sup>218</sup> None of the five proposed bills were even reviewed by a committee.<sup>219</sup>

## V. Statutory and Case Law on Federal Circuit Court (Contempt) Powers

Unfortunately, much of the true history about criminal contempt was until recently buried. Wholly unfounded assumptions about “immemorial usage” acquired a factitious authority and were made the basis of legal decisions. This false history still enjoys wide legal currency. —Felix Frankfurter<sup>220</sup>

In recent years, scholarly literature has taken issue with the propensity of judges to depart from preferred canons of statutory

order, rule, decree, or command. Each such division shall have such assistance in the carrying out of its lawful writ, process, order, rule, decree, or command as is available to a court of the United States.”) (internal quotations omitted).

217. H.R. 4258; *H.R. 4258-United States Immigration Court Act of 1996*, CONGRESS.GOV, [https://www.congress.gov/bill/104th-congress/house-bill/4258/all-actions?actionsSearchResultViewType=expanded&\\_=1552262881677](https://www.congress.gov/bill/104th-congress/house-bill/4258/all-actions?actionsSearchResultViewType=expanded&_=1552262881677).

218. *Actions for H.R. 2356-United States Immigration Court Act of 1983*, CONGRESS.GOV, <https://www.congress.gov/bill/98th-congress/house-bill/2356/actions> (last visited May 5, 2019); *Actions for H.R. 3187-United States Immigration Court Act of 1985*, CONGRESS.GOV, <https://www.congress.gov/bill/99th-congress/house-bill/3187/all-actions?q=%7B%22search%22%3A%5B%22actionCode%3A%5C%2272000%5C%22%22%5D%7D> (last visited May 5, 2019); *Actions for H.R. 4107-United States Immigration Court Act of 1998*, CONGRESS.GOV, <https://www.congress.gov/bill/105th-congress/house-bill/4107/actions> (last visited May 5, 2019); *Actions for H.R. 185-United States Immigration Court Act of 1999*, CONGRESS.GOV, <https://www.congress.gov/bill/106th-congress/house-bill/185/actions> (last visited May 5, 2019).

219. The two resolutions introduced in the 1980s had co-sponsors, unlike the three resolutions McCollum introduced between 1996 and 1999. *Actions for H.R. 2356 - United States Immigration Court Act of 1983*, CONGRESS.GOV, <https://www.congress.gov/bill/98th-congress/house-bill/2356/actions>; *Actions for H.R. 3187 - United States Immigration Court Act of 1985*, CONGRESS.GOV, <https://www.congress.gov/bill/99th-congress/house-bill/3187/all-actions?q=%7B%22search%22%3A%5B%22actionCode%3A%5C%2272000%5C%22%22%5D%7D>; *Actions for H.R. 4107-United States Immigration Court Act of 1998*, CONGRESS.GOV, <https://www.congress.gov/bill/105th-congress/house-bill/4107/actions>; *Actions for H.R. 185-United States Immigration Court Act of 1999*, CONGRESS.GOV, <https://www.congress.gov/bill/106th-congress/house-bill/185/actions> (last visited May 5, 2019).

220. Felix Frankfurter, *Power of Congress over Procedure in Criminal Contempts in “Inferior” Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1011 (1924) (revealing how the case law inflating inherent judicial authority had been distorted by a government brief mischaracterizing the 1809 Pennsylvania and 1831 U.S. judicial contempt acts).

construction to decide questions of judicial immunity especially in cases involving the press or observers.<sup>221</sup> The question is whether the standard of quasi-immunity used for evaluating liability for other federal employees charged with violating Constitutional rights or committing torts should be used for third parties in judicial or judicial-like hearings.<sup>222</sup> Deciding on liability in the context of third parties effectively hangs on the scope of a judge's contempt powers. Are today's powers a legacy of common law's putative 'inherent' powers?<sup>223</sup> Or, as the Congressional record and several Court opinions hold, are U.S. judges constrained in their authority by the legislature?<sup>224</sup> Even if officials are afforded absolute judicial immunity for judicial functions per *Butz*, these immunities cannot exceed the scope set for federal judges deciding these cases. If the federal courts are constrained by statutes, then those statutes must guide the interpretation of the powers of the federal courts and administrative hearings. The Court followed this practice in *Butz* through its careful reading of the APA and in *Nye* through its interpretation of statutory constraints on judicial contempt authority.<sup>225</sup>

#### *A. Remedies for Federal Officials' Constitutional Rights Violations*

In *Butz*, the Court rejected the government's defense that officials have absolute immunity when performing a function authorized by a statute.<sup>226</sup> The Court explained

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221. See Johns, *supra* note 38 (denouncing the expansion of judicial immunity to non-judges); see also Chemerinsky, *supra* note 38, at 1224 (arguing that sovereign immunity is inconsistent with requirements of the Constitution and concluding: "I believe that someday the Supreme Court will change course and abolish the doctrine of sovereign immunity from American law.").

222. Chemerinsky, *supra* note 38, at 1221, 1222 ("Even when a cause of action exists, whether under *Bivens* or Section 1983, some officers have absolute immunity to suits for money damages, such as judges, prosecutors, and legislators." For quasi-immunity, "[t]he Supreme Court has held that government officials can be held liable only if they violate a clearly established right that a reasonable officer should know.") (internal citations omitted).

223. Teresa S. Hanger, *The Modern Status of the Rules Permitting a Judge to Punish Direct Contempt Summarily*, 28 WM. & MARY 553, 555 (1987) (noting that federal courts have traced contempt power to the inherent powers of courts).

224. *Id.* (noting that federal courts have also found the contempt power stemming from acts of Congress).

225. *Butz v. Economou*, 438 U.S. 478, 514-15 (1978); *Nye v. United States*, 313 U.S. 33, 50-53 (1941).

226. *Butz*, 438 U.S. at 490-91.

[A] federal official was protected for action tortious under state law only if his acts were authorized by controlling federal law. “To make out his defense he must show that his authority was sufficient in law to protect him.” Since an unconstitutional act, even if authorized by statute, was viewed as not authorized in contemplation of law, there could be no immunity defense.<sup>227</sup>

Based on this analysis, the Court affirmed absolute judicial immunity from suit by an aggrieved party for administrative law judges acting in a judicial capacity.<sup>228</sup>

The Court focused on how the “right to compensation” could be best reconciled with the “need to protect the decision-making processes of an executive department.”<sup>229</sup> Citing *Marbury v. Madison*,<sup>230</sup> the Court held that “federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.”<sup>231</sup> “[I]t is not unfair to hold liable the official who knows or should know he is acting outside the law . . . .”<sup>232</sup> The Court has subsequently held that “if equitable remedies prove insufficient, a damages remedy might be necessary to redress past harm and deter future violations. Yet the decision to recognize a damages remedy requires an assessment of its impact on

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227. *Id.* (citing *Cunningham v. Macon & Brunswick R. Co.*, 109 U.S. 446, 452 (1883); *Belknap v. Schild*, 161 U.S. 10, 19 (1896); *United States v. Lee*, 106 U.S. 196, 218–23 (1882); *Virginia Coupon Cases*, 114 U.S. 269, 285–92 (1885)).

228. *Butz*, 438 U.S. at 515–16. Although the Court has imposed limits on *Bivens* claims, it has left in place, albeit in an ad hoc fashion, the fundamental principle of a remedy for a Constitutional harm. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (noting that the Court has “consistently refused to extend *Bivens* to any new context or new category of defendants.”). The rationale for restricting *Bivens* cases to three exact contexts from *Bivens*—“a man in his own home without a warrant; a claim against a Congressman for firing his female secretary; and a claim against prison officials for failure to treat an inmate’s asthma,” *Ziglar*, 137 S. Ct. at 1860 (citations omitted)—is as sensible as declaring that henceforth the Court will confine its authority over legislation to only laws that affect the appointment of federal court judges (*Marbury v. Madison*, 5 U.S. 137 (1803)). *Ziglar* was decided 4-2, with Gorsuch, Kagan, and Sotomayor abstaining. *Ziglar*, 137 S. Ct. at 1843. Breyer’s dissent, joined by Ginsberg, quotes extensively from *Marbury. Id.* at 1874 (Breyer, J., dissenting).

229. *Butz*, 438 U.S. at 503. See also *id.* at 494 (“If any inference is to be drawn from *Spalding* in any of these respects, it is that the official would not be excused from liability if he failed to observe obvious statutory or constitutional limitations on his powers or if his conduct was a manifestly erroneous application of the statute.”).

230. 5 U.S. 137 (1803).

231. *Butz v. Economou*, 438 U.S. 478, 506 (1978).

232. *Id.*



governmental operations systemwide.”<sup>233</sup> In balancing these interests, the Court in *Ziglar* emphasized deference to legislative intent.<sup>234</sup> Courts should not pursue judicial remedies if there are “sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy” or an “alternative remedial structure” is available.<sup>235</sup> In addition, for cases other than those with the specific fact-patterns of *Bivens*, *Davis*,<sup>236</sup> or *Carlson*,<sup>237</sup> the four judges in the *Ziglar* majority stated that “special factors” had to be considered, i.e., whether the damages claim was for the purpose of deterring future unlawful actions by a specific official, as opposed to “altering an entity’s policy.”<sup>238</sup> The framework clearly calls for judicial review, absent which there is no independent entity for evaluating these equities.<sup>239</sup>

Leaving aside the dubious analysis of the four-justice majority opinion,<sup>240</sup> none of these factors in *Ziglar* entail a *prima facie* denial of a constitutional claim alleging unlawful force by an IJ to silence a critic in violation of the First Amendment. The only remedy available is an administrative complaint to the same agency and possibly the same supervisors coordinating with the IJ to obstruct access (unlike ALJs, who operate independent of the agency).<sup>241</sup> Finally, neither *Ziglar* nor other precedent specifies what counts as litigation that is so onerous that it deters a remedy. If there is a balancing test that precludes a policy outcome, then the Court must require some showing of the specific burdens of litigation in such a case, possibly producing criteria for deciding this and inferring whether the burdens outweigh the need for a remedy. If judicial contempt authority for any given power is statutory and not ‘inherent,’ then contempt orders and related actions are subject to

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233. *Ziglar*, 137 S. Ct. at 1858.

234. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017).

235. *Id.*

236. *Davis v. Passman*, 442 U.S. 228 (1979).

237. *Carlson v. Green*, 446 U.S. 14 (1980).

238. *Ziglar*, 137 S. Ct. at 1850, 1860 (citing *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 74).

239. *Ziglar*, 137 S. Ct. at 1850, 1860. *Ziglar* also noted factors weighing against remedies: Congress’s failure to provide a remedy despite publicly known allegations of frequent civil liberties violations, concerns about national security, and the alternative in some cases of a habeas remedy, *id.* at 1861–63, none of which are relevant to an immunity defense against an individual IJ’s conduct beyond the scope authorized by Congress and the Constitution.

240. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872–85 (2017) (Breyer, J., dissenting).

241. *See infra* Part VI.

judicial review and remediation. Insofar as case law disfavors decisions based on common law when a statute provides clear guidance, courts may not bestow powers exceeding limits imposed by Congress.

It is important to note that the *Butz* Court went to some lengths to support the principle of *Bivens* actions and to distinguish a hearing without the due process protections of the APA from a lawsuit against an administrative law judge (by definition covered by the APA).<sup>242</sup> Referencing the very case that prompted Congress to explicitly remove immigration courts from the jurisdiction of the APA, the *Butz* opinion held that “the safeguards” of the APA meant “the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women.”<sup>243</sup> Each and every aspect of the APA the *Butz* opinion cited as evidence of due process protections is absent for immigration hearings in general and observers in particular.

Professor Kent Barnett notes that administrative judges “are even better candidates than state supreme courts for federal judicial scrutiny because of AJs’ lack of comparative transparency, salience, federalism complications, and factual variations surrounding their systemic protections.”<sup>244</sup> The evidence that IJs and agency supervisors are acting under the direction of the Attorney General to circumvent the First Amendment makes their discretion to order force against critics especially concerning.<sup>245</sup>

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242. *Butz v. Economou*, 438 U.S. 478, 500, 514 (1978) (“We agree with the perception of these courts that, in the absence of congressional direction to the contrary, there is no basis for according to federal officials a higher degree of immunity from liability when sued for a constitutional infringement as authorized by *Bivens* than is accorded state officials when sued for the identical violation under § 1983. The constitutional injuries made actionable by a § 1983 are of no greater magnitude than those for which federal officials may be responsible.”).

243. *Id.* at 514 at 514 (“More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency... Since the securing of fair and competent hearing personnel was viewed as ‘the heart of formal administrative adjudication, the Administrative Procedure Act contains a number of provisions designed to guarantee the independence of hearing examiners ... [Hearing examiners] may be removed only for good cause established and determined by the Civil Service Commission after a hearing on the record. Their pay is also controlled by the Civil Service Commission.”).

244. Barnett, *supra* note 188, at 1648.

245. See *infra* Part VI.

*B. Federal Court Contempt Authority*

The Act of 1831 introduced the text for the modern statutory language providing federal judges the power of summary contempt.<sup>246</sup> It was introduced the day after a judge who targeted a newspaper editor prevailed in an impeachment proceeding and affirms Congress's effort to control the contempt powers of lower courts.<sup>247</sup> In the Act, Congress expressly narrowed the scope of summary contempt power after hearings provided a consensus that the federal district courts and their powers were creatures of Congress, a point with which the Court agrees.<sup>248</sup>

Each time Congress and the Court have revisited the contempt powers of federal courts, the record once again contains a statement about the prerogative of the legislature and the overstatement of judicial contempt powers in the immediate context, and indicates that lower courts mistakenly had inferred expanded contempt powers from a murky past.<sup>249</sup> The record shows Congress and the

246. An Act Declaratory of the Law Concerning Contempts of Court, ch. 103, 4 Stat. 487–488 (Mar. 2, 1831).

247. Frankfurter, *supra* note 220, at 1025–26.

248. Frankfurter, *supra* note 220, at 1010, 1025–28. See Act of March 3, 1911, Pub. L. No. 61-475, 36 Stat. 1087 (1911); see also Crimes and Criminal Procedure, Pub. L. No. 80-772, ch. 645 (June 25, 1948) (explaining the legislative history of the title's enactment).

249. See Frankfurter, *supra* note 220 and accompanying text. See also Charles P. Curtis & Richard C. Curtis, *The Story of a Notion in the Law of Criminal Contempt*, 41 HARV. L. REV. 51, 56–57 (1927). Summary contempt power was not part of common law, although English courts in the eighteenth century wrongfully asserted otherwise. “However erroneous [Wilmot and Blackstone] were in their assertion that the jurisdiction was of common law origin, yet their statements of the [summary contempt] doctrine which we are examining are complete and accurate. Thus did our notion become firmly established in the courts of common law. Obviously it could not remain intact.” *Id.*; *Defining and Limiting the Jurisdiction of Courts Sitting in Equity: Hearing Before the Comm. on the Judiciary H. of Reps. on H.R. 5315*, 77th Cong. 8–9 (1932) (statement of Donald Richberg, representing the Railway Labor Executives Association: “Mr. Warren had made an extensive investigation into the circumstances surrounding the passage of the first judicial act, practically by the same men who framed the Constitution of the United States. He had had access to documents that had been reposing in just for years, I believe some in the attic and some in the cellar of the Capitol. As a result, he had published in the Harvard Law Review in 1923 the results of that research, which showed beyond any possibility of contradiction on a historical basis that the men who framed the Constitution and the men who wrote the first judicial act understood that the inferior Federal courts were entirely subject to the control of Congress, so far as investing them with jurisdiction and determining their procedure is concerned.” Stating just previously, “And yet the argument was made and had been made in the Supreme Court of the United States for 100 years that it was the inherent power of a court of equity to try contempt cases by the court, and that when the court was created by the Federal Government that

Court attempting to limit judicial prerogative of summary contempt and tie it to a limited policy purpose.<sup>250</sup> Caselaw offers no instances in which the Court has recognized a contempt power for an inferior federal court exceeding the jurisdiction and scope provided for by Congress.

i. Congressional Hearings and Court Precedent, 1911–1941

The statute that today provides the scope of contempt powers to federal judges was passed in 1831 and affirmed in 1911.<sup>251</sup> A statement by Chair Henry Clayton (D-AL) of the 1911 House Committee summarizes both his own understanding of the prerogative of Congress to define the jurisdiction and scope of contempt authority as well as the Supreme Court's imprimatur on his interpretation:

The moment the courts of the United States were called into existence and invested with jurisdiction over any subject they became possessed of this [contempt] power . . . but the power has been limited and defined by the act of Congress of March 3, 1831 . . . The act, in terms, applies to all courts. Whether it can be held to limit the authority of the Supreme Court, which derives its existence and power from the Constitution, may, perhaps, be a matter of doubt; but that it applies to the circuit and district courts there can be no question. These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted.<sup>252</sup>

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power was poured into the court. It was absolutely untrue historically, and it was untrue as a fact, and of the intention of the framers of the Constitution who passed the first judicial act.”)

250. See *infra* Part V.B.ii.

251. See *supra* Part V (discussing the initial enactment of the 1831 statute and history of the 1911 enactment).

252. *Hearings Before the Committee on the Judiciary of the House of Reps. on Contempt of Court*, 62nd Cong., 37 & 44–45 (1911) (statement by Chairman Henry Clayton (quoting *Bessette v. W. B. Conkoy Co.*, 194 U.S. 324, 327 (1904); *Ex parte Robinson*, 86 U.S. 505, 510 (1873))).

The analysis offered in the 1911 hearing by Representative Wilson<sup>253</sup> and Jackson H. Ralston<sup>254</sup> carries forward the rule of law envisioned by Edward Coke, John Locke, and Thomas Jefferson, and provides further guidance as to the prerogative of Congress to control the contempt powers of all courts save the Supreme Court.<sup>255</sup>

The following exchange during the 1911 hearing also underscores the view that Congress creates courts and its contempt powers:

MR. THOMAS [D-KY]. Has a United States circuit court any such thing as an inherent power?

MR. RALSTON. I am not prepared on all questions of constitutional law to-day [sic]; but I should think it had no power except such as was conferred upon it.

MR. THOMAS. Is not all the power of these courts conferred upon them by act of Congress?

MR. RALSTON. That is correct.

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253. *Hearings Before the Committee on the Judiciary of the House of Reps. on Contempt of Court*, 62nd Cong., 56 (Statement by Hon. William B. Wilson (R-Penn.)) (“The only powers which our courts have are the powers which are granted to them by the Constitution and by our laws, and that all other powers exercised by our courts are usurpations of authority. I can realize that where the court believes that such powers are implied in order to carry out the powers that are specifically granted will exercise its discretion in the use of those implied powers where there is no law to the contrary. But when the question arises in the legislative branch of the Government as to how far those implied powers can be carried by the courts of our country, then the legislative branch of the Government has, or at least should have, the power to determine whether or not the construction of the court relative to its implied powers is correct or incorrect and to define the limitations of those implied powers.”).

254. *Hearings Before the Committee on the Judiciary of the House of Reps. on Contempt of Court*, 62nd Cong., at 38–39, 60 (statement of Jackson H. Ralston) (“Theoretically a contempt is a disobedience of a certain impalpable thing, something we may not put our hands upon, the law. But in point of fact it is a violation of the commands of a human being, although clothed in form of law; and it is very, very difficult for that human being to try a case of contempt without the personal feeling entering into it, and the difficulty is not removed when the question is sent to one of his associates, who is very likely, in a greater or less degree, to share either the individual feeling of the judge whose orders have been violated, or the general feeling of the bench that whatever proceeds from the bench is sanctified itself. So that the work of the jury in breaking the force of those feelings is one of the very greatest possible importance, and of the greatest possible public advantage.”). Ralston successfully represented labor activist Samuel Gompers in *Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418 (1911) and *Gompers v. United States*, 233 U.S. 604 (1914), cases involving the scope of judicial contempt authority in *J.H. Ralston Dead; Noted Lawyer*, 88, N.Y. TIMES (Oct. 14, 1945), <https://www.nytimes.com/1945/10/14/archives/jhralston-dead-noted-lawyer-88-an-authority-on-international-cases.html>.

255. *United States v. Shipp*, 203 U.S. 563, 566 (1906) (“An act of Congress controls the courts of its own creation, but not this court . . .”).

MR. MOON [R-PA.]. It has inherent judicial power that no power can take away.

MR. THOMAS. I contend that these courts have no power of any character, inherent, or otherwise, except what is conferred upon them by the act of Congress creating them. What do you think about that?

RALSTON. I think that is true, except as to the Supreme Court of the United States.<sup>256</sup>

Although Moon was asked about the inherent powers of courts, he recognized that contempt orders had to be made for contempt power to be effected:

MR. MOON: Is it not true that the rule of law is that a contempt order must have been one that was judicially and properly made?

MR. DAVENPORT: Certainly; so far as it is jurisdictional.

MR. MOON: And one which the court had a right to make.<sup>257</sup>

Shortly before this, on March 3, 1911, Congress passed “[a]n Act [t]o codify, revise, and amend the laws relating to the judiciary.”<sup>258</sup> The law clarified Congress’s perception of its role in defining contempt powers. There was one express exception, the now-defunct Court of Claims, which “may punish for contempt in the manner prescribed by the common law, may appoint commissioners, and may exercise such powers as are necessary to carry into effect the powers granted to it by law.”<sup>259</sup> That Congress in the same bill created one set of contempt guidelines for the Court of Claims and another for other federal courts leaves no doubt about its intentions.

256. *Hearings Before the Committee on the Judiciary of the House of Reps. on Contempt of Court*, *supra* note 252, at 39–40.

257. *Hearings Before the Committee on the Judiciary of the House of Reps. on Contempt of Court*, *supra* note 252, at 30.

258. Act of March 3, 1911, Pub. L. No. 61-475, 36 Stat. 1087 (1911).

259. Act of March 3, 1911, Pub. L. No. 61-475, 36 Stat. 1139 (detailing contempt powers of the Court of Claims); *Ex parte Savin*, 131 U.S. 267, 274–75 (1889) (quoting Act of Congress of Mar. 2, 1831, ch. 99 § 725) (“The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts.”).

Congress revisited the question of contempt powers specific to injunctive orders over twenty years later:<sup>260</sup>

The judiciary act of September 24, 1789, passed by the First Congress, creating the United States district courts as the first inferior Federal courts, not only created the courts but expressly conferred jurisdiction; and in conferring jurisdiction it said: 'The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment at the discretion of the court, contempts of their authority.' Maybe it was inherent, but it was expressly granted also by the judiciary act. As early as 1831, more than a hundred years ago, the Congress found it necessary to limit that power, and, by the act of March 2, 1831, Congress enacted into law this provision.<sup>261</sup>

In 1924, the Court in *Michaelson v. U.S. ex rel. Chicago, St. P., M. & O. Ry. Co.* affirmed this line of analysis and jettisoned any "inherent judicial powers" of lower district courts in conflict with Congressional statutes on contempt powers:

The courts of the United States when called into existence and vested with jurisdiction over any subject, at once become possessed of the power. So far as the inferior Federal courts are concerned, however, it is not beyond the authority of Congress; but the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative. That it may be regulated within limits not precisely defined may not be doubted.<sup>262</sup>

In the wake of this hearing, Congress passed the Norris-LaGuardia Anti-Injunction Act requiring a trial by jury for any contempt charge outside the immediate presence of the court if based on an injunctive order tied to labor organizing.<sup>263</sup> It further allowed the defendant in such a proceeding to "file with the court a demand for the retirement of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge and if the attack occurred elsewhere than in the

260. *Defining and Limiting the Jurisdiction of Courts Sitting in Equity: Hearing Before the Comm. on the Judiciary H. of Reps. on H.R. 5315, 77th Cong.* 90 (1932).

261. *Defining and Limiting the Jurisdiction of Courts Sitting in Equity: Hearing Before the Comm. on the Judiciary H. of Reps. on H.R. 5315, 77th Cong.* 54 (1932) (Statement by James S. Easby-Smith, counsel for American Federation of Labor).

262. 266 U.S. 42, 66 (1924) (internal citations omitted).

263. Norris-LaGuardia Anti-Injunction Act, Pub. L. No. 72-65, ch. 90, § 11, 47 Stat. 70 (1932).

presence of the court or so near thereto as to interfere directly with the administration of justice.”<sup>264</sup>

ii. Modern Jurisprudence on Court Contempt Authority

There is something unseemly at best in a judge *sua sponte* or otherwise invoking alleged pre-constitutional common law intuitions that conflict with more recent case law and favor those wearing “black nightgowns” themselves.<sup>265</sup> The cases discussed by other scholars who argue judges should limit their grants of immunity to government officials all refer to actions that were part of their jurisdiction or were not excluded from it by Congress.<sup>266</sup> At stake is whether it is correct to exclude complaints for bad faith or unconstitutional conduct by officials acting in a putatively judicial capacity from judicial review. The three main criticisms of prevailing precedent are that it has: 1) expanded absolute judicial immunity to non-judicial state employees; 2) expanded absolute judicial immunity to functions that are not inherently judicial; and 3) created a self-serving exclusion from standards citizens otherwise are afforded for due process and the rule of law under the U.S. Constitution.

The case against absolute immunity for IJs who order force avoids these thickets. Not only does the statute deprive IJs of summary contempt powers,<sup>267</sup> case law indicates Congress’s has the authority to limit even the inherent judicial powers of federal district court. There are two questions at the heart of the issue. May those acting in an official quasi-judicial capacity exert summary contempt-like powers afforded judges under common law that Congress has deprived them of? And if so, are such actions to be afforded absolute judicial immunity or only quasi-immunity?

*a. The Powers of Federal Courts Derive from Congress and Are Not Inherent*

A line of decisions indicate that the powers of federal courts, including summary contempt authority, come from Congress and

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264. Pub. L. No. 72-65, ch. 90, § 12. The act has not been repealed.

265. See Hanger, *supra* note 223, at 561 (criticizing the latitude the Court afforded the statutory reach of summary contempt powers).

266. See, e.g., Johns, *supra* note 38, at 276–310 (discussing the expansion of judicial immunity to non-judges in the judicial system).

267. See Hanger, *supra* note 223 (discussing the narrowing of summary contempt powers).



are not inherent. In *Nye v. United States*,<sup>268</sup> the Court vacated and remanded for trial a contempt conviction for pressuring an illiterate plaintiff “feeble in mind and body” to dismiss a lawsuit.<sup>269</sup> Both the majority and the dissent found that the Court was “dealing here only with a problem of statutory construction, not with a question as to the constitutionally permissible scope of the contempt power.”<sup>270</sup> The Court noted that “[w]e cannot by the process of interpretation obliterate the distinctions which Congress drew” between contempt in and out of the presence of the judge.<sup>271</sup> It explained that the “legislative history of th[e] statute and its career demonstrate that this case presents the question of correcting a plain misreading of language and history so as to give full respect to the meaning which Congress unmistakably intended the statute to have.”<sup>272</sup> In dissent, Justice Stone also affirmed that the statute had “curtailed an authority which federal courts exercised before its enactment[,]”<sup>273</sup> a restriction that could not exist if contempt powers of the lower courts were inherent and could not be restrained by the legislature.

Teresa Hanger points out that while state courts were referencing the inherent powers of courts on an ad hoc basis, “federal courts . . . have found that the contempt power stems from acts of Congress. In fact, the Supreme Court now adheres to the latter view.”<sup>274</sup> Subsequent cases demonstrate the Court’s inclination to review and overturn summary contempt orders under circumstances exceeding the statutory authority—such as an IJ irritated by observers. In *In re Oliver*,<sup>275</sup> the Court overturned a summary contempt conviction because the alleged contemnor’s conduct of lying, although in the presence of the judge, did not

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268. 313 U.S. 33 (1941).

269. *Id.* at 39 (“Petitioners, through the use of liquor and persuasion, induced Elmore to seek a termination of the action.”).

270. *Id.* at 50.

271. *Id.*

272. *Id.* at 51.

273. *Id.* at 53.

274. Hanger, *supra* note 223, at 555.

275. 333 U.S. 257, 276–78 (1948). While the Contemnor was found guilty in the state court under a state statute providing state judges summary contempt powers, the “failure to afford the petitioner a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law.” *Id.* at 273.

physically obstruct court proceedings. In *Sacher v. United States*,<sup>276</sup> the Court held that the summary contempt power to remove someone from a court room was rooted in a statute and a federal rule of civil procedure designed to specify its implementation. It also recognized Congress's and its own restraints on any so-called "inherent" judicial powers.<sup>277</sup> In *Offutt v. United States*,<sup>278</sup> the Court found that personal animosity between the attorney and the judge issuing the contempt order was sufficient grounds to reverse the order.<sup>279</sup> In *Bloom v. Illinois*,<sup>280</sup> the Court overturned a summary contempt conviction, finding that any conviction for a "serious contempt" violated the Sixth Amendment.<sup>281</sup> "Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority [of a judge], but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries."<sup>282</sup> Moreover, the Eleventh Circuit in 1987 overturned a contempt order the panel found no evidence of an "actual obstruction of justice" by the alleged contemnor.<sup>283</sup>

The harm posed to the public by an IJ untethered to the rule of law may be far more consequential to individuals and policy than summary contempt convictions. The need for an appeal process in the wake of a formal punishment of a third party by a judge is no different than the need for an appeal for a third party deterred from observing hearings. This is particularly true in cases of unlawful

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276. 343 U.S. 1, 11 (1952); *id.* at 7 ("Rule 42 obviously was intended to make more explicit 'the prevailing usages at law' by which the statute has authorized punishment of contempts.") (internal citations omitted).

277. *Id.* at 25 (Frankfurter, J., dissenting) ("[a]nd even before Congress drew on its power to put limits on inherent judicial authority, this Court derived the general boundaries of this power from its purpose . . .").

278. 348 U.S. 11 (1954).

279. *Id.* at 17 ("The record is persuasive that instead of representing the impersonal authority of law, the trial judge permitted himself to become personally embroiled with the petitioner.").

280. 391 U.S. 194 (1968).

281. *Id.* at 209 ("When a serious contempt is at issue, considerations of efficiency must give way to the more fundamental interest of ensuring the evenhanded exercise of judicial power.").

282. *Id.* at 208.

283. *United States v. Turner*, 812 F.2d 1552, 1568 (11th Cir. 1987) (citing *In re McConnell*, 370 U.S. 230, 234 (1962)).

force for which no official order is on the record and indeed was ordered secretly and then hidden.<sup>284</sup>

*b. Statutory Powers of Administrative Judges*

As noted in Part II, one hurdle confronting courts reviewing challenges to administrative judges' orders is the apparent similarity between the terminology, costumes, and interior design of administrative and Article III court hearings.<sup>285</sup> Professor Kent Barnett notes the obscurity of attorneys employed within agencies as "administrative judges" (AJ), and how courts and others confuse them with "administrative law judges," although the AJs lack the expertise, professionalism, and independence of the latter.<sup>286</sup>

That said, AJs do need order to conduct their hearings. But no rationale supports a need for more order and more tools than other federal officials. Federal officials conduct business in an orderly fashion despite disgruntled and even unruly citizens with the assistance of security guards, who are often hired through the Federal Protective Service.<sup>287</sup> Bona fide disruptions or threats are the responsibility of security personnel, who have the legal

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284. See Brief for Appellant, *supra* note 96, at 10–11 (illustrating how Judge Cassidy hid his orders to remove appellant). The rationale for immunities under *Butz* is to avoid endless litigation by a party unhappy with a hearing order. 438 U.S. 478, 512 (1978) ("The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.") The same rationale does not apply to a third party observer to the hearings. The disputants contemplated by *Butz* had recourse to a proceeding with safeguards of independence, unlike a hearing observer as contemplated by the Eleventh Circuit panel decision in *Stevens*. *Stevens v. Osuna*, 877 F.3d 1293, 1314–15 (11th Cir. 2017) (Williams, J., concurring) ("These facts animate the claim that the process available to Professor Stevens was not just 'displeasing' but arguably inadequate as a check on IJ Cassidy's misconduct.>").

285. *Supra* Part II.

286. Barnett, *supra* note 188, at 1660–61 ("Indeed, the Bush administration came under fire for appointing Immigration Judges ("IJs")—a category of AJs—based on political criteria, instead of under a competitive process. Half of the 37 hired IJs had no immigration experience, and those with experience had all worked in enforcement or as prosecutor.") (internal citations omitted).

287. The Federal Protective Service is a component of the Department of Homeland Security with the "mission to protect federal buildings, federal employees and contractors, and visitors to federal facilities." *Federal Protective Service Operations*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/fps-operations> (last updated June 29, 2016).

authority to evaluate risk to public order and charge people with disorderly conduct.<sup>288</sup>

EOIR stated that even its top officials cannot order guards employed by ICE to allow observers into immigration hearings, regardless of the regulation mandating public access.<sup>289</sup> The Eleventh Circuit did not address the merits of this interpretation of functional responsibilities. It relied instead on a superficial resemblance between immigration hearings and Article III courts, and provided no substantive legal reason IJs should have unilateral authority not available to other federal employees conducting public business.<sup>290</sup> Indeed, many of the hearings at issue have been for those detained, which occur by televideo in an otherwise empty room.<sup>291</sup> That these hearings may as well occur in an office as a courtroom suggests they are administrative rather than true court proceedings. Absent the presence of attorneys, court reporters, and staff, the immigration hearing room may offer no real-time accountability to other witnesses of IJ orders to use force. In other words, the use of force against an observer likely happens most often in secret.

Constitutional problems with closed hearings aside,<sup>292</sup> IJs have authority only to close hearings under 8 CFR 1003.27. The regulation does not, however, give IJs more command authority over guards than clerks working in adjacent offices. First, as was the case for observer Bonnie Pechter, an IJ can order a hearing closed and then postpone the hearing until after the order has been reviewed by a federal court without having to order a guard to clear it.<sup>293</sup> Similar authority for judicial review of orders to close hearings occurred in response to demands for declaratory and injunctive relief in *Detroit Free Press* and *North Jersey Media*.<sup>294</sup>

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288. 40 U.S.C. § 1315 (2008).

289. Brief for Appellant, *Stevens v. Lynch*, No. 16-12007-DD, 2016 WL 3964938, at \*21 (11th Cir. Jul. 20, 2016).

290. See *Stevens v. Osuna*, 877 F.3d 1293, 1301–04 (11th Cir. 2017) (discussing the similarities of IJs and Article III judges).

291. Jacqueline Stevens, *Lawless Courts*, NATION (Oct. 20, 2010), <http://www.the.nation.com/article/155497/lawless-courts> (reporting televideo hearing conducted by immigration judge in violation of agency protocols).

292. See Kitrosser, *supra* note 79 (supporting the public's First Amendment right to observe immigration hearings).

293. *Pechter v. Lyons*, 441 F. Supp. 115 (S.D.N.Y. 1977).

294. *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d. 948 (E.D. Mich. 2002); *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d. 198 (3d Cir. 2002).

Hearing closures are supposed to be predicated on the characteristics of the hearing, not the identity of the observers present on any given day.<sup>295</sup> These decisions can and should be made in advance of the hearing itself. Government requests to close hearings are supposed to take the form of a motion in writing.<sup>296</sup> If an IJ or a party has followed this protocol and insists on proceeding immediately with a closed hearing without allowing time for judicial review, an IJ can exclude the public without using force simply by locking the courtroom doors.<sup>297</sup> An exclusion imposed without an opportunity for review arguably would trigger a constitutional remedy, including one authorized under *Bivens*.<sup>298</sup>

### 3. *Stevens* Revisited

In *Stevens*, the Eleventh Circuit stated that IJs are functionally equivalent to judges, and therefore have the authority to remove people from federal buildings housing immigration hearing rooms.<sup>299</sup> In noting the similarities between federal courts and judges, on the one hand, and immigration hearings and IJs, on the other, the panel quoted 8 U.S.C. § 1229a(b)(4)(A), (B), with the glaring exception of the sentence limiting IJ contempt powers to civil fines.<sup>300</sup> The panel's analysis puts forward a common law defense of IJ contempt powers without any engagement with the case law disfavoring this approach.<sup>301</sup>

If Congress imposes statutory limits on the summary contempt powers of administrative judges, may courts supersede those limits based on common law? And, if they may not—an interpretation in keeping with prevailing precedent on statutory

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295. See 8 C.F.R. § 1003.27.

296. 8 C.F.R. § 1003.46.

297. Observers are regularly excluded from hearings by staff locking the doors to hearing rooms. In July 2014, Stevens was observing the hearings of IJ Clarease Rakin Yates in Houston. Following an announced break, Stevens was unable to re-enter the locked room. An administrator informed Stevens that Rakin Yates had ordered this in private.

298. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (holding the existence of a constitutional remedy by waiver of immunity for law enforcement due to illegal acts).

299. *Stevens v. Osuna*, 877 F.3d 1293, 1305–07 (11th Cir. 2017).

300. *Id.* at 1303. See 8 U.S.C. § 1229a(b)(1) for language limiting contempt powers to civil money penalty.

301. See EIG, *supra* note 202 (interpreting comparable statutes in which Congress specifies different conduct).

construction<sup>302</sup>—on what basis may courts impute similar judicial functions and immunities? If the legislation proposed by Bill McCollum had passed, IJs would have summary contempt powers and arguably absolute immunity for actions taken in their official capacities.<sup>303</sup> Maintaining order is necessary, but the appropriate extent of force and the actual motives are *factual* questions.<sup>304</sup> They are therefore better suited to a jury.<sup>305</sup> The Eleventh Circuit and other courts have expanded judicial immunities to non-judges based on precedent derived from common law rather than keeping pace with policy and legislative developments and judicial powers and immunities precedent.<sup>306</sup>

## VI. Immigration Judge Misconduct: Administrative Remedy?

The majority in *Stevens* noted that a third party aggrieved by alleged IJ misconduct had an administrative remedy.<sup>307</sup> In her dissent, Judge Williams questioned that assumption because the very officials responsible for investigating the complaint had also been embarrassed by Stevens' reporting.<sup>308</sup> This section reviews the internal protocols and outcomes of IJ misconduct complaint investigations more generally. Original quantitative and qualitative analyses of investigations into 768 IJ misconduct complaints filed between 2002 and 2016 show: (1) the complaints are concentrated among certain IJs; (2) there is no escalation of

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302. See Hanger, *supra* note 223.

303. H.R. 4258, 104th Cong. (1995-1996).

304. Consider, for instance, if an IJ shot an observer and claimed, as a defense for civil damages, that it was his prerogative to maintain courtroom order and the observer in the lobby posed a threat to this.

305. *Stevens v. Osuna*, 877 F.3d. 1293, 1313 (11th Cir. 2017) (“I disagree with the blanket assertion that for judicial immunity purposes, ordering persons removed from a courthouse is an obligation for judges and an ordinary function performed by judges.”); *id.* at 1313 n.1 (“The cases cited by the majority . . . all involve individuals who disturbed ongoing proceedings in the courtroom or otherwise obstructed adjudicatory matters before the judge. None address judicial immunity.”); *id.* at 1313–14 (“Absent [a] connection to an ongoing judicial proceeding, however, the ‘nature of the function’ performed is not necessarily judicial.”).

306. See, e.g., Douglas K. Barth, *Immunity of Federal and State Judges from Civil Suit — Time for a Qualified Immunity?*, 27 CASE W. RES. L. REV. 727, 727 (1977) (“[The] shield of immunity not only leaves the injured victim without a remedy, but also allows the offending judge to remain on the bench . . . . [The author] proposes a partial immunity for judges limited to good-faith acts . . .”).

307. *Stevens*, 877 F.3d. at 1308 n.13.

308. *Id.* at 1315. See also *id.* at 1315 n.3.

responses to complaints against repeat-offenders; (3) the quasi-judicial character of the IJ position lends itself to agency cover-ups; and (4) the coding and tracking of complaints is slipshod—officials are inclined to dismiss complaints despite internal communications acknowledging a facially valid complaint was stated.

*A. Immigration Judge Complaint and Investigation  
Protocols*

The current IJ misconduct review process referenced in *Stevens* emerged from then Attorney General Alberto Gonzalez's *22 Measures of Improvement to the Immigration Courts and Board of Appeals*.<sup>309</sup> This review was occasioned by Congressional hearings and media coverage of partisanship in the appointment of IJs and abysmal incidents of adjudication.<sup>310</sup> DOJ political appointee Monica Goodling testified that she selected IJs with strong ties to the Republican Party establishment or ideology.<sup>311</sup> Gonzalez's memorandum mandated new procedures for reporting to EOIR's leadership "adjudications that reflect immigration judge temperament problems or poor Immigration Court or Board quality . . ."<sup>312</sup> The result was to "[i]mplement a process for receiving, evaluating, and responding to complaints of inappropriate conduct by EOIR adjudicators."<sup>313</sup>

EOIR's Ethics and Professionalism Guide for Immigration Judges<sup>314</sup> is an internal advisory memorandum lifted virtually verbatim from the misconduct statutes and regulations governing all federal employees. It differs markedly from the Model Code of

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309. Memorandum from Att'y Gen. Alberto Gonzalez, *Measures to Improve the Immigration Courts and the Board of Immigration Appeals*, DEP'T OF JUST. (Aug. 9, 2006), <http://www.justice.gov/sites/default/files/ag/legacy/2009/02/10/ag-080906.pdf> [hereinafter Gonzalez, *Measures to Improve*].

310. Barnett, *supra* note 188, at 1660–61.

311. Monica Goodling, Remarks of Monica M. Goodling before the Committee on the Judiciary, United States House of Representatives 6 (May 23, 2007), <https://web.archive.org/web/20070609195922/http://judiciary.house.gov/media/pdfs/GoodlingII070523.pdf>.

312. Gonzalez, *Measures to Improve*, *supra* note 309, at 3.

313. The Attorney General's Management Review of the Immigration Hearing Process, 72 Fed. Reg. 53,675 (Sept. 20, 2007) (codified at 8 C.F.R. § 1003.0(b)(1)(viii)).

314. EXEC. OFFICE OF IMMIGRATION REVIEW, ETHICS AND PROFESSIONALISM GUIDE FOR IMMIGRATION JUDGES (2011), <http://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf>.

Judicial Conduct<sup>315</sup> and the U.S. Code for Judicial Conduct<sup>316</sup> used for Article III state and federal judges, respectively, as well as the ethics code for ALJs.<sup>317</sup> EOIR adjudicators are unionized and their employment relations are governed by Articles 8 and 9 of the Labor Agreement between the National Association of Immigration Judges (NAIJ) and EOIR.<sup>318</sup>

EOIR states its recommendations will reflect the “immigration judge’s length of service and past disciplinary record, mitigating circumstances, the likelihood of repeat occurrence absent action by the Agency, the impact of the offense on the reputation of the agency, and the consistency of the penalty with similar instances of misconduct.”<sup>319</sup> Instructions for filing misconduct complaints appear on the EOIR website.<sup>320</sup> The supervisor investigating the complaints is an Assistant Chief Immigration Judge (ACIJ).<sup>321</sup> The supervisor overseeing all investigations is the ACIJ of Conduct and Professionalism (ACIJ C/P).<sup>322</sup> Upon receipt, an employee of the Office of the Chief Immigration Judge (OCIJ) must assign a number and “create an entry for it in OCIJ’s complaint tracking database.”<sup>323</sup> Complaint sources may be “anonymous, respondent’s

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315. A.B.A., ABA MODEL CODE OF JUDICIAL CONDUCT (2011), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2011\\_mcjc\\_preamble\\_scope\\_terminology\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2011_mcjc_preamble_scope_terminology_authcheckdam.pdf).

316. JUDICIAL CONFERENCE, CODE OF CONDUCT FOR UNITED STATES JUDGES (2014), [http://www.uscourts.gov/sites/default/files/vol02a-ch02\\_0.pdf](http://www.uscourts.gov/sites/default/files/vol02a-ch02_0.pdf).

317. The Office of Personnel Management relies on the A.B.A. Model Code for Judicial Conduct for ALJ disciplinary procedures. See A.B.A., *supra* note 315.

318. EXEC. OFFICE FOR IMMIGRATION REVIEW, SUMMARY OF OCIJ PROCEDURE FOR HANDLING COMPLAINTS AGAINST IMMIGRATION JUDGES 2 n.3 (2010), <https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/IJComplaintProcess.pdf> [hereinafter EOIR, SUMMARY OF COMPLAINT PROCESS] (“If an IJ wishes to challenge a disciplinary action, the IJ may either file a grievance . . . or pursue applicable statutory remedies . . .”).

319. *Id.*

320. See *id.* at 1. A complaint may also be communicated “orally, and it may be anonymous.” *Id.* For instructions for filing complaints and contact information, see *Instructions for Filing a Complaint Regarding an Immigration Judge’s Conduct*, EXEC. OFFICE FOR IMMIGRATION REVIEW, DEP’T OF JUST., <http://www.justice.gov/EOIR/instructions-filing-complaint-regarding-immigration-judges-conduct> (last updated May 5, 2015).

321. See EOIR, SUMMARY OF COMPLAINT PROCESS, *supra* note 318, at 2 (“For matters that fall outside of OPR or OIG jurisdiction, an ACIJ will investigate the complaint.”).

322. *Id.* (“Throughout the process, all complaints will be monitored by the ACIJ C/P to ensure proper and expeditious handling and resolution.”).

323. *Id.* at 1. The Chief Immigration Judge (CIJ) and the ACIJs are supervisors and have no adjudicative responsibilities. See *id.* at 2 (explaining that when



attorney, third party, (e.g., relative, an interested attorney, a courtroom observer, etc.), Board of Immigration Appeals (BIA), Respondent, Circuit Court, OIL (Office of Immigration Litigation), EOIR, OPR, Department of Homeland Security (DHS), Office of Inspector General (OIG), main justice, media, and other.”<sup>324</sup> The agency codes we analyzed were: in-court conduct, incapacity, out-of-court conduct, due process, bias, legal, criminal, and other. The ACIJ C/P offered frequent suggestions to the ACIJs performing the investigations as to how to code and respond to the complaints. We noted no discrepancies between the ACIJ C/P suggestions and the formal findings sent to the IJ from the ACIJs. In addition to listening to the hearing recordings, the ACIJ “may also solicit statements from the complainant, the IJ, and any witnesses.”<sup>325</sup> Possible agency responses ranged from the dismissal of the complaint for “failure to state a claim”—the most frequent response—to firing the accused IJ.<sup>326</sup> The three-page “Complaint Procedure” available on the agency website provides no criteria for “misconduct.”<sup>327</sup>

## B. Findings

### i. Complaint Distribution

Of the 768 complaints for which we have information, ACIJs coded 60% (n = 460) as “in-court conduct”; 37% (n = 284) as “due process” complaints; 25% (n = 194) as “legal”; 18% (n = 134) as “bias”; and 10% (n = 76) as “out-of-court conduct.” Just 1% (n = 8) referenced “criminal conduct.”<sup>328</sup> There were 268 IJs employed

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disciplinary action is appropriate, the Deputy Chief Immigration Judge reviews and imposes the appropriate discipline).

324. For example, “a relative, an interested attorney, a courtroom observer, etc.), BIA, Respondent, Circuit Court, OIL (Office of Immigration Litigation), EOIR, OPR, DHS, OIG, main justice, media, and other.” *Id.*

325. *Id.* at 2 (“[T]he investigation will usually begin with a review of the hearing record, including the audio recordings.”). Audio recordings are created solely by the IJs and may omit exchanges at their discretion. 8 C.F.R. § 1240.9 (2019) (“In his or her discretion, the immigration judge may exclude from the record any arguments made in connection with motions, applications, requests, or objections . . .”).

326. EOIR, SUMMARY OF COMPLAINT PROCESS, *supra* note 318, at 3; *see infra* Section VI.B.ii.

327. *See* EOIR, SUMMARY OF COMPLAINT PROCESS, *supra* note 318.

328. Twenty-three ACIJs evaluated the complaints. ACIJ information is missing for case numbers 608 and 609, referencing also 22, 27, 76, and 173. We received anonymized data with a three letter code assigned to each IJ. First and last name

during the time frame these complaints were recorded, of whom 200 elicited at least 1 complaint.<sup>329</sup>

A key finding is that just 7 IJs accounted for 24% of all complaints. Sixteen IJs (6%) accounted for 299 (39%) of the complaints, and 15% of the IJs (n = 41) drew 60% of the complaints. Nine (3.4%) had between 10 and 19 complaints. The plurality of IJs with reported complaints (41%, n = 109) had just 1 to 2 complaints each, and another 48 (18%) had 3 to 4 complaints lodged against them. These results are consistent with police misconduct research: a small percentage are responsible for the majority of the complaints.<sup>330</sup>

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initials in this Article are for the ACIJIs, whose identities EOIR made public. At the high end, ACIJIs LD and GS coded 113 and 100 complaints about the actions of 26 and 33 IJs, respectively. Six ACIJIs handled fewer than 10 complaints each. In 301 cases, more than one possible type of misconduct was indicated, e.g., “due process” and “legal,” and thus the codes total to greater than 768. See notes on file with author.

329. See IMMIGRATION JUDGE REPORTS—ASYLUM, TRAC IMMIGRATION, <https://trac.syr.edu/immigration/reports/judgereports> (last visited Mar. 21, 2019).

330. See Angela Caputo & Jeremy Gerner, *Small Group of Chicago Police Costs City Millions in Settlements*, CHIC. TRIB. (Jan. 30, 2016), <https://www.chicagotribune.com/news/ct-chicago-police-misconduct-settlements-met-20160129-story.html> (finding that 124 police officers of about 12,000 total were identified in 1/3 of misconduct lawsuits). The paucity of research on misconduct also bears reflection. See Sandro Cabral & Sérgio G. Lazzarini, *The “Guarding the Guardians” Problem: An Analysis of the Organizational Performance of an Internal Affairs Division*, 25 J. PUB. ADMIN. RES. & THEORY 797, 799 (2014) (describing analysis of a police oversight body and finding that “systematic empirical research on [Internal Affairs Divisions] and other watchdog agencies has been surprisingly scant.”); Linda Kleve Trevino, *The Social Effects of Punishment in Organizations: A Justice Perspective*, 17 ACAD. MGMT. REV. 647, 668 (1992) (“Despite its widespread use as a management tool, a relatively small amount of research has been conducted on organizational punishment.”). See also Brian Niehoff et al., *The Social Effects of Punishment Events: The Influence of Violator Past Performance Record and Severity of the Punishment on Observers’ Justice Perceptions and Attitudes*, 19 J. ORGANIZATIONAL BEHAV. 589, 601 (1998) (describing their study on the social effects of punishment and concluding that “[t]here is still much research to do before we can understand the social effects of punishment completely.”).

Table I: Distribution of Complaints Across Immigration Judges					
IJ Category	Complaints per IJ	# IJs	Complaints (% of total)	# IJs Suspended	# IJs Retired or Terminated
Extreme	20+	7	24%	2	1
High	10-19	9	15%	1	1
Medium	5-9	25	21%	6	1
Low	3-4	48	21%	0	4
Negligible	1-2	109	19%	0	6
None	0	70	0%	0	0

To test whether the variation in complaints tracked the variation in caseloads, we reviewed the caseloads for 30 anonymized IJs using EOIR's code sheet, as well as the asylum proceeding caseloads for IJs deanonymized.<sup>331</sup> We found that IJ caseloads were not causing the variation in IJ misconduct complaints. We found that the Negligibles had a rate of complaints per case heard of 0.12% to 0.74%. The range of complaints per case for the Highs and Extremes was 1.12% to 5.23% complaints per case heard.

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331. After consultation with the EOIR FOIA office, to hasten the agency response time, we limited our request for case load information for each anonymized IJ in the database to those described above. For the FOIA request and data, and the spreadsheet with our codes created from the FOIA data, see *United States Citizens in Deportation Proceedings*, DEPORTATION RESEARCH CLINIC, <https://deportationresearchclinic.org/USCData.html> (last visited Mar. 21, 2019). The test of whether caseloads are driving the variation comes from asylum caseload data available after a private attorney using Adobe software deanonymized forty-six of the IJs in our database. Bryan Johnson, *Secret Identities of Immigration Judges Revealed*, AMOACHI & JOHNSON, PLLC ATTORNEYS AT LAW (Jan. 16, 2017), <https://amjlaw.com/2017/01/16/secret-identities-of-immigration-judges-revealed/>. We were thus able to create a dataset with asylum caseload, city, and background employment data for 9 of the top offenders, or 57% of the Extremes, 44% of the Highs, 8% of the Middles, 16% of the Lows, and 4% of the Negligibles. Using case load data on asylum proceedings, we found that while the Highs have a higher than average case load, the Extremes actually have a lower than average case load. We did not use regression analysis because we do not believe the data are sufficiently robust to credit representation that might convey objective, statistically significant inferences, though they are robust enough for purposes of hypothesis falsification.

**Table II: IJ Complaints by Asylum Caseload**

<u>IJ Category</u>	<u>Average Asylum Caseload, 2004-2009</u>
Extreme	480
High	873
Medium	778
Low	682
Negligible	785
Anonymized	683

Our analyses show no correlation between the average number of asylum cases and the number of misconduct complaints.<sup>332</sup> The caseload of the Highs is 18% above the mean for all IJs, but the number of IJ misconduct complaints for the Highs is 227% of the mean for all IJs. In sum, the tests using EOIR data for 30 IJs and the asylum caseload data reveal that caseload is not accounting for the distribution of IJ complaints.

#### ii. Agency Efficacy

We were interested in assessing whether the misconduct complaint investigation process meaningfully advanced EOIR's stated goals. First, we found an inverse or no relation between the number of complaints and the severity of the agency response.<sup>333</sup> Second, we observed a long delay between a complaint being filed and its investigation.<sup>334</sup> A failure to address misconduct in real-time or close thereto is inconsistent with the stated objective of acquiring these complaints. Slow response times mean that additional complaints for similar behavior are likely to accrue. Third, we tested whether the complaint source was associated with the outcome and found that complaints generated by government employees were far

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332. See Ramji-Nogales, et al., *supra* note 138, at 326 ("The administrators in each immigration court assign cases to immigration judges to distribute the workload evenly among them, and without regard to the merits of the cases or the strength of defenses to removal that may be asserted by the respondents.").

333. See *supra* Table I.

334. See *infra* Tables III, IV.

more likely to elicit investigations and disciplinary responses than complaints from respondents, their attorneys, or third parties.<sup>335</sup>

The ACIJ Checklist (Checklist) for misconduct investigation training provides three possible supervisor responses to misconduct complaints: no response, training, or discipline.<sup>336</sup> Of the 768 cases with discernible outcomes, only 22 (2.9%) closed with a response that was officially disciplinary. One IJ was terminated based on allegations unrelated to an immigration case complaint. Nine cases were closed with suspensions (1.2%) and twelve (1.6%) received written reprimands. No IJ was terminated based on allegations of improprieties in their handling of immigration cases.

Thirty-six percent either were “dismissed” (n = 277) or closed with “oral counseling” (41%, n = 316), “written counseling” (6.3%, n = 49), or “training” (7.8%, n = 6).<sup>337</sup> Sixty cases (15%) were “concluded” following nine IJs retiring or resigning, and thirty-six were “resolved” in association with findings from other cases.<sup>338</sup> The concentration of complaints among repeat offenders and the lack of escalation, detailed in the third test below, suggests that EOIR’s low rate of disciplinary responses does not reduce IJ misconduct.

Pursuant to EOIR’s statement about escalating responses for repeat offenders, one expects EOIR to respond especially quickly for complaints generated by those attracting prior complaints. This did not occur. We found that the average time between an underlying incident occurring and an ACIJ adding the complaint to the database to initiate an investigation was 461 days.

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335. See *infra* Table VI.

336. EXEC. OFFICE FOR IMMIGRATION REVIEW, ACIJ CHECKLIST FOR HANDLING COMPLAINTS AGAINST IJS 1 (2010), <http://governmentillegals.org/ACIJChecklist-2015-10218.pdf> [hereinafter EOIR, ACIJ CHECKLIST]. For more information regarding FOIA Case No. 2015-10218, see *Policies: Source Materials from Completed FOIA Requests*, DEPORTATION RES. CLINIC, <https://deportationresearchclinic.org/FOIA-Policies.html> (last visited Apr. 13, 2019).

337. Data on the final action in six cases is pending.

338. This figure represents the cases marked as “closed” because they are associated with IJs who retired. One IJ who retires may have numerous complaints in the database and they would all be listed as “closed” with no findings of culpability, although the retirement may reflect concerns about misconduct.

**Table III: Days Elapsed Between Alleged Misconduct and Complaint Entered into Database, by IJ Complaint Frequency**

IJ Complaint Frequency	Average Number of Days
Negligible	-3.62 <sup>339</sup>
Low	37.45
Medium	211.16
High	499.10
Extreme	1146.20

We also analyzed the average time between a complaint being investigated and a complaint being closed. The average number of days elapsed was 95 days, but for the Extremes, the average was 240 days. Further, the average time between an incident occurring and the complaint investigation closing for the Extremes was over 1,000 days.<sup>340</sup>

**Table IV: Average Time Elapsed between Complaint Received and Final Action**

IJ Complaint Frequency	Number of Days
Negligible	4.79
Low	16.73
Medium	34.59
High	76.98

339. Twenty-nine cases are missing the date of the alleged misconduct, either because it was not listed or there were multiple dates of misconduct referenced in the complaint. This figure is negative number of days because Complaint 12 was investigated before the initial complaint and second complaint about retaliation three months were entered into the database. The first complaint was coded as “unsubstantiated” and there was no new case created or investigation of the second complaint of retaliation.

340. The mean number of days between an event occurring and a case closing was 508 days (1.4 years). For the 754 complaints for which we have time data, 16 (2.1%) were closed in less than 30 days; 76 (10%) in more than 30 and less than 365 days; 93 (36.6%) in more than 365 and less than 730 days; and 99 (13.1%) in more than 730 days (2 years).

Extreme	242.30
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In addition, ACIJs addressed multiple complaints in one oral or written counseling session and would conclude or dismiss more than one case the same date. Fourteen of the sixteen Extremes had more than one complaint closed on the same day. One of the Extremes, FRW, had eighteen cases closed with “termination.”<sup>341</sup> These results indicate the agency response time allowed multiple complaints to accrue before responding, and that the ACIJs and ACIJ C/P did not efficaciously address complaints.

Complaints against the Extremes (twenty or more complaints) were less likely to be dismissed outright than those filed against other IJs, but they also elicited *less discipline*. IJs with fewer complaints were more likely to be suspended.<sup>342</sup> Of the 16 IJs who received 10 or more complaints, 3 received 1 suspension each, 4-5 years after the first complaint.<sup>343</sup> Four IJs with 20 or more complaints received only non-disciplinary warnings of oral and written counseling, as did 8 of those with 10-19 complaints, including IJ Cassidy.<sup>344</sup> Their recidivism suggests that the agency responses were ineffective.

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341. These complaints for FRW are coded as “concluded - IJ termination during trial period made no action necessary.” This practice produces misleading EOIR descriptive data. EOIR’s “Immigration Judge Complaint Statistics” web page marks these cases simply as “Concluded,” obscuring the fact that 18 complaints were elicited for someone who was fired and whose misconduct subsequent to the offending incident might have been avoided had the agency addressed the complaints more promptly. EXEC. OFFICE FOR IMMIGRATION REVIEW, DEP’T OF JUSTICE, COMPLAINTS AGAINST IMMIGRATION JUDGES 6 (2018), <https://www.justice.gov/eoir/page/file/1100976/download>.

342. Other adjudicators who received suspensions were coded as Middles: GNE, KSV, ANY, NHQ, ATX, GER.

343. *See infra* Table V.

344. Johnson, *supra* note 331.

**Table V: Disciplinary Responses by Number of Complaints**

IJ	Class <sup>345</sup>	Suspension	Retired or Terminated <sup>346</sup>	Total Complaints	Date of First Complaint Entered in Database	Date of Last Complaint Entered in Database
GEP	E	8/4/12		15	5/1/09	7/8/13
IQV	E	3/1/11		25	4/24/09	5/14/13
GOE	H	12/8/10		13	11/25/08	5/7/12
HKX	E		1/20/06	31	11/6/08	5/3/11
FRW	H		12/22/08	18	9/1/08	10/6/10

The fact that HKX had been recorded conspiring with an attorney to pursue a business relationship with a firm providing visas is further grounds for requiring a statement on the record in the presence of the observer stating specific, legal grounds for closing a hearing and an opportunity for the observer to object and appeal the order. Absolute judicial immunity effectively circumvents these

345. E means Extreme and H means High.

346. EOIR does not code “retirement” as a disciplinary response. See EXEC. OFFICE FOR IMMIGRATION REVIEW, COMPLAINTS AGAINST IMMIGRATION JUDGES, *supra* note 280 at 6. HKX, an Extreme whose complaint investigations were closed by retirement, was identified as Dallas IJ Anthony Rogers, *supra* note 331. A 1998 recording of Rogers bragging about a business relationship with an attorney practicing before him was obtained by then INS in 1998. Walter Roche, *Immigration Judge Sought Business with Visa Vendors*, BALTIMORE SUN (Jan. 10, 2003), <https://www.baltimoresun.com/news/bs-xpm-2003-01-10-0301100076-story.html> (“A few months after the tape was made, on March 4, 1998, it was seized in a raid by INS investigators. Four years later, in a memo addressed to Joseph R. Greene, the assistant commissioner of the INS, an agency official complained that Rogers was still serving, despite a negative report on the incident by the inspector general of the Department of Justice... In the memo to Greene, the assistant INS commissioner, the conversation was described as an example of the ‘corrupting influence’ of the investor visa program. The memo stated that the taped conversation ‘reflects that the judge was not satisfied with Interbank’s “typical immigration attorney deal,” under which attorneys were paid up to \$20,000 for each alien referred to Interbank; he also wanted ‘revenue at the back end.’ ‘Also discussed during the conversation were the judge’s planned trip to Riyadh and Jeddah, Saudi Arabia, and his ‘agency relationship [with] some sheik,” the memo continued.”).



protections and permits IJs such as HKX to pursue illicit deals with attorneys in secret.<sup>347</sup>

### iii. Final Action by Complaint Source

In order for a government of the people and by the people to be effective, the guardians of the guardians need to be as responsive to complaints from respondents, their attorneys, or third parties, as when the guardians' colleagues are aggrieved. This is particularly true in cases involving immigration and deportation policies. The ACIJ's are more likely to substantiate allegations from government than non-government sources. This may mean the former are more likely to be accurate in their assessments of misconduct. But it also may mean that agency officials are disregarding *bona fide* misconduct complaints from fellow citizens. Information from the training manual itself suggests the latter may be occurring.<sup>348</sup>

The Checklist is the training document on which ACIJ's rely for intake and investigative response decisions.<sup>349</sup> The Checklist includes of test cases drawn from actual complaints. One example references a letter signed by seventy detained respondents charging that the "Dallas IJs are engaged in racketeering by virtue of their setting high bonds and then profiting from the aliens' continued detention via kickbacks from the owners of the detention

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347. Pursuant to the effort to ban her, the Atlanta court administrator solicited a complaint against Stevens from an Atlanta attorney to whom Defendant Cassidy had recently referred a pro se respondent. Cassidy received "written counseling," but no discipline. See Plaintiff's Reply Brief in Support of Rule 60 Motion, at 6-7, *Stevens v. Lynch*, No. 1:12-CV-1352-ODE, 2016 WL 10950435 (N.D. Ga. Feb. 29, 2016) (No. 19-1) ("In Complaint 164, the Board of Immigration Appeals admonishes Defendant Cassidy for violating a federal regulation on asylum records by sharing the file of an asylum seeker with a private attorney. The transcript shows Defendant Cassidy referring a pro se respondent to the for-profit attorney without any representation that the assistance will be pro bono. The private attorney to whom Defendant Cassidy referred the respondent on December 10, 2009 happens to be the same attorney from whom Atlanta Court Administrator Defendant Cynthia Long on April 14, 2010 solicited a complaint against Plaintiff . . . Defendant Cassidy appearing to steer business to the one private attorney of whom Defendants later requested a complaint suggests impropriety.") (internal citations omitted). FRW (IJ Carey Holliday), was terminated on December 22, 2008, two years after his appointment, and after accumulating 18 complaints that all closed with no findings of improprieties and no discipline. Prior to being fired, he denied asylum to 662 respondents of the 791 cases he heard. See IMMIGRATION JUDGE REPORTS, *supra* note 329.

348. EOIR, ACIJ CHECKLIST, *supra* note 336.

349. EOIR, ACIJ CHECKLIST, *supra* note 336, at 1-3, 9-13, 15.

centers.”<sup>350</sup> The ACIJ C/P states that the complaint was “likely able to be closed as frivolous, merits-related, and unable to be substantiated; *however the complainant probably did successfully state a claim.*”<sup>351</sup> According to the protocols, such allegations of criminal activity should have been forwarded to the DOJ Office of the Inspector General (OIG).<sup>352</sup> Generally, the agency was more responsive to complaints from government officials than from others. Seventy-eight percent of complaints from non-government sources were dismissed, compared with 13% from the BIA, which generated the plurality of complaints, 17% from the DHS, and 22% from EOIR staff.<sup>353</sup>

**Table VI: Final Action by Complaint Source**

Complaint Source	# of Complaints	Corrective Response <sup>354</sup>	Disciplinary Response <sup>355</sup>	Dismissed
BIA	360	56% (202)	6% (21)	13% (47)
Respondents/ Attorneys	212	26% (55)	2% (5)	78% (139)
DHS	35	63% (22)	6% (2)	17% (6)
EOIR	50	26% (13)	26% (13)	22% (11)
Third Party	64	22% (14)	0% (0)	78% (50)

#### iv. Data Limits

Studies of misconduct complaints rely on data that have an unknown relation to the universe of actual misconduct. Several things may have distorted these reports. For example, intake

350. EOIR, ACIJ CHECKLIST, *supra* note 336, at 10–11.

351. EOIR, ACIJ CHECKLIST, *supra* note 336, at 11 (emphasis added). The training documents also include examples of conduct contemplated by the codes. For instance, the training materials specify “COV [change of venue]” as a “due process” violation. EOIR, ACIJ CHECKLIST, *supra* note 336, at 15. But on receiving a complaint “alleging multiple IJs’ improper denials of COV motions” and that “at least two Atlanta IJs” were “denying COVs where clearly warranted” the SACIJ coded and dismissed the complaint as merits-related. EOIR, ACIJ CHECKLIST, *supra* note 336, at 12.

352. EOIR, SUMMARY OF COMPLAINT PROCESS, *supra* note 318, at 1 n.2.

353. The large proportion of the total complaints emanating from the BIA likely is in response to the Gonzalez memorandum, which obligates these referrals. Gonzalez, *Measures to Improve*, *supra* note 309, at 7.

354. Corrective Response includes oral or written counseling and training.

355. Disciplinary Response includes written reprimand, suspension, termination, or resignation.

supervisors may have protected some IJs and not others by not entering cases or by closing them as “unsubstantiated” without investigating them. Otherwise, IJs may have used intimidation or threats to discourage private practitioners from filing complaints. Attorneys in the American Immigration Law Association have reported that IJs in the Atlanta area filed cross-complaints against attorneys who reported IJ misconduct.<sup>356</sup> An attorney in the Atlanta area filed a complaint against an IJ in our Highs reporting that the IJ (QJC) failed to record his own allegedly unprofessional comments during hearings. The complaint was affirmed but no action was taken, and the complaint is not in the misconduct database. On hearing of the initial complaint, QJC filed a cross complaint that was never closed, despite repeated efforts on the part of the attorney, whose name was on a list of those “under investigation.” “I was on permanent probation,” the attorney stated.<sup>357</sup> He believed additional complaints about this IJ would cause further retaliation.<sup>358</sup>

Furthermore, the ratio of complaints per caseload may understate the rate of IJ misconduct. This is because caseloads may not be exogenous to IJ temperament. Two IJs who received persistent and serious verified misconduct complaints—but attracted little or no discipline in Atlanta (PBZ and QJC)—invoked their “mass removal” hearings to rationalize their actions.<sup>359</sup> ACIJ supervisors may overlook misconduct in exchange for these IJs keeping pace with the dockets generated by DHS, a major priority for an agency that has attracted front page headlines and Congressional scrutiny for its notoriously large case backlog.<sup>360</sup>

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356. Correspondence on file with authors.

357. The attorney who described the failures in recording shared this with the co-author only after he retired and on conditions of confidentiality. Interview (June 22, 2009) (on file with authors).

358. *Id.*

359. See Jacqueline Stevens, *New FOIA Documents: EOIR Performance Awards and Raises for 2008-2010*, STATES WITHOUT NATIONS (Oct. 20, 2010), <https://stateswithoutnations.blogspot.com/2010/10/new-foia-documents-eoir-performance.html>; see also Jacqueline Stevens, “PBZ” (aka J. Dan Pelletier?) Reveals Atlanta IJs WERE Using Boilerplate [and Incorrect] IRS Analyses, STATES WITHOUT NATIONS (June 18, 2016), <http://stateswithoutnations.blogspot.com/2016/06/pbz-aka-j-dan-pelletier-reveals-atlanta.html>.

360. Congressional and Executive frustration with EOIR’s backlog has been a longstanding issue. See GOV’T ACCOUNTABILITY OFFICE, GAO-17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES (2017), <http://www.gao.gov/products/>

Former Attorney General Jeff Sessions further incentivized a fast pace of hearings by implementing case quotas.<sup>361</sup>

The OIG “found that immigration court performance reports are incomplete and *overstate the actual accomplishments of these courts*.”<sup>362</sup> The fact that the OIG would flag EOIR’s overstatement of its case completions on the first page of its report suggests that the agency may value a high rate of case completions more than requiring due process for its hearings. A system that rewards the individual and the agency for high completion rates and has no other measures of performance is inconsistent with expecting the agency to meaningfully review complaints about IJ misconduct, or, more importantly, to forward them to either the DOJ Office of Professional Responsibility or OIG. Quantitative performance goals for the agency that work their way through the bureaucracy may explain why agency officials tolerate repeat offender misconduct without escalating disciplinary responses, as well as why certain Extremes or Highs have large caseloads.<sup>363</sup>

### Conclusion

This Article analyzes government operations, administrative decisions, and court orders associated with federal officials obstructing access to immigration hearings to engage a more general political problem. The specific question of whether federal judges may create a so-called inherent judicial power for IJs who, for unlawful reasons, prohibit the public from observing hearings engages the importance to democracy of statutory constraints on the exercise of authority by government officials. We sought in this Article to tie the contemporary deficiencies of immigration courts in general to court-crafted exceptions to due process principles for

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GAO-17-438. For more information on backlog data, see *Immigration Court Backlog Tool*, TRAC IMMIGRATION, [http://trac.syr.edu/phptools/immigration/court\\_backlog/](http://trac.syr.edu/phptools/immigration/court_backlog/) (last visited Mar. 21, 2019).

361. Joel Rose, *Justice Department Rolls out Quotas for Immigration Judges*, NPR (Apr. 3, 2018), <https://www.npr.org/2018/04/03/599158232/justice-department-rolls-out-quotas-for-immigration-judges/>.

362. OFFICE OF THE INSPECTOR GEN., DEP’T OF JUSTICE, MANAGEMENT OF IMMIGRATION CASES AND APPEALS BY THE EXECUTIVE OFFICE OF IMMIGRATION REVIEW, at i (2012), <https://oig.justice.gov/reports/2012/e1301.pdf>.

363. For an explanation of the benefit of focusing on extreme cases, see JASON SEAWRIGHT, MULTI-METHOD SOCIAL SCIENCE: COMBINING QUALITATIVE AND QUANTITATIVE TOOLS 117 (2016) (“[T]he best alternatives for finding omitted variables involve choosing cases that are extreme on the outcome variable . . .”).

policies advanced in the name of “the nation” or national security.<sup>364</sup> We then reviewed the history of statutes defining and constraining the prerogatives of special inquiry and, later, immigration hearing officers or IJs. We also sought to demonstrate the substantive importance of hearing access in light of the life-and-death stakes of these hearings, the public’s ignorance of these proceedings, and, finally, the deficiencies of the agency’s own efforts at responding to allegations of IJ misconduct. Since the Presidential election of 2016, the actions of political appointees diminishing IJ discretion have become more obvious,<sup>365</sup> and the need for public access to hearings, commensurately, has become more pressing.<sup>366</sup> By acting on the statutory authority to overturn orders of the BIA and issue new opinions that are binding on IJs, the DOJ is further concretizing the political nature the EOIR. On top of the control of IJ and BIA hirings and firings, salaries, and working conditions, the Attorneys General in the Trump administration are mandating IJs to issue decisions that conform with specific and legally dubious interpretations of the law by political appointees.<sup>367</sup> Such

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364. See *supra*, note 3 and the Introduction more generally.

365. In *Matter of A-B-*, 27 I&N Dec. 316, 320 (A.G. 2018), for example, Trump-appointed Attorney General Sessions took jurisdiction of an asylum case and used it as the occasion for overturning a 2014 precedential decision of the BIA. (“Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”). Then, in *Matter of M-S-*, 27 I&N Dec. 509, 510 (A.G. 2019), Attorney General Barr overturned a 2005 order and prohibited IJs from releasing asylum-seekers from custody (“The respondent here was transferred from expedited to full proceedings after establishing a credible fear, and an immigration judge ordered his release on bond. Because the respondent is ineligible for bond under the Act, I reverse the immigration judge’s decision.”).

366. A further concern is that the ACIJ who supervised the ineffective misconduct investigations described in this study has been promoted to Chief Immigration Judge. *Office of the Chief Immigration Judge*, DEP’T HOMELAND SECURITY, <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios> (last visited May 31, 2019). MaryBeth Keller now “establishes operating policies and oversees policy implementation for the immigration courts.” *Id.* Keller is the ACIJ who dismissed as “frivolous” a complaint about Dallas IJ corruption, even though then INS had a recording of the IJ seeking business ties with a firm that handles business visas. See *supra* note 347.

367. Catherine Kim, *The President’s Immigration Courts*, 68 EMORY L.J. 1, 22 (2018) (“Attorney General Jeff Sessions has addressed these courts repeatedly to emphasize the President’s policy priorities. In remarks during the EOIR’s Legal Training Program, he asserted, ‘[a]ll of us should agree that, by definition, we ought to have zero illegal immigration in this country,’ and reminded IJs in attendance that they are required to ‘conduct designated proceedings ‘subject to such supervision and shall perform such duties as the Attorney General shall prescribe.’” To that end, the Administration has instituted wide-ranging reforms, eliminating the power of IJs to grant ‘administrative closure’ in cases; altering the procedures

pronouncements underscore the extent to which IJs are indistinguishable from other employees of the federal government who are implementing policies based on party or candidate preferences. To the extent that IJs appointments reflect the political preferences of the party or candidate occupying the White House, bestowing absolute immunity to IJs who may be political cronies enables demonstrably partisan—and not discretionary judicial conduct—to occur in secret hearings.

Decisions are being made increasingly in coordination with the Attorney General and even the arresting agency DHS.<sup>368</sup> Moreover, Trump IJ appointees will soon comprise a plurality of all IJs. As such, it is not just legally but politically imperative to ensure that such officials and their proceedings are subject to the observation of third parties, including students, scholars, the media, and, especially, concerned U.S. citizens and taxpayers. Section 1003.28 of Title 8 of the Code of Federal Regulations exists to protect the proper functioning of democracy and the rule of law. Any unlawful restrictions on the mandate for open hearings—including the deprivation of any remedy to its violation through Court-created absolute judicial immunity—violates the principles of *Bivens* and the rule of law more generally.

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and standards for considering asylum claims; purporting to prohibit the release of detained aliens; and implementing a series of managerial reforms including an ambitious hiring initiative, the introduction of performance metrics, and additional supervisory measures to ensure that the decisions of immigration judges conform to the President's immigration agenda.”).

368. The DHS has been limiting asylum claims at ports of entry and the DOJ ordered IJs to deny bond to those who did not make these at a port of entry. The result is a lack of immigration court “independence” and “impartiality.” See Letter from 55 Members of Congress to Attorney General Barr (May 15, 2019), <https://www.aila.org/File/DownloadEmbeddedFile/80226>.